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IN THE SUPREME COURT OF THE STATE OF IDAHO

RUSSELL ALLEN PASSONS,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court No. 47124-2019

County No. CV-2015-6283

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BRIEF OF APPELLANT RUSSELL ALLEN PASSONS

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

---

HONORABLE RICHARD CHRISTENSEN  
District Judge

---

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## II. STATEMENT OF THE CASE

### A. Nature of the Case

This is an appeal from the district court's judgment dismissing Appellant Russel Passons' petition for post-conviction relief.

### B. General Course of Proceedings

#### 1. Facts relevant to underlying criminal proceedings

On June 21, 2012 Mr. Passons entered a Walmart, took a stroller without paying for it and placed it in his car. Exhibits, p. 160-162, 177 (Ex 1, Jury Trial Transcript). Mr. Passons then re-entered the store, placed a television into a shopping cart, and again exited without paying. *State v. Passons*, 158 Idaho 286, 289, 346 P.3d 303, 306 (Ct. App. 2015) (*Passons I*). Two loss protection employees observed Mr. Passons exit without paying and confronted him in the parking lot. *Id.* These employees claimed that Mr. Passons pulled a folding knife from his pocket and pointed it at them running to his car and drove away, leaving the television in the shopping cart. *Id.*

The following day, Mr. Passons and two acquaintances went to a different Walmart in the area. *Id.* Mr. Passons and a woman entered the store and the woman attempted — unsuccessfully — to return the stroller. *Id.* An employee recognized Mr. Passons as matching the description of the person who had been at the other Walmart the day prior and called police. *Id.* Police identified Mr. Passons' vehicle after he had driven away and began pursuit. *Id.* Mr. Passons fled, but ultimately crashed the vehicle and was apprehended. *Id.* The state charged Mr. Passons with two counts of aggravated assault (one for each employee) in violation of Idaho Code §§ 18-901,

18–905, and one count of burglary, I.C. § 18–1401. The prosecution also alleged that the use of the knife as a sentencing enhancement pursuant to Idaho Code §19-2520. *State v. Passons*, 163 Idaho 643, 644, 417 P.3d 240, 241 (2018) (*Passons 2*).

The public defender was appointed to represent Mr. Passons and Mr. Passons advised counsel that he did neither used nor displayed a knife during the alleged crime. R. 20; Exhibits p. 783 (Supp Aff Oppose Summary Dismissal). On August 30, 2012, Mr. Passons’ attorney moved to withdraw so that Mr. Passons could exercise his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975). Exhibits p. 393 (Clerk’s Record No. 41288). After exploring Mr. Passons’ competence and whether he knowingly waived his right to representation, the magistrate indicated it would give Mr. Passons more time to consider his decision. Exhibits, p. 394 (Clerk’s Record No. 41288). Mr. Passons advised that he did not require additional time and the magistrate admonished that he was giving it to him anyway. Exhibits p. 394 (Clerk’s Record No. 41288).

The following day, the magistrate again inquired regarding Mr. Passons’ desire to forego counsel and Mr. Passons advised he wished to represent himself so that he could review discovery, which he had not yet been allowed to review. Exhibits p. 397 (Clerk’s Record No. 41288). Ultimately, the magistrate granted Mr. Passons’ request, allowed the public defender to withdraw and remain as standby counsel. Exhibits p. 397, 403 (Clerk’s Record No. 41288).

On September 11, 2012, Mr. Passons requested a continuance because he had not reviewed a video and needed more time in the law library. Exhibits p. 405 (Clerk’s Record No. 41288). The magistrate denied the motion and left the preliminary hearing scheduled for the

following day. Exhibits p. 405 (Clerk's Record No. 41288). At the time set for the preliminary hearing, Mr. Passons again indicated he was not ready to proceed and submitted a written motion to continue. Exhibits, p. 408-413 (Clerk's Record No. 41288); p. 793, ln. 1-5 (prelim transcript).

