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## Parvin v. State Appellant's Brief 2 Dckt. 40824

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## STATEMENT OF THE CASE

### Nature of the Case

On appeal, Mr. Parvin asserts that the district court erred when, after an evidentiary hearing held on remand from the Idaho Court of Appeals, it denied him post-conviction relief. Specifically, he maintains that he established both deficient performance and prejudice with respect to his claim that his attorney failed to ensure that the Idaho Criminal Rule 35 (“Rule 35”) relief that he was originally given was retained when that attorney failed to take any steps to have the Rule 35 motion ruled upon while the district court still had jurisdiction.

In its Respondent’s Brief, the State raises a number of arguments, none of which is well-taken, and only three of which merit a reply. One is that Mr. Parvin has not properly raised a statutory ineffective assistance of counsel claim because he failed to cite to Idaho Code § 19-852 in his Petition or his Appellant’s Brief. A second is that Mr. Parvin cannot show deficient performance based on the State’s claim that he unilaterally amended his Petition via testimony at a supplemental evidentiary hearing following remand and he cannot show deficient performance under the State’s formulation of a “new” claim. A third is that Mr. Parvin cannot show prejudice because he could not have obtained Rule 35 relief without a contested hearing as, according to the State, a district court’s decision on a Rule 35 motion for leniency constitutes a resentencing, which pursuant to the State’s interpretation of the terms of his plea agreement, was not permitted without the input of the victims and their families.

This Reply Brief is necessary in order to dispose of the above-listed arguments. Other arguments advanced by the State do not require responses, as they are adequately addressed in the Appellant's Brief.

Statement of the Facts and Course of Proceedings

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

## ISSUES

1. May Mr. Parvin obtain post-conviction relief if he failed to cite to Idaho Code § 19-852 in his Petition for Post-Conviction Relief or his Appellant's Brief?
2. May the State amend a petitioner's post-conviction petition on appeal?
3. Does a decision on a Rule 35 motion for leniency constitute a "resentencing," such that it requires a hearing?

## ARGUMENT

### I.

#### A Petitioner Need Not Cite To Idaho Code § 19-852 In Order To Obtain Post-Conviction Relief Based On A Claim Of Statutory Ineffective Assistance Of Counsel

The State's first basis for opposing Mr. Parvin's appeal from the denial of his Petition for Post-Conviction Relief is that, when a Sixth Amendment basis for an ineffective assistance claim does not lie, it is necessary that a petitioner specifically cite Idaho Code § 19-852 in his petition, appellant's brief, or both in order to obtain relief. In opposing Mr. Parvin's claim, the State argues,

At no time below, however, did Parvin ever assert that his ineffective assistance of counsel claim in relation to his Rule 35 motion was based on the deprivation of his statutory right to counsel. (See, e.g., R., pp.73, 81; see also Tr.) Parvin likewise failed to invoke a statutory right in his appellant's brief. (See generally Appellant's brief.) Under Idaho Code § 19-4903, petitioners for post-conviction relief are required to "specifically set forth the grounds upon which the application is based." Because Parvin failed to specifically set forth (or even generally set forth) the deprivation of a statutory right as the basis for his ineffective assistance of counsel claim, no such claim should be considered on appeal.

(Respondent's Brief, pp.6-7.) The State then argued that, even if the issue had been preserved, precedent provides no basis for believing that post-conviction relief should be "afforded . . . to a defendant seeking a routine reduction of sentence without the submission of any new evidence or argument." (Respondent's Brief, p.7.)

Aside from quoting a portion of Idaho Code § 19-4903 setting forth a requirement that a petitioner provide the grounds upon which an application for post-conviction relief is based, the State provides no authority for its argument that a petitioner must cite to Idaho Code § 19-852 in order to pursue a claim of statutory ineffective assistance of counsel. (Respondent's Brief, pp.6-8.) The State's partial quotation of Idaho

Code § 19-4903 ignores the last sentence of that statute, which provides, “Argument, citations, and discussions of authorities are unnecessary.” I.C. § 19-4903.

The fatal problem, however, with the State’s argument is that it ignores the Idaho Court of Appeals’ earlier opinion remanding this matter for the hearing from which this appeal follows, including its conclusion that “[t]here is no question that Parvin has raised a plausible claim of ineffective assistance of counsel[,]” and that “Parvin correctly notes that he had received counsel pursuant to I.C. § 19-852 for the Rule 35 motion, and, as such, had a statutory right to effective counsel.” *Parvin v. State*, 2012 Unpublished Opinion No. 453, pp.3, 4 n.1 (Ct. App. April 30, 2012).

Under the “law of the case” doctrine, the Court of Appeals’ conclusion that Mr. Parvin’s Petition contains a plausible claim of statutory ineffective assistance of counsel under Idaho Code § 19-852 that necessitated remand for a decision on the merits cannot be re-litigated in this appeal. See *Swanson v. Swanson*, 134 Idaho 512, 515-16 (2000) (applying “law of the case” doctrine, which “provides that ‘upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal,” to final decisions of the Court of Appeals).

