11-12-2013

Dixon v. State Appellant's Brief Dckt. 39745

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE DIXON,	)	
	)	
Petitioner-Appellant,	)	S.Ct. No. 40761
	)	39745
vs.	)	
	)	D.Ct. No. 2008-5912
STATE OF IDAHO,	)	(Kootenai County)
	)	
Respondent.	)	
	)	

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 FRED M. GIBLER
Presiding Judge

Robyn Fyffe
NEVIN, BENJAMIN, McKAY & BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

IDAHO ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's judgment denying Mr. Daniel Dixon's petition for post-conviction relief following an evidentiary hearing and its order denying his motion for relief from judgment pursuant to Idaho Rule of Civil Procedure 60(b).

B. General Course of Proceedings

1. Underlying criminal proceedings

In April 2005, a large piece of sheet metal fell on Mr. Dixon's left arm and severed three tendons and a radial artery. Tr. (39745)[1] p. 17, ln. 11-20; Tr. (33384) p. 294, ln. 22 - p. 295, ln. 3. For months following emergency surgery on Mr. Dixon's left forearm, he could not lift with his left arm and had a visible six to seven inch scar. Tr. (39745) p. 18, ln. 1-12. On June 20, 2005, Mr. Dixon's arm remained in poor condition and he was unable to lift more than a few pounds with his left arm. *Id.* at p. 19, 1-9. However, he had recuperated to the point where he was able to shoot pool and hoops. Tr. (33384) p. 307, ln. 10-18; p. 330, ln. 19 - p. 331, ln. 10.

Thus, that day, Mr. Dixon played pool at a few bars in downtown Coeur d'Alene and then walked to a crowded park on Coeur d'Alene Lake in hopes of meeting some friends to play basketball. *Id.* at p. 236, ln. 4-7; p. 269, ln. 1-3; p. 315, ln. 20 - p. 316, ln. 14; p. 318, ln. 2 - p. 319, ln. 19; p. 323, ln. 15-18. Mr. Dixon communicated via text and voice with his cellular

---

[1] This Court consolidated two pending appeals related to Mr. Dixon's petition for post-conviction relief for purposes of briefing – Docket Numbers 39745 and 40600. Additionally, the district court considered the transcripts prepared in conjunction with Mr. Dixon's direct appeal, Docket Number 33384, as evidence in the post-conviction action. Tr. (39745) p. 56, ln. 15-20. A request to judicially notice those transcripts is being filed contemporaneously with this brief. Citations to the different appellate records are accompanied by their docket numbers.

phone while standing near the basketball courts. *Id.* at p. 318, ln. 12 - p. 320, ln. 17. Mr. Dixon then stopped for a drink from the drinking fountain on his way to join some people he recognized on the basketball court. *Id.* at p. 320, ln. 18 - p. 321, ln. 9.

Also on June 20, 2005, twelve year old KBG, her brother and her mother were at the same crowded park as Mr. Dixon. *Id.* at p. 39, ln. 15 - p. 40, ln. 17; p. 73, ln. 6-17; p. 236, ln. 4-7; p. 269, ln. 1-3. According to KBG, she was playing just out of her mother's sight when a man she did not know grabbed her and pulled her towards the water. *Id.* at p. 42, ln. 14 - p. 43, ln. 23; p. 46, ln. 5-21, p. 66, ln. 13-17. The man then picked KBG up, placed her on his lap and touched her private area. *Id.* at p. 46, ln. 5-21. KBG screamed and escaped and the man walked into some trees towards the bathrooms. *Id.* at p. 48, ln. 3-24; p. 52, ln. 24 - p. 53, ln. 10; p. 100, ln. 12-20. KBG watched the man as she ran towards her mother but admitted she briefly lost sight of him when he went around a streambed and behind some bushes. *Id.* at p. 56, ln. 7-10; p. 69, ln. 19-23.

A woman and her fiancee who were also at the park observed a man in khaki shorts and a blue shirt escort KBG toward the water by her arm, pick her up and place her on his lap. *Id.* at p. 76, ln. 13-14; p. 96, ln. 21 - p. 97, ln. 24; p. 104, ln. 4-8; p. 111, ln. 19-22. When KBG ran off, the woman approached her while the fiancee followed the man from a distance of about fifteen feet. *Id.* at p. 101, ln. 4-10; p. 122, ln. 10 - p. 123, ln. 24. Although the woman also watched the man who grabbed KBG, she lost sight him when he went behind the bushes. *Id.* at p. 102, ln. 2-6; p. 113, ln. 20 - p. 114, ln. 2.

KBG told her mother and a police officer that Mr. Dixon, who was in the area the man had gone but wearing a black and white t-shirt, was the man who touched her. *Id.* at p. 56, ln. 17

- p. 57, ln. 8; p. 58, ln. 18 - p. 59, ln. 23; p. 76, ln. 18; p. 269, ln. 18 - p. 270, ln. 12. The mother and officer approached Mr. Dixon where he stood with other people near the bathrooms and basketball courts. *Id.* at p. 81, ln. 8-20; p. 223, ln. 7-10. Mr. Dixon explained to the officer that he walked from the resort area to meet some friends and play basketball and that he had not touched any children. *Id.* at p. 208, ln. 15 - p. 209, ln. 11. Mr. Dixon was arrested for lewd conduct with a minor under sixteen and first degree kidnaping.[2] *See id.* at p. 209, ln. 19 - p. 210, ln. 8.