Mr. Passons explained that the investigator with the public defender's office had completed some investigation but was out of town. Exhibits, p. 793, ln. 1-5 (Prelim Transcript No. 41288). The magistrate noted that the public defenders were not Mr. Passons' "attorneys anymore" and Mr. Passons indicated: "But they have pertinent information and evidence that I need, I would like to have." Exhibits, p. 793, ln. 6-11 (Prelim Transcript No. 41288). Mr. Passons argued that he received his case file two days earlier and had insufficient opportunity to review it and prepare for the hearing. Exhibits, p. 793, ln. 14-18 (Prelim Transcript No. 41288).

The magistrate denied Mr. Passons' motion to continue, finding the "inconveniences" of self-representation had been addressed in the previous hearing, he was advised "strongly of those things. . . understood them [and] discharged [his] attorney." Exhibits, p. 794, ln. 3-9 (Prelim Transcript No. 41288). After the preliminary hearing, Mr. Passons noted that he was provided neither time nor materials and information necessary to prepare for the hearing and had been "steamrolled." Exhibits, p. 819, ln. 4-14 (Prelim Transcript No. 41288).

Mr. Passons was bound over to the district court. Exhibits, p. 408-418 (Clerk's Record No. 41288). On September 18, 2012, Mr. Passons filed a motion seeking law library time and legal supplies. Exhibits, p. 421-422 (Clerk's Record No. 41288). Mr. Passons indicated that the one hour of access to the law library and six sheets of paper, which he was permitted, were inadequate for him to properly prepare his case. Exhibits, p. 421-422 (Clerk's Record No.

41288). On September 23, 2012, Mr. Passons submitted a kite<sup>1</sup> indicating he needed to view a DVD in the public defender's possession. Exhibits, p. 499 (Clerk's Record No. 41288).

On October 1, 2012, Mr. Passons submitted a kite seeking a hearing as soon as possible on his application for funds related to his self-representation. Exhibits, p. 660 (Clerk's Record No. 41288). On October 2, 2012, Mr. Passons applied for investigator funds to assist with trial preparation. Exhibits, p. 434-435 (Clerk's Record No. 41288). Mr. Passons also asked for legal publications, legal supplies, envelopes and paper, a video expert and phone use. Exhibits, p. 434-435 (Clerk's Record No. 41288). Mr. Passons requested a hearing on his motions. Exhibits, p. 438 (Clerk's Record No. 41288)

At the arraignment, the district court did not address Mr. Passons' requests and questioned his decision to represent himself. *See* R. 134. After approximately five minutes of discussion, Mr. Passons stated, "you convinced me - can I get him appointed to represent me again?" R. 134. Without further inquiry, the district court re-appointed the public defender. R. 134.

On November 7, 2012, Mr. Passons submitted a kite indicating he need to reschedule a phone appointment because the one schedule for the previous day did not happen. Exhibits, p. 663 (Clerk's Record No. 41288). Finally, on December 18, the district court denied Mr. Passons' motion for law library access, noting Mr. Passons was represented. Exhibits, p. 664 (Clerk's

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<sup>1</sup> Forms titled "Inmate Request Form — Kite" appear in the clerk's record from Mr. Passons' direct appeal, which is an appellate exhibit. Exhibits, p. 656-664. These forms, which provide space for the inmate to write the request and to choose from among various recipients, are referred to herein as "kites."



Record No. 41288). On January 19, 2013, Mr. Passons submitted a kite indicating he needed the investigator to contact witnesses. Exhibits, p. 656 (Clerk's Record No. 41288).

The case proceeding to trial and, during voir dire, the district court asked if anyone knew of a reason why they could not be fair and impartial. A prospective juror responded: "this is kind of embarrassing to say, but if he's a defendant, I work in a bar. He's already covered in tattoos. He's been in and out of jail more than I can count. Those aren't normal tattoos that people just get for decoration. I've already formed an opinion of him. I honestly don't think I can give him a fair trial" *Passons I*, 158 Idaho at 293, 346 P.3d at 310. The district court indicated he did not agree but appreciated the juror sharing her conclusion. *Passons I*, 158 Idaho at 293, 346 P.3d at 310. The juror interjected: "I know about the difference between decorative and —" at which point the district court interrupted: "That's quite all right. Thank you very much. . . Why don't you go ahead and step down and I will excuse you." *Id.* at 293, 346 P.3d at 310. Mr. Passons asked the district court to declare a mistrial, which it denied. *Id.* at 293, 346 P.3d at 310.

