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Adams v. State Appellant's Reply Brief Dckt. 42920

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLAYTON ADAMS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 42920 Canyon Co. CV-2010-6258

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Third Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE RENAE J. HOFF,
District Judge

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II. ARGUMENT IN REPLY

A. *The District Court Abused its Discretion When Denying Mr. Adams's Motion for Investigative Services.*

It was an abuse of discretion to deny Mr. Adams's motion for investigative services and it was manifestly unfair to dismiss the causes of action which the court did not grant Mr. Adams the resources to investigate.

The state attempts to justify the court's ruling by noting that the motion was filed "[t]hirteen days before the hearing on the state's motion for summary dismissal." State's Brief, pg. 21. In fact, the state's motion was heard 26 days later, on June 23, 2014. R 1855. Moreover, when Mr. Adams filed his motion on May 28, 2014, the state had not yet set a hearing date on its motion. R 1812. No hearing date was set until June 10, 2014, the day of the hearing on Mr. Adams's motion for investigative services. Thus, the state's motion was never set for a hearing until after the court had already denied Mr. Adams's request. R 1825; T (6/10/2014) pg. 12, ln. 10-12; pg. 15, ln. 1-2. The denial of the motion cannot be justified by "the imminent hearing date on the state's motion" (State's Brief, pg. 22) because that date hadn't been set. And, of course, the court could have set the hearing on the state's motion out far enough to give plenty of time for investigation, had it wanted to do so.[1] It just didn't need to do so because it had already denied Mr. Adams's

[1] Moreover, the court's concern about delaying the case was illogical and unreasonable because the court couldn't hear the motion for 13 days anyway and the investigation could have been completed by then, especially as it appears that both witnesses lived locally.

motion.

By focusing on the timing of the motion and counsel's failure to set out in detail what steps she had taken to locate the witnesses, the court failed to consider the legal issue before it: Whether the requested investigative funds was "necessary to protect [Mr. Adams's] substantial rights." *Murphy v. State*, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006); *see Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App. 1992) (discovery request).

The state argues that Mr. Adams's substantial rights were not adversely affected "for the same reasons Adams' claim that his trial counsel performance failed to meet the prejudice prong under Strickland – that Lynette Skeen and Crissy Powell's statements were irrelevant and/or inadmissible[.]" State's Brief, pg. 23. But that argument does not make sense. If the evidence already in Mr. Adams's possession was inadequate to establish a *prima facie* case, the motion should have been granted as further investigation had the potential to produce additional relevant, admissible evidence. By the state's own logic, locating the witnesses and obtaining affidavits was necessary to protect Mr. Adams's substantive rights because the IAC claims based upon failure to investigate these witnesses were insufficient to survive summary disposition. Mr. Adams needed the investigative services so he could produce evidence to counter the state's argument and the court's eventual finding that the failure to call Ms. Powell and Ms. Skeen as witnesses was trial strategy by producing an affidavit that the defense never

contacted them. The reasons why the evidence available was sufficient to require additional investigation is set forth below.

B. ***The trial court erred in dismissing causes of action E (the failure to call Crissy Powell as a witness) and F (failure to call Lynette Skeen as a witness).***

Crissy Powell was at the Dutch Goose prior to the stabbing and observed that Tyler Gorley was "rude and a jerk and he was looking for a fight all night and called her the town whore." R1 376 (Exhibit L to *pro se* petition). Lynette Skeen said in her witness statement that she saw car headlights at the fight scene and heard someone yell, "Get the Fuck back here." She then heard the car drive off as she called 911. (A copy of Ms. Skeen's witness statement was attached to the *pro se* petition as Exhibit M-4. R1, 393.) According to Officer's Schorzman's report, the events happened so quickly Ms. Skeen did not even have time to make contact with 911 before Mr. Adams drove away.

> Lynette said she heard a commotion outside her house and it woke her up. She looked outside and saw one car parked in the road with it's lights pointing east. She said she heard men arguing and heard one say "get the fuck back over here." Lynette then called 911. She saw the car drive away and decided to hang up while 911 was still dialing.