Mr. Dixon hired trial counsel approximately three and one half months before the case went to trial and immediately explained that the injury to his arm prevented him from picking up the victim as alleged. Tr. (39745) p. 45, ln. 13-25; p. 65, ln. 4-21. Despite the information Mr. Dixon provided and his repeated requests that counsel speak with his medical providers, trial counsel neither spoke with Mr. Dixon's physical therapist or surgeon nor investigated hiring an expert witness. *See id.* p. 45, ln. 20 - p. 47, ln. 2. Counsel made this decision because she believed she would need six months to secure an appropriate witness and Mr. Dixon refused to agree to a continuance of his trial. *See id.* p. 103, ln. 6-16; p. 127, ln. 11-15 p. 135, ln. 9-23.

Mr. Dixon's trial was held in a courtroom within the county jail – a concrete building surrounded by fences and razor wire. Tr. (39745) p. 53, ln. 1-7; Post Trial Briefing Support Post-Conviction Relief[3] p. 6-7. The jury found Mr. Dixon guilty of lewd conduct and kidnaping. Tr.

---

[2] Mr. Dixon was also charged with and ultimately found guilty of misdemeanor possession of drug paraphernalia and misdemeanor malicious injury to property. Because trial counsel's decision to allow the felonies to be tried with the misdemeanors was not challenged in post-conviction proceedings, the misdemeanor convictions are not relevant in this appeal.

[3] A motion to augment this brief into the record is being filed contemporaneously with this brief.

(33384) p. 398, ln. 6-22. Prior to sentencing, Mr. Dixon submitted to a polygraph examination that supported he was innocent of the crimes. *See id.* at p. 449, ln. 25 - p. 450, ln. 2. The district court nonetheless sentenced Mr. Dixon to concurrent unified terms of twenty-five years with minimum periods of confinement of ten years. *Id.* at p. 459, ln. 23 - p. 463, ln. 7. The Court of Appeals affirmed Mr. Dixon's sentences in an unpublished opinion dated June 26, 2007. CR (39745) p. 86.

2. Post-conviction proceedings

On July 28, 2008, Mr. Dixon filed a petition for post-conviction relief. CR (39745) 1-5. After the state answered and counsel was appointed to represent Mr. Dixon, the state moved to summarily dismiss Mr. Dixon's Third Amended Petition. *Id.* at p. 6-44. The district court denied the state's motion and Mr. Dixon filed a fourth amended petition. *Id.* at p. 46-47. Mr. Dixon alleged that he received ineffective assistance of counsel because counsel failed to present favorable evidence and witnesses, failed to object to the prosecutor's improper questioning, failed to present favorable physical or expert testimony regarding the injury to Mr. Dixon's arm, failed to move for a change of venue and failed to object to the trial being held at the jail. *Id.* at p. 47-85.

After an evidentiary hearing, the district court denied Mr. Dixon's petition for post-conviction relief on April 12, 2011. *Id.* at p. 86-96. Mr. Dixon filed a pro se notice of appeal on July 20, 2011 and the appeal was dismissed as untimely on September 14, 2011. *Id.* at p. 98, 119-120. On October 5, 2011, Mr. Dixon filed a motion seeking relief from judgment pursuant

to Idaho Rule of Civil Procedure 60(b), which the district court denied on January 23, 2012.[4] CR (39745) 122-123. Mr. Dixon appealed. *Id.* at p. 124-128.

On December 31, 2012, this Court ordered the appeal held in abeyance pending the outcome Mr. Dixon's successive petition for post-conviction relief, which presumably asserted that post-conviction counsel was ineffective for not timely appealing the denial of post-conviction relief. CR (40600) 49. Thereafter, the parties stipulated to re-enter the judgment denying Mr. Dixon's petition for post-conviction relief and to thereby restore his right to appeal the district court's denial of his post-conviction petition. *Id.* at p. 55-56, p. 71-72. These consolidated appeals follow.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Mr. Dixon's petition for post-conviction relief because he established that he received ineffective assistance of counsel?

2. Did the district court abuse its discretion in denying Mr. Dixon's motion for relief from judgment?

IV. ARGUMENT

A. The District Court Erred in Denying Mr. Dixon's Petition for Post-Conviction Relief Because He Established That He Received Ineffective Assistance of Counsel

1. Pertinent legal standards

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Mendiola v. State*, 150 Idaho 345,

---

[4] Neither the motion nor the affidavit admitted into evidence in support of that motion are presently part of the appellate record. A motion to augment those documents into the record is being filed contemporaneously with this brief.

