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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

KOOTENAI NO. CV-2015-6283

REPLY BRIEF OF APPELLANT RUSSELL ALLEN PASSONS

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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I. TABLE OF AUTHORITIES

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II. ARGUMENT IN REPLY

Mr. Passons alleged, in part, that he was entitled to post-conviction relief because the trial court deprived him of the means necessary to represent himself. 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.

In response, the state alleges that Mr. Passons did not preserve his argument that the district court violated his self-representation right by failing to provide him with adequate resources. Respondent's Brief, p. 6. The state is incorrect.

Generally, appellate court review is limited to the evidence, theories and arguments that were presented below. *State v. Hoskins*, 165 Idaho 217, 225, 443 P.3d 231, 239 (2019); *State v. Godwin*, 164 Idaho 903, 913, 436 P.3d 1252, 1262 (2019); *State v. Garcia-Rodriguez*, 162 Idaho 271, 396 P.3d 700 (2017). Nonetheless, a party is expected to polish arguments on appeal so long as the polish is akin to riding a horse that has been "groomed and reshod for the appellate process," rather than riding a "similar looking but entirely new horse." *Hoskins*, 165 Idaho at 225, 443 P.3d at 239.

The state supports its contention that Mr. Passons did not raise this issue below by citing to pages fifteen to nineteen of Mr. Passons' response to the state's motion for summary dismissal. *See* Respondent's Brief, p. 6-7, *citing* R. 72-76. However, on the page preceding the state's citation, page fourteen, Mr. Passons argued that "the totality of circumstances shows a forced situation wherein [his] right to self-representation (or request for substitute counsel) was compromised by the court." R. 71.

Further, in his amended petition, Mr. Passons alleged that lack of access to funds for investigation or legal materials and the magistrate's refusal to continue his preliminary hearing forced him to later relinquish his self-representation right. R. 21-23, 29. Specifically, Mr. Passons alleged that after he obtained permission to represent himself, "he met with unending barriers to obtaining information and legal research material, so he involuntarily waived that right." R. 18. Mr. Passons also alleged that he "requested and was denied funds to hire an investigator to examine the Wal mart camera evidence, and lack thereof [and] was denied assistance in legal research or access to legal materials while attempting to represent" himself . R. 20. Similarly, Mr. Passons alleged that the court denied his "request for an investigator and funds for the same" before the preliminary hearing. R. 22

Mr. Passons alleged that the "lack of funds for investigation and similar rulings" forced him to forego hope of obtaining the tools necessary to represent himself. R. 23. Thus, Mr. Passons alternatively argued that the court and ineffective assistance of counsel forced him to forego his right to self-representation. R. 20-23.

In granting summary dismissal, the district court noted that Mr. Passons alleged that it coerced him into improperly revoking his right to self-representation and cited to page fourteen of Mr. Passons' memorandum. R. 133. As noted above, Mr. Passons argued therein that "the totality of circumstances shows a forced situation wherein [his] right to self-representation (or request for substitute counsel) was compromised by the court. R. 71. As alleged in Mr. Passons' amended petition, the court's refusal to grant his requests for assistance, including investigation and legal materials, was a significant part of those circumstances. R. 18-23.

Mr. Passons presented a genuine issue of fact as to whether the court's refusal to grant his requests for adequate resources to represent himself improperly coerced him to forgo his fundamental right to self-representation. The district court erred in summarily dismissing Mr. Passons' petition and this Court should vacate and remand.

Mr. Passons also presented an issue of material fact as to whether he receive ineffective assistance of counsel of standby counsel, whether newly appointed counsel should have raised the issue of a proper revocation of a *Faretta* based self-representation and whether trial counsel provided effective assistance at trial. In response, the state argues Mr. Passons did not legally and factually support his arguments. However, the facts and arguments set forth in Mr. Passons' opening brief refute the state's arguments. *See* Appellant's Brief p. 1-11 (facts); p. 10-13, 16 (ineffective assistance by failing to protect Mr. Passons' right to self-representation, also supported by facts supporting self-representation claim); p. 15 (standby counsel provided ineffective assistance by failing to assist); p. 16-19 (ineffective assistance of counsel at trial). No further reply is required.

III. 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, for all the reasons stated above and in Mr. Passons' opening brief, 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 24th day of July 2020.

FYFFE LAW, LLC

/s/ Robyn Fyffe
ROBYN FYFFE
Attorney for Russel Passons

CERTIFICATE OF SERVICE

I CERTIFY that on July 24, 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