R1, 394. Their testimony would have shown that Mr. Gorley was the aggressor in the fight and was still willing and able to fight at the time Mr. Adams was getting in his car and driving away. It also would have supported Mr. Adams's testimony that he was the one attacked and acted in self-defense.

The court summarily dismissed the Crissy Powell claim finding that: 1) "this

appears to be an issue strategy for defense counsel;" 2) "Mr. Adams has failed to show that Powell's testimony would have changed the course of the criminal case or the outcome of the trial;" 3) "Mr. Adams has failed to show that Powell would have testified consistently with what his sister has stated nor that she was even available to testify." T (6-23-14) pg. 64, ln. 15 -pg. 65, ln. 22. The state makes a different argument on appeal: That Ms. Powell's statements were not admissible evidence. State Brief, pg. 16-17. But her observations of Mr. Gorley at the bar, *i.e.*, that he was "rude and a jerk and he was looking for a fight all night," were relevant and admissible because they showed Mr. Gorley's aggressive state of mind and corroborated Mr. Adams's testimony that Mr. Gorley started the fight between them a short time later. I.R.E. 401. The Court has recognized "four well-defined categories in which a declarant-victim's state of mind is relevant because of its relationship to the legal theories presented by the parties," including "when the defendant claims self-defense as justification for the killing." *State v. Abdullah*, 158 Idaho 386, 435, 348 P.3d 1, 50 (2015), *reh'g denied* (2015), *cert. denied*, 136 S. Ct. 1161 (2016), *quoting. State v. Shackelford*, 150 Idaho 355, 364, 247 P.3d 582, 591 (2010). Of course, Mr. Gorley's statement that Crissy Powell was "the town whore" was not "hearsay in need of an exception" as claimed by the state as it would not be offered for the truth of the matter asserted. I.R.E. 801(c).[2] The statement was

[2] Likewise, the state's contention that the evidence was not admissible as character evidence is also a strawman argument as the evidence would not have been offered to prove Mr. Gorley's character for violence, but his aggressive state of mind that particular evening. See State's Brief, pg. 17.

relevant because it was a concrete example of Mr. Gorley's rude and aggressive behavior.

As to the Lynette Skeen claim, the court found: 1) "this was an issue of strategy for defense counsel" and "Mr. Onanubosi made the tactical decision not to call Lynette Skeen;" 2) "Petitioner failed to show that Skeen's testimony would have changed the course of the criminal case or the outcome of the trial;" 3) "Petitioner has not shown that Skeen would have testified consistently with his version of the events nor that she was even available." T (6-23-14) pg. 66, ln. 6-24. However, as previously noted, the court's finding that defense counsel made a strategic decision to not call the witnesses is not based upon any evidence in the record. Defense counsel testified he did not recall Crissy Powell or know Lynette Skeen. (Augmented Record, Onanubosi Deposition, pg. 39, ln. 21- pg. 41, ln. 24.) He did not testify that he decided to not investigate or not call these witnesses as a matter of strategy or tactics.

The state argues that "based upon [the state's version of] the facts of the case, the assertion that Gorley was the person who yelled, 'Get the Fuck back here' runs counter to common sense and logic." State's Brief, pg. 18. The assertion does make sense in light of Mr. Adams's testimony that he was attacked by Mr. Maylin and that Mr. Gorley joined in the attack, and it would have corroborated Mr. Adams' statement to the police that he "began to back up towards [his] car that when [Tyler Gorley] said 'Get the Fuck back here, I am not done with you yet.'" R3 1814. Additionally, it is obvious that Mr. Adams was leaving the scene as Ms. Skeen

heard the car drive off after that statement. The statement could not have been made by Mr. Adams because he was removing himself from the fight by driving away.