348, 247 P.3d 210, 213 (Ct. App. 2010). An applicant is entitled to post-conviction relief when he proves his allegations by a preponderance of the evidence. I.C. § 19–4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990); *Mendiola*, 150 Idaho at 348, 247 P.3d at 213. When reviewing a decision denying post-conviction relief after an evidentiary hearing, this Court will disturb the lower court's factual findings if they are clearly erroneous and exercises free review of the district court's application of the relevant law to the facts. *Mendiola,* 150 Idaho at 348, 247 P.3d at 213.

The right of a criminal defendant to counsel during trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, (1963); *Milburn v. State*, 130 Idaho 649, 652, 946 P.2d 71, 74 (Ct. App. 1997). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient and, that (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). Nonetheless, this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* The prejudice prong is met when the

defendant shows there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Mitchell,* 132 Idaho at 277, 971 P.2d at 730.

2. Mr. Dixon proved that he received ineffective assistance of counsel due to counsel's failure to object to the jury trial being held in the county jail

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury." Additionally, the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *State v. Crawford*, 99 Idaho 87, 95, 577 P.2d 1135, 1143 (1978). Practices such as shackling a defendant or requiring him to wear prison garb are unmistakable indications of the need to separate a defendant from the community at large. *See Holbrook v. Flynn,* 475 U.S. 560, 568-69 (1986). Such practices are inherently prejudicial before a jury because they undermine the presumption of innocence and the courtroom's formal dignity. *Deck v. Missouri,* 544 U.S. 622, 635 (2005); *State v. Wright*, 153 Idaho 478, 283 P.3d 795, 805 (Ct. App. 2012). Thus, the use of an inherently prejudicial practice during trial is reversible error if the trial judge fails to make a finding that the practice is necessary for physical security, to prevent escape, or to maintain courtroom decorum, unless the state can show the error was harmless. *Deck*, 544 U.S. at 635; *Wright*, 153 Idaho at 484, 283 P.3d at 801.

Mr. Dixon's trial was held in a courtroom inside the county jail – a concrete building surrounded by fences and razor wire. Tr. (39745) p. 53, ln. 1-7; Post Trial Briefing Support Post-Conviction Relief p. 6-7. Jurors entered the jail through heavily tinted doors and reached the

courtroom by passing through a security booth protected by thick bullet proof glass and an intercom to communicate with jail staff. Post Trial Briefing Support Post-Conviction at p. 7. Inside the courtroom, the jury box was shielded on the left by thick glass "presumably to protect the jury from inmates entering the jail." *Id.*

This setting constantly reminded the jury of Mr. Dixon's alleged dangerousness and deprived the process of dignity and neutrality essential to the integrity of the trial process. *See also State v. Cavan*, 98 P.3d 381 (Or. 2004) (courtroom contributes a dignity essential to the integrity of the trial process and conducting a trial in a correctional facility diminishes the perception of neutrality attaching to proceedings in a courthouse); *State v. Lane*, 397 N.E.2d 1338, 1342-43 (1979) ("prison environment which is laden with a sense of punishment of the guilty within transmits too great an impression of guilt on the part of the inmate who is on trial). Further, the record is devoid of any justification for conducting the trial at the jail. Accordingly, trial counsel should have objected to the setting and asked that the trial be conducted at the courthouse.

In denying Mr. Dixon's claim, the district court noted that no Idaho appellate case addresses whether holding a jury trial in a correctional setting is inherently prejudicial and that a relevant opinion from the Washington Supreme Court – *State v. Jaime*, 233 P.3d 554 (Wash. 2010) – was issued after Mr. Dixon's trial. CR (39745) 89-90. The district court further reasoned that it agreed with the *Jaime* dissent, which found no error in the jail setting for trial, and it would have therefore denied any motion to change Mr. Dixon's trial to the courthouse. *Id.* at p. 89. The district court thus concluded that trial counsel had no duty to object to the jail setting. *Id.* at p. 89-90. The district court also found that Mr. Dixon was unharmed by the jail setting because he

voluntarily informed the jury that he was incarcerated. *Id.* at p. 90.

The district court's decision is erroneous. While no Idaho precedent specifically addresses jury trials in jail settings, the basis for trial counsel's objection would not have raised a novel legal theory. Rather, such an objection would have been grounded in United States Supreme Court and Idaho precedent. Additionally, while *Jaime* was issued following Mr. Dixon's trial, several cases from around the nation had addressed conducting jury trials in correctional settings. *See State v. Cavan*, 98 P.3d 381 (Or. 2004) (cataloging several opinions on the subject and holding that the defendant's trial at the prison violated his constitutional right to an impartial jury). Finally, the majority and better view is that conducting a jury trial in a correctional setting is inherently prejudicial and that any decision to hold a trial in such a location must thus be supported by compelling reasons and subjected to the strictest scrutiny. *See Bright v. State*, 875 P.2d 100, 109 (Alaska App. 1994); *Jaime*, 233 P.3d at 558.