Over Mr. Passons' objection, the district court allowed the jury to hear evidence of Mr. Passons' flight from police the day after the alleged burglary and assaults. *Passons I*, 158 Idaho at 289, 346 P.3d at 306. During direct examination of an officer, the prosecutor asked her to describe what was going on during the pursuit, and the officer responded: "We were following a suspect from a robbery that occurred." *Id.* at 293, 346 P.3d at 310. Defense counsel objected and the district court sustained the objection. *Id.* Outside the presence of the jury, defense counsel again moved for a mistrial, arguing that the term robbery was inaccurate and inflammatory, that it was misconduct for the prosecutor to solicit the testimony and that cumulative error had

infected the fairness of his trial. *Id.* The district court recognized the testimony came from law enforcement but concluded a mistrial was unnecessary and the statement did not deprive Mr. Passons of a fair trial. *Id.* at 293-94, 346 P.3d at 310-11. Though acknowledging the juror articulated what she believed the tattoos to mean, the district court concluded that the comments were not so extreme as to warrant a mistrial. *Id.* The district court instructed the jury that there was no robbery, there had been no robbery charged, and that Mr. Passons was not a suspect in a robbery. *Id.*

The jury found Mr. Passons guilty of two counts of aggravated assault and burglary. Exhibits, p. 635 (Clerk's Record No. 41288). On March 8, 2013, Mr. Passons filed a document outline difficulties with representation. p. 647-654 (Clerk's Record No. 41288). The district court sentenced Mr. Passons to a unified term of twenty years with a minimum period of confinement of ten years for aggravated assault enhanced by §19-2514, concurrent unified term of five years, all determinate, for aggravated assault, concurrent unified term of ten years with a minimum period of confinement of five years for burglary. p. 678 (Clerk's Record No. 41288).

## **2. Direct Appeal**

On appeal, Mr. Passons argued the district court abused its discretion by allowing testimony relating to his actions the day after the charged crimes, that the district court erred in failing to grant his motions for a mistrial and that the various alleged errors at trial combined to deprive him of his right to a fair trial. *Passons I*, 158 Idaho 286, 290, 346 P.3d 303, 307. The Court of Appeals held that returning the stroller tended to show Mr. Passons had a plan upon entering the store to obtain an item of value and to later return it to a different store. *Id.*. Thus, it

was proper for the State to introduce evidence to establish that it was part of Passons' plan to steal items before he entered the store. *Id.* at 291, 346 P.3d at 308.

However, the Court of Appeals held that whether Mr. Passons fled from officers the day after he entered Walmart to steal the television had no bearing on his intent or motive upon entering the store the previous day. *Passons I*, 158 Idaho at 291–92, 346 P.3d at 308–09. Thus, only the testimony of returning the stroller was relevant to show a motive or intent. *Id.* at 292, 346 P.3d at 309. Nevertheless, the Court concluded that Mr. Passons' conduct the previous day put him at risk of prosecution for a number of crimes, and his flight from the same retail store chain the subsequent day was admissible evidence to establish a consciousness of guilt. *Id.* The Court concluded that the evidence was prejudicial to Mr. Passons but not “unfairly so” and the district court did not abuse its discretion by admitting the evidence. *Id.* Considering the trial as a whole, the Court held none of the statements were so prejudicial as to require reversal and affirmed his judgment of conviction. *Id.*

### **3. Post-Conviction Relief**

On September 4, 2015, Mr. Passons initiated the instant post-conviction relief proceedings. R. 12-15. Counsel was appointed and filed an amended petition on March 10, 2016. R. 16-34. Mr. Passons alleged that the court's refusal to provide him access to legal materials, an investigator and other tools to present his defense deprived him of his right to self-representation. R. 20-23. Mr. Passons also alleged that standby counsel provide ineffective assistance of counsel by failing to assist Mr. Passons in securing the video recording of the alleged assault, other investigator information and failing to protect his right to self-representation. R. 24, 71. Mr.

Passons also alleged that the court failed to conduct an adequate inquiry into his waiver of his right to self-representation. R. 21-23. Mr. Passons alleged that trial counsel was ineffective for failing to adequately cross-examine the Walmart employees regarding the failure to preserve the video and their inconsistent descriptions of the event. R. 24. Mr. Passons alleged that counsel should have requested a spoliation instruction. R. 26. Mr. Passons also alleged his trial attorney was ineffective by failing to object to this unconstitutional infliction of multiple punishment.