The state's argument that "[t]here is no basis for concluding . . . that Chrissy Powell or Lynette Skeen could have added any information to their statements," (State's Brief, pg. 18) is inadequate for two reasons. First, they both should have been called simply on the basis of the content of their statements. Their testimony would have supported Mr. Adams's testimony that Mr. Gorley was the aggressor and that he was acting in self-defense. The absence of their testimony was prejudicial because the jury might have had a reasonable doubt about whether Mr. Adams's was acting unlawfully, *i.e.,* without legal justification or excuse, an element of both murder and battery. ICJI 704A; 1203. Second, there is no way to know what further investigation would have shown had it been conducted by trial counsel or permitted by the post-conviction court.

In conclusion, all the court's reasons for dismissing Claims E and F are inadequate because they are not supported by the record or the court erred by not giving Mr. Adams the means by which to establish the necessary facts to avoid summary disposition.

C. *The court erred by dismissing Claim M. Counsel was ineffective for not objecting to the paramedic's testimony that Mr. Maylin suffered a stab wound. The evidence was not admissible and there is no strategic reason for allowing the evidence to come in.*

The state does not address this claim in its brief. Consequently, no reply is

needed.

D. *The trial court erred in dismissing the IAC claim based on counsel's failure to seek independent DNA testing of Tyler Gorley's clothing and then by denying the motion to reconsider.*

The state argues that the absence of Mr. Maylin's DNA on Mr. Gorley's clothing "does not show Maylin was not stabbed first [or] . . . was not stabbed by a knife at all." State's Brief, pg. 26. However, evidence to be relevant does not need to conclusively prove a fact. It just needs to have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." I.R.E. 401. Here, the absence of Mr. Maylin's DNA has a tendency to prove he was not stabbed as he tried to get out of the car and was fleeing from Mr. Adams, as Mr. Maylin claimed. Dr. Hampikian's affidavit, which at this point must be construed in the light most favorable to Mr. Adams, stated that he "would expect to find DNA on an object or weapon after it punctured a person and caused extensive bleeding." In fact, "it is extremely unlikely that DNA would not be found on that object or weapon." R3 1906. While the state suggests that Dr. Hampikian may not have expertise in the "*transfer* of DNA," his CV shows that he is a member of the American Academy of Forensic Science, teaches classes in Forensic Biology, focuses his research on forensic casework analysis, and had taught police and crime lab workers in DNA analysis. *Id*.

The state argues, as it did below, that the "testing site selection" may explain the absence of Maylin's DNA because there were four stab wounds to the torso. Thus,

the four test sites on the T-shirt and jacket could have been from the same two wounds. State's Brief, pg. 27. The state also speculates without any evidentiary support that Mr. Adams wiped the knife blade after stabbing Mr. Maylin but before stabbing Mr. Gorley. At this point, however, these theories hold no sway because on summary disposition the evidence must be construed in the light most favorable to Mr. Adams. *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010).

E. *The court erred by dismissing Claim Q: counsel was ineffective for conceding Mr. Adams was guilty of manslaughter in closing argument without consulting Mr. Adams or seeking his permission.*

The state argues that trial counsel did not abandon the self-defense theory of the case. However, the district court found otherwise: "From the record I reviewed, the statements of counsel were strategically designed to minimize the charges against his client." T (6/23/14), pg. 79, ln. 1-17. But that is precisely the error. Mr. Adams did not want to minimize the charge, he wanted to be acquitted because he acted in self-defense. He stated that "[a]t no time . . . did I give consent to my trial counsel . . . to change my trial strategy of self-defense. I'm not guilty of any crime and have remained adamant about that fact since the beginning." R1 1366. Mr. Adams was willing to run the risk of conviction in exchange for the chance of acquittal and thus did not give his attorney permission to pursue the voluntary manslaughter strategy.