The district court would have erred in holding Mr. Dixon's trial at the county jail over counsel's objection unless the location was supported by compelling justifications. Further, the inherently prejudicial effect of holding a trial in a correctional setting goes beyond simple knowledge that a defendant is incarcerated and instead deprives the process of neutrality and dignity essential to the physical indicia of innocence to which Mr. Dixon was entitled. Accordingly, Mr. Dixon proved that he received ineffective assistance of counsel due to counsel's failure to object to the trial being held at the county jail and the district court erred in denying Mr. Dixon's petition for post-conviction relief.

a. the legal basis for objection to a jury trial held at a jail was established at the time of Mr. Dixon's trial

According to trial counsel's testimony at the post-conviction evidentiary hearing, she did not believe there was a legal basis to object to the trial being held at the jail prior to the *Jaime* decision and she "couldn't make an objection based on a legal basis that didn't exist at the time." Tr (39745) p. 100, ln. 17-25; p. 120, ln. 5-6. Similarly, in denying Mr. Dixon's claim, the district court noted that the jury trial took place approximately four years prior to *Jaime* and that the Washington decision is not binding authority in Idaho. CR (39745) 89-90.

Because several states had addressed the constitutional concerns of holding jury trials in correctional settings at the time of Mr. Dixon's trial – including a 2004 opinion from our neighbors in Oregon – the district court's focus on the timing of the *Jaime* decision was misplaced. In *Cavan*, the Oregon Supreme Court cataloged various opinions on the subject:

> Our review of similar cases in other jurisdictions indicates that only one jurisdiction, Utah, unequivocally allows trials in prisons. Four jurisdictions completely disallow the practice, while three others limit the practice depending on the nature of the prison facility and safety concerns. *See State v. Lane*, 397 N.E.2d 1338 (1979) (holding that trials in prison violate defendants' rights to fair trial, public trial and due process of law); *Vescuso v. Commonwealth*, 360 S.E.2d 547 (1987) (holding that trials in prisons violate right to public trial); *Bright v. State*, 875 P.2d 100, 109 (Alaska Ct. App.1994) (holding that "any decision to hold a trial in a prison must be subjected to the strictest scrutiny, and that decision must be supported by compelling reasons"); *State ex rel Varney v. Ellis*, 524, 142 S.E.2d 63, 65 (1965) (concluding that "[h]olding a trial in the office of the jailer, as was done in the instant case, does not, in our opinion, afford an opportunity for a public trial in the ordinary common-sense acceptation of the term public trial"). *See also Howard v. Commonwealth*, 367 S.E.2d 527, 532 (1988) (holding that conducting trial in administration building adjacent to prison, as opposed to prison itself, "was not inherently prejudicial"); *People v. England*, 83 Cal.App.4th 772, 100 Cal.Rptr.2d 63 (conducting trial on prison grounds, but outside actual prison wires in facility to which jurors could drive directly, did not violate defendant's right to fair trial or public trial); *Foley v. Commonwealth*, 429 Mass. 496, 500, 709 N.E.2d 794, 797 (1999) (arraignment did not violate right to public trial, because facilities

were open to public, but distinguishing arraignment from trial, where other rights may be implicated). *But see State v. Kell*, 61 P.3d 1019, 1027 (2002) (holding that, "although the trial took place in a courtroom at the prison, the proceedings were in no way closed to the public"); *State v. Daniels*, 40 P.3d 611, 618–19 (2002) (holding that "trying [the] defendant in a courtroom located inside a prison did not present an unacceptable risk of presenting impermissible factors").

Cavan, 98 P.3d at 388 n.6. The Oregon Supreme Court agreed with the majority view, reasoned that holding a trial in a correctional facility diminished the perception of neutrality attaching to proceedings in a courthouse and held that the defendant's trial at the prison violated his constitutional right to an impartial jury. *Id.* at 389.[5]

Nor does the absence of an Idaho case precisely on point signify that an objection to a trial being conducted in a jail would have been unsupported by the law or presented a novel legal theory. Idaho is a small state and certainly not all counties hold jury trials in county jails. It is not surprising that this particular inherently prejudicial practice has not been addressed in a published Idaho opinion. *See Bright*, 875 P.2d at 107 (noting there are few published decisions addressing whether holding a trial inside a prison violates a defendant's right to a public trial "perhaps on account of our strong tradition of holding trials in public courthouses").

The legal basis for an objection to the county jail as a location for trial would have been well-grounded in United States Supreme Court and Idaho precedent and directly supported by numerous extra-jurisdictional opinions. The absence of an Idaho case directly on point did not

---

[5] A dissenting justice in *Jaime* distinguished *Cavan* because it involved a prison rather than a jail. *Bright*, 875 P.2d at 562, n.2 (Fairhurst, J. dissenting). However, the jail at issue here, like most maximum security prisons, is a concrete building surrounded by razor wire that houses persons deemed unsafe to the community and employs security measures beyond those employed in courthouses. As a frequent visitor of jails, prisons and courthouses, counsel suggests that most jail environments are more akin to a maximum security prison than to a courthouse or even a medium security institution.

relieve counsel of her obligation to object to the inherently prejudicial procedure of holding Mr. Dixon's trial at the county jail.

b. the district court would have erred in holding the jury trial at the jail over Mr. Dixon's objection

The district court noted that it had conducted numerous trials at the jail without objection and that the dissenting opinions in *Jaime*, which concluded that the practice of conducting trials in a jail courtroom is not inherently prejudicial, "are the correct analysis and the analysis which should be adopted in Idaho." CR (39745) p. 88-89. The district court thus concluded Mr. Dixon failed to prove ineffective assistance of counsel because it would have denied any motion to change the trial to a different location.