The state moved for summary dismissal. R. 55. In the underlying criminal case, on April 28, 2016, Mr. Passons filed a motion to correct an illegal sentence pursuant to Idaho Criminal Rule 35. Exhibits, p. 823-845. Mr. Passons argued that his enhanced sentence for aggravated assault violated double jeopardy because the aggravated assault statute and the enhancement statute both punished the same offense — using a deadly weapon in an assault. *Passons 2*, 163 Idaho at 649, 417 P.3d at 246 (2018).

On January 17, 2017, the district court summarily dismissed all Mr. Passons' claims with the exception of his claim regarding multiple punishments, which the district court entered a stay pending the outcome of Mr. Passons' appeal from his the denial of his Rule 35. On March 19, 2019, Mr. Passons filed a motion to lift the stay, noting the Idaho Supreme Court's opinion in *Passons 2*. R.156-58. The state moved for summary dismissal of the sentence enhance claim, alleging *Passons 2* was dispositive. R. 161-166. The district court agreed, summarily dismissed the remaining claim and entered judgment. R. 246-249. This appeal follows. R. 250.

### III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Passons' petition for post-conviction relief because he alleged facts that established that he was denied a meaningful opportunity to represent himself in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

2. Did the district court err in summarily dismissing Mr. Passons' petition for post-conviction relief because he alleged facts that established he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

### IV. ARGUMENT

#### A. Standard of Review

Summary dismissal is appropriate only if the petitioner's allegations are clearly disproven by the underlying criminal record, the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Black v. State*, 165 Idaho 100, 439 P.3d 1272, 1276 (Ct. App. 2019), *review denied* (May 17, 2019). The court must construe all disputed facts in the petitioner's favor and may summarily dismiss when the facts so construed fail to establish a basis for relief as a matter of law. *DeRushé*, 146 Idaho at 603, 200 P.3d at 1152; *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). An evidentiary hearing must be conducted when petition, affidavits, and other evidence supporting the petition allege

facts that, if true, would entitle the petitioner to relief. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Black*, 165 Idaho 104, 439 P.3d at 1276.

**B. The District Court Erred in Summarily Dismissing Mr. Passons' Petition for Post-Conviction Relief Because He Alleged Facts Establishing That He Was Denied A Meaningful Opportunity to Represent Himself in Violation of the Sixth Amendment**

“*Faretta* held, without qualification, that a defendant who makes an unequivocal and timely request to represent himself has a Sixth Amendment right to self-representation, and that a denial of self-representation in the face of such a request is a violation of that right.” *Tamplin v. Muniz*, 894 F.3d 1076, 1086 (9th Cir. 2018). Courts violate the right to self-representation guaranteed by the Sixth Amendment to the United States Constitution by denying a self-represented defendant the means of presenting a defense. *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989); *People v. Moore*, 253 P.3d 1153, 1169 (Cal. SC 2011). An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense. *List*, 880 F.2d at 1047.

Here, Mr. Passons alleged that his lack of access to funds for investigation or legal materials and the magistrates refusal to continue his preliminary hearing forced him relinquish his self-representation right. R. 21-23, 29, 71. Specifically, eleven days after the the magistrate allowed the public defender to withdraw and remain as standby counsel— two days before the preliminary hearing — Mr. Passons received his case file. Exhibits p. 397, 403 (Clerk’s Record No. 41288); p. 793, ln. 14-18 (Prelim Transcript No. 41288). Mr. Passons sought to continue his preliminary hearing, noting he had insufficient opportunity to review the file and prepare for the hearing. Exhibits, p. 405, 408-413 (Clerk’s Record No. 41288), p. 793, ln. 1-18 (Prelim

Transcript No. 41288). Mr. Passons also explained that the investigator with the public defender's office had completed some investigation but was out of town and that the public defenders had: "pertinent information and evidence" that he needed. Exhibits, p. 793, ln. 1-11 (Prelim Transcript No. 41288).