The second problem with the State’s argument is that nowhere in his Verified Amended Petition for Post-Conviction Relief did Mr. Parvin limit his ineffective assistance claim to one under the Sixth Amendment. His claim was that he received “Ineffective Assistance of Counsel,” with no mention of either the Sixth Amendment or

Idaho Code § 19-852. (R., p.73.) Explaining his claim in more detail later in his Petition, Mr. Parvin wrote,

Petitioner's attorney was deficient in failing to take action to ensure that the District Court took timely action on the clearly meritorious motion to reduce sentence. This failure resulted in a delay which, according to the Court of Appeals, deprived the District Court of jurisdiction. Timely action by Petitioner's attorney would have resulted in Petitioner's [sic] receiving the just sentence he is entitled to, five to twenty years.

(R., p.81.) The third problem with the State's argument is that, in his Appellant's Brief, Mr. Parvin discussed the prejudice prong of the ineffective assistance of counsel claim by quoting *Hassett v. State*, 127 Idaho 313 (Ct. App. 1995), a case involving a claim of ineffective assistance of counsel for failing to file a Rule 35 motion. (Appellant's Brief, p.7.) The final problem with the State's contention is that it completely ignores the Idaho Supreme Court's insistence that Idaho Code § 19-852's "statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel," with the Court continuing, "We can see no legitimate basis for determining whether there has been a violation of the right to effective assistance of counsel guaranteed by I.C. § 19-852 differently from determining whether there has been a violation of a similar constitutional right." *Hernandez v. State*, 127 Idaho 685, 687 (1995). The Court then went on to note that the requirements for proving ineffective assistance of counsel are: (1) establishing deficient performance by counsel, and (2) demonstrating prejudice. *Id.* (citing *Aragon v. State*, 114 Idaho 758, 760 (1988)).

For all of these reasons, the State's argument that Mr. Parvin's statutory ineffective assistance of counsel claim is not properly before this Court is without merit.

II.

The State May Not Amend A Petitioner's Post-Conviction Petition On Appeal

The State's next contention is that Mr. Parvin has failed to establish deficient performance because

On remand, Parvin argued that his attorney was deficient, asserting that he should have asked the district court to rule on the Rule 35 motion on day 120, after filing the motion on day 119, in order to preserve the district court's jurisdiction. (Tr., p.12, Ls.12-24.) But that is not what the standard requires.

...

The district court lost jurisdiction to rule on Parvin's Rule 35 motion because it delayed ruling on the motion for more than three months and there was no adequate record for its delay, not because trial counsel insufficiently nagged the court the day after he filed the Rule 35 motion. Because Parvin failed to prove that his counsel was objectively deficient in regards to his Rule 35 motion, his claim was correctly denied.

(Respondent's Brief, pp.10-11.)

The key problem with the State's argument is that it takes testimony provided by Mr. Parvin at a supplemental evidentiary hearing held following remand, and attempts to amend Mr. Parvin's Petition by reference to that testimony. It may seem fairly obvious, but Mr. Parvin will note that it is the *petitioner* who decides what issues to raise in a petition for post-conviction relief, not the State. See I.C. § 19-4903 ("The application shall identify the proceedings in which the *applicant* was convicted . . . [and] shall identify all previous proceedings, together with the grounds therein asserted, *taken by the applicant to secure relief from his conviction or sentence.*") (emphasis added). Even assuming that Mr. Parvin's testimony was an attempt to amend his Petition, he would have needed leave from the district court to do so. See I.C. § 19-4906(a) ("The court

may make appropriate orders for amendment of the application . . . .”) (emphasis added).

The other problem with the State’s argument is that, even assuming the State may amend Mr. Parvin’s Petition on appeal (or may argue that Mr. Parvin unilaterally did so via his testimony at the supplemental evidentiary hearing), a review of that testimony in context reveals that Mr. Parvin and post-conviction counsel were merely providing information as to his defense attorney’s total failure to precipitate timely action on the Rule 35 motion, which constituted deficient performance. The testimony cited to by the State, when the testimony immediately preceding and following the cited portion of the transcript is included,<sup>1</sup> reads as follows:

[Counsel:] *And through the procedural history, which this Court has taken judicial notice of – it’s a long history – the long and the short of it is at one point the Court of Appeals held Judge Morfitt had lost jurisdiction because he did not act upon the Rule 35 in a timely matter [sic]; is that correct?*

[Mr. Parvin:] *That’s correct.*

[Counsel:] Now, we’ve talked about the fact that you requested Mr. Onanubosi to file the Rule 35?

[Mr. Parvin:] Yes.

[Counsel:] And basically [it] was filed 119 days before [sic] the judgment was issued, correct?

[Mr. Parvin:] Correct.

[Counsel:] And then, that one additional day that Judge Morfitt still had remaining jurisdiction, to the best of your knowledge, Mr. Onanubosi did not come in and speak to Judge Morfitt about making a ruling on that day while he still had jurisdiction; is that right?