However, the *Jaime* majority was supported by existing constitutional principles and reflects the opinion of the majority of other jurisdictions. Accordingly, this Court should hold that a jury trial may only be conducted at a jail upon a showing of compelling reasons and that trial counsel should have objected to Mr. Dixon's trial being held at the county jail.

In *Jaime*, the Washington Supreme Court utilized the analysis employed by the United States Supreme Court in *Holbrook* to address whether conducting the defendant's trial in a jailhouse courtroom violated his right to due process by eroding the presumption of innocence. *Jaime*, 233 P.3d at 556-57. The *Jaime* Court recognized:

> that "the courtroom in Anglo–American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process."

Jaime, 233 P.3d at 554, *citing Estes v. Texas* 381 U.S. 532, 561 (1965). The Court distinguished

the presence of armed security guards, which *Holbrook* determined was not inherently prejudicial in all instances, because the average juror would neither take a visit to a jail for granted nor be inured to the experience in the same manner as the average person is accustomed to security in public places. *Jaime*, 233 P.3d at 557. The Court then held:

> In short, under the analysis of *Holbrook*, holding a trial in a jail courtroom is inherently prejudicial for two reasons. First, the setting is not in a courthouse, a public building whose purpose is to provide a neutral place to conduct the business of the law. Second, the setting that replaces the courthouse has a purpose and function that is decidedly not neutral, routine, or commonplace. Holding a criminal trial in a jailhouse building involves such a probability of prejudice that we must conclude it is " 'inherently lacking in due process.' " *Holbrook*, 475 U.S. at 570 (quoting *Estes*, 381 U.S. at 542–43).

Jaime, 233 P.3d at 557.

As illustrated by the Court's reasoning in *Jaime*, the jail setting reminds the jury of the need to separate a defendant from the community at large in the same manner as wearing prison garb or shackling. The reasoning of the *Jaime* Court was also similar to several state appellate decisions addressing the prejudicial effect of holding trials in prison settings. For instance, in 1979, the Ohio Supreme Court reasoned:

> [S]uch a trial setting violates the spirit of neutrality which serves as a cornerstone to modern notions of due process. As has been aptly stated, "the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, [parties and their attorneys], and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of [a] trial, contributing a dignity essential to the integrity of the trial process."

Lane, 397 N.E.2d at 1342-43, *citing Estes,* 381 U.S. at 561. Similarly, in 1994, the Alaska appellate court reasoned that in contrast to the typical courthouse, "prisons are perfused with physical manifestations of the coercive power of the state. Many citizens who would otherwise attend a trial might not willingly enter a prison. Jurors might find themselves unable to set aside

the constant reminder of the dangerousness of any defendant incarcerated there." *Bright*, 875 P.2d at 109; *see also Vescuso*, 360 S.E.2d at 551 (court unable to identify any location that gives less freedom of access than a prison. and noting that the character of a prison facility is fundamentally different from that of a courtroom at the public courthouse)

In light of these concerns, *Jaime* and several other states addressing the issue allow a jury trial to be conducted in a correctional setting only if the decision is supported by supported by compelling reasons. In contrast to the sound reasoning of these courts, the reasoning of the *Jaime* dissents relied on by the district court misapprehend the related concerns and incorrectly apply the related cases. For instance, one dissenting justice disagreed that a jail setting for a jury trial is inherently prejudicial in light of the historic practice of combining jail and court facilities in the same building. *Jaime*, 233 P.3d at 565 (Johnson J. concurring in dissent). However, as noted by a concurring justice, "there is a significant difference between a jail in a courthouse and a courtroom in a jailhouse" and "one entering . . a county courthouse [that houses a jail] to conduct business or attend a court session would have no sense that they were in a building that housed the jail." *Jaime*, 233 P.3d at 559 (Alexander, J. concurring). Conversely, the jurors in this case passed through two sets of heavily tinted doors and a security booth where persons entering the jail speak with personnel via intercom behind heavy glass.

Further, notwithstanding the dissent's claim to support from other jurisdictions, several of the cited cases support the majority opinion by holding that the decision to hold a jury trial in a correctional setting must be supported by compelling reasons. *Compare Jaime,* 233 P.3d at 565 (Johnson, J. concurring in dissent) *with Bright*, 875 P.2d at 109 (refusing to adopt a bright line rule but holding that any decision to hold a trial in a prison must be subjected to the strictest

scrutiny, and that decision must be supported by compelling reasons); *Harper v. State*, 887 So.2d 817, 826 (Miss. Ct. App.2004) (holding that there are *rare* circumstances where a trial may be held inside a prison"); *State v. Daniels*, 40 P.3d 611 (Utah 2002) (although trying defendant in prison courtroom was not inherently prejudicial in that case, court cautioned that holding a criminal trial in a courtroom located inside a prison simply because a defendant is already incarcerated, or it would be more safe or convenient, would be error absent adequate findings and compelling reasons). Another case relied on by the dissent, *Howard v. Com.*, 367 S.E.2d 527, 532 (Va. App. 1988), is distinguishable because unlike the case at bar, the trial was held outside the prison compound without a view of the prison and the jury did not have to pass through gates or other security devices to reach the courtroom.