In denying Mr. Passons' motion to continue, the magistrate ruled that Mr. Passons' lack of access to his file and the investigator's findings were part of the "inconveniences" of self-representation." Exhibits, p. 794, ln. 3-9 (Prelim Transcript No. 41288). After Mr. Passons was bound over to the district court, he filed a motions and kites seeking time in the law library, legal supplies such as paper, telephone access and an investigator. more than one hour of law library time and legal supplies, including more than the six sheets of paper a week he was then allotted. R. 20-22; Exhibits, p. 421-422, p. 434-435, p. 660 (Clerk's Record No. 41288).

Two weeks later, at Mr. Passons' arraignment, the district court failed to address Mr. Passons' requests for the means to meaningfully represent himself, the district court Exhibits, p. 456-58 (Clerk's Record No. 41288). Instead, the district court dissuaded Mr. Passons from continuing with self-representation and appointed the public defender without inquiring whether Mr. Passons' waiver of his right to represent himself was knowing and voluntary. R. 134.

The facts of this case stand in contrast to those in *People v. Lawley*, 38 P.3d 461 (2002) where the California Supreme Court found that the alleged inadequacy of the law library and the sufficiency of the ancillary services did not deprive the defendant of his due process right to meaningful access to the courts or his Sixth Amendment right as a self-represented defendant to an opportunity to prepare his defense. *Lawley*, 38 P.3d at 492. Significantly, whenever the

defendant voiced complaints about his lack of access to the jail law library, the means to review tape recordings of interviews with prosecution witnesses, or access to witnesses, the trial court made an effort to address his concerns. *Lawley*, 38 P.3d at 493. The court offered defendant the opportunity to interview witnesses in the jury room between 4:00 and 5:00 p.m. each day, ordered an investigator report directly to the defendant, ordered the jail not to record phone calls with witnesses and observed that witnesses could be compelled by subpoena to appear at the jail for interviews. *Lawley*, 38 P.3d at 493.

As an incarcerated defendant, Mr. Passons could not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense. *See also List*, 880 F.2d at 1047. However, rather than provide Mr. Passons with time and basic resources to exercise his right self-representation, the magistrate admonished the lack of tools were an inconvenience that accompanied the loss of counsel. The district court also did not address Mr. Passons requests for basic resources and an investigator, leading Mr. Passons to relinquish his self-representation.

Accordingly, the district court erred in concluding there was no issue of fact as to whether the court deprived Mr. Passons of his right to self-represent. Moreover, a Sixth Amendment violation is complete at the time a court erroneously denies self-representation *Tamplin*, 894 F.3d at 1085. An unwanted attorney “represents” the defendant only through a tenuous and unacceptable legal fiction as the defense presented is neither his defense nor the defense guaranteed him by the Constitution. *Faretta*, 422 U.S. at 821. Thus, Mr. Passons was not



required to demonstrate any prejudice and the court's deprivation of a meaningful opportunity to exercise his right to self-representation require that his judgement of conviction be vacated.

Nor did Mr. Passons properly waive his right to self-representation. A defendant's waiver of his right to counsel's remains valid and in effect throughout a criminal proceeding unless intervening events substantially change the circumstances existing at the time of the initial colloquy. *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019); *United States v. Hantzis*, 625 F.3d 575, 580–81 (9th Cir. 2010). A defendant must expressly request appointment of counsel for later proceedings or suggest that his waiver was limited to a particular stage of the proceedings for his initial waiver to lapse. *Audette*, 923 F.3d qt 1236; *Hantzis*, 625 F.3d at 581.

Here, the district court had no reason to question Mr. Passons' choice to represent himself as no intervening event placed the initial waiver into question. Moreover, the trial court failed to inquire into the reasons for Mr. Passons' change of heart or whether he was knowingly and intelligently relinquishing his self-representation right. R. 74-75.

The trial court deprived Mr. Passons of the means necessary to represent himself and then convinced him to relinquish his right to self-representation without conducting a proper inquiry. Mr. Passons established an issue of fact as to whether his right to self-representation was violated and this Court should vacate the judgment dismissing his post-conviction relief petition and remand for an evidentiary hearing.