[Mr. Parvin:] Not that I’m aware of, no.

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<sup>1</sup> The portions of the transcript not cited by the State are italicized.

[Counsel:] *And to the best of your knowledge or to your opinion, if the Rule 35 had been filed in a more timely fashion, and had Mr. Onanubosi followed up and made sure that Judge Morfitt ruled while he still had jurisdiction, is it your opinion that, but for that, the relief that you requested would have been granted and been valid?*

[Mr. Parvin:] *Yes, I believe it would have been.*

[Counsel:] *Okay. And but for the fact that it was not ruled upon because your counsel failed to make sure that Judge Morfitt ruled in a timely manner, the Court lost jurisdiction?*

[Mr. Parvin:] *That is correct.*

(Tr., p.12, L.4 – p.13, L.12 (emphases added).) In proper context, then, it is clear that Mr. Parvin was not attempting to modify his sole post-conviction claim, namely, that his attorney was ineffective for failing to take steps to ensure that his Rule 35 motion was decided before the district court lost jurisdiction.

In light of the complete lack of authority for the State's argument, as well as the lack of any indication that Mr. Parvin sought – let alone received the district court's permission – to amend his Petition via testimony at a supplemental evidentiary hearing on remand, Mr. Parvin asserts that the State's argument is without merit.

### III.

#### A Decision On A Rule 35 Motion For Leniency Does Not Constitute A "Resentencing," Requiring A Hearing

The last of the State's argument that necessitates a reply is that Mr. Parvin cannot establish prejudice because "under the peculiar facts of this case, the district court *could not* grant Parvin Rule 35 relief absent a contested hearing" because one of the conditions of the plea agreement was "that all of Parvin's victims, including their immediate family members, would be present and permitted to testify at sentencing."

(Respondent's Brief, pp.14-15 (emphasis in original) (citation omitted). The State completed its argument by explaining,

To *resentence* Parvin without granting the victims and their families the right to be present and to testify would be a breach of Parvin's plea agreement. Parvin's plea agreement required the district court to hold a contested hearing before it could reduce his sentence,<sup>2</sup> and upon holding that contested hearing the district court did not grant Parvin's motion.

(Respondent's Brief, p.15 (emphasis added).)

The key problem with the State's argument is that it ignores the plain text of Idaho Criminal Rule 35, which, in relevant part provides, "Motions to correct or modify sentence under this rule . . . *shall be considered and determined by the court without the admission of additional testimony and without oral argument*, unless otherwise ordered by the court in its discretion." I.C.R. 35(b) (emphasis added); see also I.C.R. 43(c) ("A defendant need not be present in the following situations unless otherwise ordered by the court . . . (4) At a reduction of sentence under Rule 35."); I.C. § 19-2503 ("For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present"). In light of the clear statutes and rules on the matter, a decision to grant or deny a Rule 35 motion for leniency is not a "resentenc[ing]" necessitating a hearing, let alone one at which any victims and the defendant need be present.

Because a district court's decision to grant or deny a Rule 35 motion for leniency is not a "resentenc[ing]," the State's argument that Mr. Parvin could not prove prejudice

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<sup>2</sup> Mr. Parvin will not address this portion of the State's argument, as the State cites to nothing in the record to indicate that the plea agreement included a requirement that a contested hearing be held prior to the district court ruling on a Rule 35 motion for leniency. See I.A.R. 35(b)(6) ("The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, *with citations to the authorities, statutes, and parts of the transcript and record relied upon.*") (emphasis added).

because the granting of his motion required a hearing at which the victims and their family members were present is not well-taken.<sup>3</sup>

CONCLUSION

For the reasons set forth herein, and in his Appellant's Brief, Mr. Parvin respectfully requests that this Court vacate the district court's judgment of dismissal as to his Rule 35 claim, and remand this matter for entry of an order reinstating the district court's order granting Rule 35 relief, in which it reduced his sentence from life, with ten years fixed, to a unified sentence of twenty years, with five years fixed.

DATED this 2<sup>nd</sup> day of April, 2014.

  
\_\_\_\_\_  
SPENCER J. HAHN  
Deputy State Appellate Public Defender

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<sup>3</sup> To the extent that the State may be advancing an argument that, under the statutory and constitutional provisions granting rights to Idaho crime victims, crime victims have special rights in Rule 35 proceedings not provided to a criminal defendant, such an argument should be rejected on due process grounds. See *Wardius v. Oregon*, 412 U.S. 470 (1973) (one-sided procedural rules that benefit the state violate the Fourteenth Amendment's Due Process Clause).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of April, 2014, 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:

MICHAEL R PARVIN  
INMATE # 59529  
ICIO  
381 W HOSPITAL DRIVE  
OROFINO ID 83544

BRADLY S FORD  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

GREG FERNEY  
CANYON COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand delivered to Attorney General's mailbox at Supreme Court.

  
\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

SJH/eas