Thus, the law in Idaho should be that jury trials may be conducted in correctional settings only when necessary for compelling reasons. The district court erred in concluding that there was no legal basis for counsel to object to holding Mr. Dixon's jury trial at the county jail.

c. Mr. Dixon was prejudiced by counsel's failure to object to holding the trial at the jail

The due process right to a fair trial requires that the decision to permit an inherently prejudicial practice such as restraining a criminal defendant be supported by a finding of necessity, based on an overriding state interest. *Wright*, 153 Idaho at 488, 283 P.3d at 805; *Crawford*, 99 Idaho at 95, 577 P.2d at 1143. Thus, had trial counsel objected to the trial setting, the district court would have erred in overruling that objection unless the state demonstrated the jail setting was necessary for physical security, to prevent escape, or to maintain courtroom decorum.

Here, the record reveals no justification for the decision to conduct Mr. Dixon's jury trial at the county jail. While Mr. Dixon bore the burden to prove a constitutional violation, the burden to justify the decision to hold the trial in the jail shifted to the state once Mr. Dixon established that his trial was conducted at the county jail. *See Vescuso*, 360 S.E.2d at 551 (upon showing that trial was held within prison, it was incumbent upon the state to produce evidence to justify the transfer of the trial from the regular courthouse to another location). Accordingly, Mr. Dixon proved that any motion to change the trial location should have been granted.

Where the district court permits an inherently prejudicial practice visible to the jury without adequate justification, "the defendant need not demonstrate actual prejudice to make out a due process violation." *Wright*, 153 Idaho at 488, 283 P.3d at 805, *citing Deck*, 544 U.S. at 635. Further, an inherently prejudicial practice such as compelling a defendant to wear prison clothing inevitably has an adverse effect on the jury's perception of the character of the defendant in a manner that cannot be shown from a trial transcript. *Deck*, 544 U.S. at 635. In such a circumstance, the state must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Deck*, 544 U.S. at 635; *Wright*, 153 Idaho at 488, 283 P.3d at 805.

The district court found that Mr. Dixon "is not in a position to complain that the jury might have inferred that he was incarcerated because of the place of the trial [because he] voluntarily, and against his counsel's advice, informed the jury that he was incarcerated." CR (39745) p. 90. However, the prejudicial effect flowing from holding a jury trial in a correctional setting goes beyond conveying knowledge that a defendant is incarcerated. Instead, the setting that the courtroom provides is itself an important element in the constitutional conception of a

trial, contributing a dignity essential to the integrity of the trial process. *Estes*, 381 U.S. at 561 (1965); *Lane*, 397 N.E.2d at 1342-43; *Jaime*, 233 P.3d at 556. The prejudicial effect of knowing that Mr. Dixon was incarcerated is entirely distinct from the prejudicial effect imposed by holding the trial at a location that undermined the neutrality and integrity of the process.

Further, the distinctive environment of the jail provided a constant reminder of Mr. Dixon's condition that continually influenced the jury throughout the trial that and presented an unacceptable risk that impermissible factors came into play. In contrast to the pervasive influence of the jail environment, Mr. Dixon briefly referred to his incarcerated status near the end of trial. Specifically, at the end of Mr. Dixon's redirect examination, trial counsel inquired why Mr. Dixon had not had access to his phone for the past ten months. Mr. Dixon responded that he had been incarcerated at the Kootenai County jail in a ten-foot by six-foot cell for the 289 days on a million dollar bail and had been called a child molester, a baby raper, and a kidnaper. Tr. (33384) p. 349, ln. 6-13. While Mr. Dixon's testimony provided the factual information that he had been incarcerated and considered dangerous, the isolated reference lacked the constant psychological impact of the jail environment and did not cause the same risk that impermissible factors effected the juror's reasoning.

No compelling state interest justified holding Mr. Dixon's jury trial at the county jail. Thus, had counsel objected to the trial setting, the district court would have erred in overruling that objection. Additionally, the prejudicial effect flowing from the trial's location went beyond the prejudice visited by Mr. Dixon's testimony that informed the jury he was incarcerated. Accordingly, Mr. Dixon established that he was prejudiced by counsel's failure to object to the trial location and the district court erred in denying his petition for post-conviction relief.

