

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAXX E. DIAZ)	
)	No. 46798-2019
Plaintiff-Appellant,)	
)	Ada County case no.
v.)	CV01-18-03154
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE MELISSA MOODY
District Judge**

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ARGUMENT

Trial counsel's failure to consult with and retain an expert in this case was unreasonable, based on inadequate preparation, and constituted deficient performance.

“A lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] the client’s factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Marr v. State*, 163 Idaho 33, 39, 408 P.3d 31, 37 (2017)(citing *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)).

The State articulately argued that Mr. Diaz’ counsel did not perform deficiently by failing to consult with and present at trial an expert witness in the field of toxicology. Appellant respectfully disagrees.

Appellant concedes that decisions on whether or not to present certain testimony and witnesses are generally considered “strategic decisions” which will almost never be usurped in post-conviction review. This point is well-established in Idaho post-conviction jurisprudence.

However, the record in this case demonstrates that counsel did not engage in “decision-making” at all on this issue. Rather, he completely failed altogether to consult or confer with an expert. (*See* Tr., pp. 20, l. 22 – 21, l. 1; p. 22, l. 6 – p. 23, l. 7; p. 24, ls. 1-4; p. 28, ls. 11-23; p. 49, l. 23 – p. 50, l. 8). Disturbingly, he failed to do so despite having knowledge that the State was calling a toxicologist to testify and was relying on this expert to convict Mr. Diaz.

Mr. Diaz’ position is that counsel could not have made a strategic decision when counsel failed to even consider this route. Counsel could not have “decided” to do something when he did not consider the pros and cons of such a decision in the first place. The record is devoid of

any evidence that counsel “[made] a reasonable decision that [made] particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Case law is clear that strategic decisions will not be “second-guessed” on appeal. However, this Court has further defined that general legal premise with the caveat that strategic decisions should be scrutinized under post-conviction review if they are based on “inadequate preparation, ignorance of relevant law or other shortcomings capable of objective review.” *Wurdemann v. State*, 161 Idaho 713, 717, 390 P.3d 439, 443 (2017); *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

The defense knew that the State would rely on scientific evidence and expert testimony in the prosecution of Mr. Diaz. Consequently, counsel had a duty to adequately prepare for and attempt to rebut that evidence and testimony. Counsel simply failed to do so. Respondent’s counsel correctly argues that other evidence was presented by the prosecution against Mr. Diaz. That mirrors nearly every criminal trial. However, the scientific evidence in this case carried substantial weight in convicting Mr. Diaz.

Mr. Diaz asserts that in engaging in this omission, his counsel failed to make reasonable investigations in his defense, failed to make any reasonable decision that made this particular investigation unnecessary, and engaged in inadequate preparation in Mr. Diaz’ defense. *See Strickland*, 466 U.S. at 690-91. As Mr. Diaz stated herein above, “[a] lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] the client’s factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Marr v. State, supra*.

Counsel's failure to prepare Mr. Diaz' defense was not a reasoned choice or decision when he knew the State was trying to convict his client utilizing science and an expert toxicology witness. Mr. Diaz asserts that counsel's failures were "the result of inattention, not reasoned strategic judgment." *See Wiggins v. Smith*, 539 US. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Therefore, he should be entitled to post-conviction relief.

Conclusion

Mr. Diaz has shown that the District Court's judgment denying him post-conviction relief was in error. He demands that this Court remedy that error and reverse the decision of the District Court.

RESPECTFULLY SUBMITTED this 31st day of January, 2020.

/s/ Paul E. Riggins
PAUL E. RIGGINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of January, 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Via Email
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/s/Paul E. Riggins
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