**C. The District Court Erred in Summarily Dismissing Mr. Passons' Petition for Post-Conviction Relief Because He Alleged Facts Establishing That He Received Ineffective Assistance of Counsel**

The Sixth Amendment to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Murray v. State*, 156 Idaho 159, 164, 321 P.3d 709, 714 (2014). Ineffective assistance of counsel claims require the post-conviction petition to prove: (1) the attorney performed deficiently and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687–88; *Wurdemann v. State*, 161 Idaho 713, 717, 390 P.3d 439, 443 (2017).

A post-conviction petitioner establishes his attorney's performance was deficient by proving his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688; *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443. Counsel's strategic and tactical decisions can justify relief when the petitioner shows the decisions resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443; *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). Ultimately, "the standard for evaluating attorney performance is objective reasonableness under prevailing professional norms." *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443; *State v. Mathews*, 133 Idaho 300, 306, 986 P.2d 323, 329 (1999). Under the second prong, the defendant must show a reasonable probability that the outcome of trial would be different but for counsel's deficient performance. *McKay*, 148 Idaho at 570, 225 P.3d at 703. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *McKay*, 148 Idaho at 570, 225 P.3d at 703.

**1. Standby counsel provided ineffective assistance by failing to assist Mr. Passons preserve the Walmart surveillance footage**

Although a self-represented defendant has no constitutional right to the appointment of advisory counsel, when such counsel is appointed, the defendant is entitled to expect professionally competent assistance within the narrow scope of advisory counsel's proper *Lawley*, 38 P.3d at 491–92. The district court held that the duties of standby counsel are limited to appearing with a defendant “during proceedings in the event counsel needs to step-in.” R. 129-130. Because the district court found that standby counsel’s duties did not include assisting Mr. Passons in obtaining the video surveillance before it was destroyed, it concluded that Mr. Passons did not receive ineffective assistance of counsel of standby counsel. *Id.*

However, during the preliminary hearing, the Walmart asset protection employee testified that the security camera stored 90 days worth of video, which meant that unrecorded video of the day in question would expire six days after the preliminary hearing. Exhibits, p. 803, ln. 10-11. Mr. Passons asked standby counsel, who was present at the hearing, to assist in obtaining the surveillance video. Under these circumstances, it fell squarely within standby counsel’s duties to assist Mr. Passons in preparing a preservation request and subpoena, which would have prevented Walmart from allowing the video to be destroyed.

Moreover, Mr. Passons obtained new recordings from Walmart, which were taken at the same date and time as the day in question, four years later. Exhibits 8a through 8d, and 21. This camera view would have shown that Mr. Passons did not have a knife and instead wielded car keys. Because standby counsel failed to provide effective assistance, this crucial piece of

evidence-the video was destroyed. Accordingly, Mr. Passons presented an issue of material fact as to whether he receive ineffective assistance of counsel of standby counsel.

**2. Counsel provided ineffective assistance by failing to protect Mr. Passons' right to self-representation**

As noted above, the district court failed to adequately determine whether Mr. Passons' knowingly and voluntarily waived his right to self-representation. Newly appointed counsel should have raised the issue of a proper revocation of a *Faretta* based self-representation. Counsel's conduct, in addition to the district court's, violated Mr. Passons's right to self-representation. *See also* R. 71. Accordingly, the district court erred in summarily dismissing Mr. Passons' petition for post-conviction relief.

**3. Counsel provided ineffective assistance by failing to failing to object to testimony of the knife, failing to effectively cross examine the employees and failing to request a spoliation instruction**

At trial, counsel failed to elicit testimony establishing that the Walmart employees failed to preserve the video recording of the confrontation in the parking lot. R. 21, 62, 80. Counsel similarly failed to effectively cross examine the Walmart employees regarding their conflicting descriptions of the alleged knife, whether the video recording was truly whited out and the employees' motive for recording inculpatory clips from the surveillance but allowing the only objective evidence of the alleged assault to be destroyed. Because counsel failed to effectively cross-examine the witnesses, the state was able to argue in closing that "there is nothing to impeach either of those two employees about what they saw." R. 63. Because counsel failed to introduce evidence regarding Walmart's failure to preserve the video, counsel did not request an

instruction telling the jury that the lack of a DVD of the critical, decisive interaction allows an inference that the evidence was favorable to Mr. Passons. R. 63, 82. Similarly, trial counsel did not request an instruction that advised the jury could infer the destroyed evidence would have been helpful to Mr. Passons.