3. Mr. Dixon proved that he received ineffective assistance of counsel due to counsel's failure to present physical evidence and/or expert testimony regarding an injury to Dixon's arm

Two months before he allegedly lifted the eighty to ninety pound victim, Mr. Dixon suffered a grievous injury to his left arm that imposed significant physical limitations. Following Mr. Dixon's surgery, he received physical therapy twice a week to work on regaining strength and flexibility and was examined by his surgeon weekly. Tr. (33384) p. 297. ln. 1-21. Mr. Dixon was not allowed to lift more than five pounds for four months. *Id.* at p. 298, 13-25. Trial counsel nonetheless failed to interview Mr. Dixon's therapist or surgeon or investigate witnesses who could corroborate Mr. Dixon's physical limitations because she mistakenly assumed that no witnesses could be obtained in the three and a half months remaining until trial. There is a reasonable probability that the jury would have acquitted Mr. Dixon if it had heard from objective witnesses who corroborated Mr. Dixon's explanations as to why he could not have committed the offense. Thus, Mr. Dixon was thus prejudiced by trial counsel's unreasonable failure to evidence regarding Mr. Dixon's physical limitations.

Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law premised on the circumstances surrounding the attorney's investigation. *Thomas v. State*, 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008); *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-91; *State v. Mathews*, 133 Idaho 300, 307, 986 P.2d 323, 330 (1999). Whether an investigative decision is reasonable depends on the defendant's strategic decisions and what information the defendant provides to his or her attorney.

Strickland, 466 U.S. at 691; *Baker v. State*, 142 Idaho 411, 417, 128 P.3d 948, 954 (Ct. App. 2005).

Mr. Dixon hired trial counsel approximately three and one half months before the case went to trial. Tr. (39745) p. 65, ln. 4-21. During Mr. Dixon's initial meeting with trial counsel, he informed counsel that he was physically incapable of lifting KBG as alleged and showed her his scar. *Id.* at p. 45, ln. 13-25. During various meetings, Mr. Dixon asked counsel about calling his surgeon to testify regarding his physical limitations. *Id.* at p. 45, ln. 20 - p. 47, ln. 2. According to trial counsel's testimony at the post-conviction evidentiary hearing, she did not believe the surgeon could testify as to weight restrictions and did not recall interviewing Mr. Dixon's doctors. *Id.* at p. p. 136, ln. 4 - p. 137, ln. 2. Although Mr. Dixon's physical therapist and surgeon were in the area, counsel believed she could not find a local witness to testify about Mr. Dixon's physical limitations and that it would take six months to arrange for an expert to testify at trial. *See id.* at p. 135, ln. 9-23. Counsel testified that she informed Mr. Dixon that it would take time to find an expert to testify about the injury to his arm and she did not investigate calling any such witnesses because Mr. Dixon did not want to delay his trial. *Id.* at p. 103, ln. 6-16; p. 127, ln. 11-15.

In denying Mr. Dixon's claim that trial counsel should have called witnesses to corroborate his physical limitations, the district court found that Mr. Dixon choose to forgo any such testimony to prevent delay in his trial. R (39745) 93. However, trial counsel's conclusion that it would take six months to find a witness who could testify regarding Mr. Dixon's limitations was objectively unreasonable. As testified to by an attorney appearing as an expert witness during the post-conviction hearing, counsel could have subpoenaed Mr. Dixon's medical

providers such as physical therapists to testify regarding their knowledge of Mr. Dixon's limitations and condition. Tr. (39745) p. 117, ln. 4-12; p. 147, ln. 16-24. The expert further testified that arrangements for such witnesses could be made within a week. *Id.* at p. 148, ln. 11-25. Thus, it was unreasonable for counsel to forgo any investigation regarding medical witnesses because none could possibly be secured within three and one half months.

The district court found that Mr. Dixon failed to prove his claim because he had not presented the testimony of an "expert" medical witness in post-conviction proceedings. CR (39745) p. 93. However, the information that would have been provided by medical witnesses such as Mr. Dixon's physical therapist or surgeon was contained in Mr. Dixon's testimony at the jury trial and post-conviction hearing his treatment and limitations. Specifically, Mr. Dixon described the frequency of the appointments with both providers, that physical therapy worked on strength and that his scar was more visible on the day in question. *See* Tr. (33384) p. 294, ln. 22 - p. 295, ln. 3; p. 297. ln. 1-21; p. 298, 13-25; Tr. (39745) p. 17, ln. 11-20; p. 18, ln. 1-12; p. 19, 1-9. Testimony from Mr. Dixon's physical therapist or surgeon would have verified this information or an expert opinion would have opined that such limitations were likely. Mr. Dixon's own testimony proved by a preponderance of the evidence the information that would have been provided by the additional witnesses that his counsel failed to present.

Counsel was obliged to investigate medical witnesses based on the information provided by Mr. Dixon and his request that a witness with knowledge regarding his limitation testify. Trial counsel nonetheless did not speak with any of Mr. Dixon's medical providers or investigate hiring any expert witnesses. This decision was not strategic decision but, rather, based on counsel's incorrect assumption that no witnesses could be arranged in the applicable three and one half

month time frame. Accordingly, the decision to forgo any investigation regarding witnesses who could corroborate Mr. Dixon's physical limitations was unreasonable.