Trial counsel did not attempt to obtain an acquittal based upon self-defense. His argument to the jury was that the fight was a "sudden quarrel that rises to the

heat of passion . . . and the end result was tragedy, deadly." T pg. 947, ln. 23 - pg. 948, ln. 1. He repeated this phrase five more times during closing argument, four of which he noted that death was the result. T pg. 948, ln 12-20 ("We call it a sudden quarrel that rises to the level of heat of passion among a group of people.); T pg. 955, ln. 25 - pg. 956, ln. 2. ("This is a fight, a sudden quarrel that rises to the level of a heat of passion among a group of people that night that turned deadly."); T pg. 963, ln. 4-6 ("This is a fight, a sudden quarrel that rises to the heat of passion . . . that turned deadly."); T pg. 966, ln. 12-15 ("This is a fight, a sudden quarrel that rise to the level of heat of passion . . . and the end result was tragedy, deadly, I concede."); T pg. 967, ln. 15-18. ("This is a fight, a sudden quarrel that rises to the heat of passion . . . that turned deadly."). The "sudden quarrel" phrase was used six times by counsel and was taken directly from the voluntary manslaughter jury instructions given by the court. T pg. 909, ln. 21 - pg. 910, ln. 24. ICJI 708. In his conclusion, trial counsel does not mention self-defense. Instead he only argues that Mr. Adams is not guilty of first-degree murder because there was no robbery. T pg. 970, ln. 15 - pg. 971, ln. 12. This argument left the jury to choose between second-degree murder or voluntary manslaughter. The fact that the jury returned a second degree murder verdict does not disprove trial counsel abandoned Mr. Adams's self-defense theory by arguing for a lesser-included, as claimed by the court and the state. State's Brief, pg. 33. (The illogic of this argument is manifest. If anything, the verdict tends to prove that counsel argued for second-degree murder.) Nor does the fact that the jury rejected trial counsel's voluntary manslaughter concession mean he did not make that

concession. A not guilty verdict would not mean the state conceded Mr. Adams was innocent.

Trial counsel did not need to say the words "find my client guilty of voluntary manslaughter" in order to make it clear he was conceding that point. As found by the district court, it was trial counsel's strategy to minimize the conviction. That was the entire point of counsel's beating the phrase "sudden quarrel . . . that turned deadly" like a drum. Thus, the state's claim that the record does not show "any actual concession by counsel to the voluntary manslaughter claim" is conclusively disproved by the record. State's Brief, pg. 32. The concession was actual even if not explicit.

Nor does the fact that counsel set out a self-defense theory in opening statement prove he did not abandon that claim in closing argument. What the opening statement and Mr. Adams's testimony (at trial and in post-conviction) prove is that Mr. Adams wanted to put on a self-defense case, trial counsel agreed to do so, but then abandoned that defense during closing arguments without obtaining Mr. Adams's permission. And by that time it was too late for Mr. Adams to raise an objection.

Finally, defense counsel's desultory references to self-defense during his closing remarks were not "argument," *i.e.*, "a coherent series of statements leading from a premise to a conclusion."[3] The portion of the closing argument quoted by the state is

[3] http://www.merriam-webster.com/dictionary/argument

nearly incoherent. State's Brief, pg 35, quoting T pg 964, ln. 15-18.[4] Counsel follows up those comments by telling the jury that Mr. Adams testified about "how he felt" and "[t]hat's why we have that self-defense instruction," but then immediately tells the jury to ignore Mr. Adams's testimony because "[t]his is a fight, a sudden quarrel that rise to the level of heat of passion . . . and the end result was tragedy, deadly, I concede." T pg. 966, ln. 2-15. And while counsel mentions the self defense jury instructions, he never asked the jury to return a not guilty verdict to the homicide or battery charge because Mr. Adams was acting in self-defense. Counsel only asked the jury to find that Mr. Adams was not "a murderer, a first-degree murderer," (T pg. 971, ln. 7-12) while he previously and repeatedly insisted Mr. Adams acted upon a sudden quarrel or heat of passion. That's not a self-defense argument. That's a plea to find Mr. Adams is guilty of voluntary manslaughter made without Mr. Adams's permission. This was highly prejudicial because Mr. Onanubosi's argument led the jury to the second-degree murder verdict as Mr. Adams did not testify in support of the manslaughter theory.