Mr. Passons presented an issue of material fact as to whether trial counsel was ineffective for failing to effectively cross examine and otherwise challenge the Walmart employees motives for destroying the video recording of the alleged assault. Accordingly, this Court should reverse and remand.

**4. Counsel provided ineffective assistance by failing to locate and call a witness to testify that Mr. Passons had money to negate intent to commit theft**

Mr. Passons' daughter, Rachel Passons would testified that Mr. Passons had access to funds and did not need to steal the items. R. 24. Had she been called, the jury would have acquitted the burglary charge and found Mr. Passons guilty of theft. would have been found to be a theft and there would have been no assault conviction. Mr. Passons presented an issue of material fact as to whether trial counsel was ineffective for to call Ms. Passons as a witness. Accordingly, this Court should reverse and remand.

**5. Violation of right to conflict free counsel**

The attorney's duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. The Sixth Amendment to the United States Constitution guarantees a defendant the assistance of conflict-free counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *State v. Carver*, 155 Idaho 489, 491, 314 P.3d 171, 173 (2013). Once alerted to a potential conflict, the

Sixth Amendment requires the trial court to conduct a thorough and searching examination of the potential conflict, which should be conducted on the record. *Carver*, 155 Idaho at 492, 314 P.3d at 174; *State v. Severson*, 147 Idaho 694, 704, 215 P.3d 414, 424 (2009). The trial court must first determine whether a conflict actually exists, necessarily relying on defense counsel's good faith and good judgment. *Cuylar v. Sullivan*, 446 U.S. 335, 346-47 (1980); *Severson*, 147 Idaho at 704, 215 P.3d at 424. Next, if the trial court finds that defense counsel is burdened with a conflict of interest, it must obtain the defendant's knowing and voluntary waiver or give the defendant an opportunity to acquire new counsel. *Id.* If the court concludes that a conflict of interest does not exist, the representation may continue without a waiver. *Id.*

Here, counsel objected to Mr. Passons' requests for assistance, resisted his efforts to gather and present a defensible case, and did not investigate or pursue funds for a proper investigation. R. 25. Counsel's disagreements with Mr. Passons' reasonable requests for defense preparation showed the existence of a conflict and a defect in representation. R. 25. The various letters and "kites" show counsel's conduct created an environment where his efforts at self-representation were thwarted by conflicts and non-action by standby counsel. R. 78.

These facts give rise to an issue of fact as to whether Mr. Passons' right to conflict-free counsel was violated. The district court erred in summarily dismissing the petition and this Court should reverse and remand.

## **6. Cumulative error**

The cumulative effect deficient performance by defense counsel and other errors can warrant where those errors, individually, are not serious enough to warrant reversal. *Stevens v. State*, 156 Idaho 396, 421, 327 P.3d 372, 397 (Ct. App. 2013). Here, on direct appeal, the Court of Appeals found neither the prospective juror's remarks, the officer's inflammatory mention of a "robbery" or the improper use of flight evidence as egregious enough to deprive Mr. Passons of his right to a fair trial. However, when the effect of these issues are viewed cumulatively with the violation of Mr. Passons' right to self-representation and his attorney's deficient performance, they establish that Mr. Passons did not receive the fair trial guaranteed by the constitution. Accordingly, the district court erred in summarily dismissing Mr. Passons' petition for post-conviction relief.

## **IV. CONCLUSION**

Mr. Passons presented issues of material fact as to whether his right to self-representation and to ineffective assistance of counsel under the Sixth Amendment were violated. Accordingly, the district court erred in summarily dismissing his petition for post-conviction relief and this Court should reverse the district court's judgment and remand with instruction to grant an evidentiary hearing.

Respectfully submitted this 27th day of February 2020.

FYFFE LAW, LLC

/s/ Robyn Fyffe  
ROBYN FYFFE  
Attorney for Russel Passons

**CERTIFICATE OF SERVICE**

I CERTIFY that on February 27, 2020, I served the foregoing document via the File and Serve system to the email that was identified as the service contact for the Criminal Appellate Unit of the Office of the Attorney General.

/s/ Robyn Fyffe  
ROBYN FYFFE