Moreover, such testimony would have likely made a difference in the verdict. KBG testified that she weighed between eighty and ninety pounds and the man who kidnaped her actually picked her up. Tr. (33384) p. 66, ln. 21 - p. 67, ln. 6. After showing the jury the scar, Mr. Dixon testified that it was more noticeable on the day he was arrested because it was a redder color and he was tanner. *Id.* at p. 299, ln. 9 - p. 300, ln. 17. KBG did not notice any markings on the perpetrator's arm during their encounter, including when she grabbed his arm to escape. *Id.* at p. 67, ln. 22 - p. 68, ln. 24. There were hundreds of people in the area, including many people playing basketball near the restrooms, and multiple ways of accessing the area where the man had KBG. *Id.* at p. 70, ln. 6-10; p. 234, ln. 16 - p. 236, ln. 7.

Objective testimony from specialized witnesses regarding Mr. Dixon's physical limitations at the time of the alleged offense would have corroborated Mr. Dixon's testimony on that subject and bolstered his explanation that KBG had mistaken him for someone else. As testified to by the attorney expert, such evidence was "fairly crucial." Tr. (39745) p. 147, ln. 16-24. Accordingly, Mr. Dixon was prejudiced by counsel's failure to present witnesses regarding Mr. Dixon's physical limitations.

B. The District Court Abused its Discretion in Denying Mr. Dixon's Motion to Reconsider

On motion and upon such terms as are just, the court may relieve a party from a final judgment or order for any "reason justifying relief from the operation of the judgment." I.R.C.P. 60(b)(6). The district court may exercise its discretion in granting a motion under Rule 60(b)(6)

upon a showing of unique and compelling circumstances justifying relief. *Eby v. State*, 148 Idaho 731, 736, 228 P.3d 998,1003 (2010); *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979). In *Eby*, the Court expanded the circumstances in which Rule 60(b)(6) relief can be granted in post-conviction relief actions because:

> we are . . . cognizant that the Uniform Post-Conviction Procedure Act is "the exclusive means for challenging the validity of a conviction or sentence" other than by direct appeal. *Rhoades v. State*, 148 Idaho 215, 217, 220 P.3d 571, 573 (2009) (*quoting Hays v. State*, 132 Idaho 516, 519, 975 P.2d 1181, 1184 (Ct. App. 1999)). Given the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for Eby to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the "unique and compelling circumstances" in which I.R.C.P. 60(b)(6) relief may well be warranted.

Eby, 148 Idaho at 737, 228 P.3d at 1004. Indeed, "failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process." *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008), *citing Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999); *see also Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J., concurring).

In denying Mr. Dixon's ineffective assistance of counsel claim for failing to present witnesses regarding his injury and resulting physical limitations, the district court found that:

> No expert evidence was presented at Dixon's post conviction trial. It would be speculative to conclude that such evidence exists or what any such expert might have concluded. Without admissible evidence as to what the witness would have said, Dixon's claim that his counsel was deficient in failing to call the witness does not pass either prong of the *Strickland* test.

CR (39745) 93. In response, Mr. Dixon submitted an affidavit from a physical therapist who had reviewed Mr. Dixon's medical records concerning the injury in support of his motion for relief

from judgment. Tr. (39745) p. 200, ln. 1-6. The physical therapist opined that Mr. Dixon would not have been capable of any quick, sudden, heavy or sustained movements prior to June 20, 2005, and could not have lifted anything with moderate or medium weight with his left upper extremity due to fragility, integrity and strength of his left fingers and forearm tendons. Affidavit of Allen Goodall.

The district court noted that the physical therapist did not actually treat Mr. Dixon and found that the information provided in the physical therapist's affidavit would not have made a difference at trial. Tr. (39745) p. 206, ln. 10-20. The district court also reiterated its prior conclusion that it "was apparently a strategic decision that Mr. Dixon, himself, chose to pursue by wanting to proceed to trial as soon as possible, not leaving his attorney time to find a witness such as" the physical therapist. *Id* at p. 205, ln. 18 - p. 206, ln. 1. The district court thus denied the motion for relief from judgment. *Id* at p. 207, ln. 5-8.

Post-conviction proceedings were the exclusive means for Mr. Dixon to challenge the validity of his conviction based on ineffective assistance of counsel. In order to provide Mr. Dixon with a meaningful opportunity to have his claim considered, he should not be penalized for his attorney's failure to introduce medical evidence in support of his petition and unique and compelling circumstances justified considering the physical therapist's affidavit. Further, for the reasons described in section A(2) *supra*, information corroborating Mr. Dixon's physical limitations was critical to his defense. Counsel's decision to forgo any investigation into witnesses who could testify regarding Mr. Dixon's physical limitations was based on the incorrect assumption and unreasonable. Accordingly, Mr. Dixon established that he received ineffective assistance of counsel and the district court abused its discretion in denying his motion for relief

from judgment.

V. CONCLUSION

Mr. Dixon respectfully asks this Court to reverse the district court's judgment denying his post-conviction claims and his motion for relief from judgment and to remand this case for further proceedings.

Respectfully submitted this 12TH day of November, 2013.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin for
Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12TH day of November, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.

Robyn Fyffe