As the state relies solely upon the argument that counsel did not abandon the self-defense case, it does not address those cases which state that counsel may not

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[4] "You know, I told you talking about self-defense, you know, hindsight is good, 20-20 is good. It describes what happened where he was. I wasn't there. They were not there. But one thing we know for sure is there is testimony about two people swinging at one another." If this is a self-defense argument, it is impossible to tell whether Mr. Adams or Mr. Gorley is the one who is "swinging" in self-defense. Perhaps the jury thought counsel was saying that Mr. Gorley was defending himself from Mr. Adams who attacked him upon sudden quarrel or while in the heat of passion.

concede guilt without consulting with the client and obtaining permission. *United States v. Thomas*, 417 F.3d 1053, 1059 (9th Cir. 2005) (B. Fletcher, concurring); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991); *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984); *see also, People v. Hattery*, 488 N.E.2d 513, 519 (Ill. 1985); *Cooke v. State*, 977 A.2d 803, 829 (Del. 2009) *cert. denied*, 130 S. Ct. 1506 (2010).

The state's citation to *Abdullah*, *supra*, is not apposite. First, *Abdullah* recognizes that the accused has the ultimate authority to decide whether to plead guilty. 158 Idaho at 505, 348 P.3d at 120, *citing Jones v. Barnes*, 463 U.S. 745, 751 (1983). Second, while Abdullah's trial counsel did not put on an alibi defense, they did not concede guilt to an included offense like Mr. Adams's attorney. They only admitted the fact that Mr. Abdullah was present in Boise at the time of the house fire and argued that Mr. Abdullah was not guilty of murder because the victim committed suicide. They did not argue that he was guilty of arson or felony-murder. Thus, *Abdullah* is not a concession of guilt case, like this one. Moreover, as previously noted, the United States Supreme Court has carved out an exception in capital cases where the concession of guilt may or may not be deficient performance but is not *per se* prejudicial because of the focus on sentencing in death penalty cases. *See, Florida v. Nixon*, 543 U.S. 175, 187 (2004). But *Nixon* was careful to distinguish capital cases from "a run-of-the mine trial" like this one. 543 U.S. at 190-1.[5]

[5] The state also draws the Court's attention to a footnote in *Abdullah* collecting cases. State's Brief, pg. 33, ft. 18. However, all those cases are capital cases or decided prior to *Florida v. Nixon*, or both.

As noted by the Supreme Court,

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Herring v. New York, 422 U.S. 853, 862 (1975). Defense counsel's argument did not sharpen or clarify Mr. Adams's claim of self-defense. Instead, the argument muddled and undermined Mr. Adams's chosen complete defense to the murder and battery charges with a plea that the jury find him guilty of voluntary manslaughter. Trial counsel literally gambled with Mr. Adams's life with his lesser-offense strategy even though, outside of capital cases, defense counsel cannot make the decision to concede guilt without first consulting with and obtaining the permission of his client. Summary disposition of this claim should be reversed.

F. *Alternatively, the Cumulative Effect of All the Instances of Deficient Performance Prejudiced Petitioner so That He Was Denied his Sixth Amendment Right to Effective Assistance of Counsel Under Strickland v. Washington*

With regard to cumulative error, the state contends that Mr. Adams has not shown two acts of deficient performance. State's Brief, pg. 36. That claim is incorrect as explained in the Opening Brief and above. Also, as previously set forth, there is a reasonable probability of a different result had defense counsel's performance been constitutionally adequate.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Adams asks this Court to reverse the summary dismissal of the amended petition and remand the matter for an evidentiary hearing.

Respectfully submitted this 22nd day of July, 2016.

__/s/_____
Dennis Benjamin
Attorney for Clayton Adams

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 22nd day of July, 2016.

_____/s/_____
Dennis Benjamin