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Esquivel v. State Appellant's Reply Brief Dckt. 35792

IN THE SUPREME COURT OF THE STATE OF IDAHO

CARLOS ESQUIVEL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Respondent.	)	S. Ct. No. 35792

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 CHERI C. COPSEY
District Judge

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A. The Law of the Case Doctrine Prohibits the District Court from Finding in Opposition to the Court of Appeals a Failure to Demonstrate Prejudice.

As set out in the Opening Brief at pages 6-9, the law of the case doctrine prohibits the district court from finding, in direct opposition to the Court of Appeals, a failure to demonstrate prejudice resulting from trial counsel's failure to properly advise his client of his Fifth Amendment rights.

In attempting to avoid this conclusion, the state argues that there was no principle of law articulated by the Court of Appeals that was contrary to the district court's later decision. The state's argument is that the Court of Appeals in finding that "the record before this Court on appeal demonstrates that the results of Esquivel's psychosexual evaluation were considered by the district court in making its sentencing decision and was a factor contributing to the length of his sentence" actually meant something different from what it stated and really was only finding that the psychosexual evaluation might have been considered in sentencing. To embrace this argument, this Court must now find that it was incapable of writing a sentence that accurately expressed its intent.

As both Carlos and the state agree, when an appellate 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 the case's subsequent progression both in the trial court and upon subsequent appeal. *Taylor v. Maile,* 146 Idaho 705, 201 P.3d 1282 (2009). Appellant's Opening Brief at pages 7-8; Respondent's Brief at page 11. And, as set out in Carlos's Opening Brief and not disputed by the state, the law of the case

doctrine applies to mixed questions of law and fact as well as questions of law. *Airstream, Inc. v. CIT Financial Services, Inc.,* 115 Idaho 569, 574-575, 768 P.2d 1302, 1307-1308 (1988); *Insurance Associates Corp. v. Hansen,* 116 Idaho 948, 950-51, 782 P.2d 1230, 1232-33 (1989). The question of whether prejudice has been established in a post-conviction claim of ineffective assistance of counsel is a mixed question of law and fact. *Young v. State,* 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App. 1988). Appellant's Opening Brief at page 8.

In deciding Carlos's appeal of the dismissal of his claim of ineffective assistance of counsel, this Court wrote:

> **2. Psychosexual evaluation**
>
> Esquivel asserts that the district court erred in denying his request for appointment of counsel to assist him in his post-conviction claim that his trial counsel was ineffective for failing to properly challenge the psychosexual evaluation used against him after Esquivel requested trial counsel to do so. A psychosexual evaluation conducted for sentencing purposes is considered a critical stage of the defendant's case. *Estrada v. State,* 143 Idaho 558, 562, 149 P.3d 833, 837 (2006). Therefore a defendant has a Sixth Amendment right to counsel's advice regarding his or her participation in an evaluation. *Id.* at 558-59, 149 P.3d at 837-38. Trial counsel's failure to properly advise a defendant regarding his or her Fifth Amendment rights in submitting to a psychosexual evaluation may amount to deficient performance. *See id.* at 564, 149 P.3d at 839. When there is a reasonable probability that the sentence would be different had the psychosexual evaluation not been included, or had been more favorable to the defendant, a trial counsel's deficient performance may also be prejudicial. *See Wood,* 132 Idaho at 101, 967 P.2d at 715; *Estrada,* 143 Idaho at 565, 149 P.3d at 840.
>
> Esquivel's application alleges facts indicating the possibility that his court-ordered psychosexual evaluation was inadequately conducted and that he voiced his concerns about the evaluation to his trial counsel. Esquivel's application, in essence, claims his trial counsel was deficient for failing to either question the conduct of the expert who performed the evaluation or request that a different expert conduct a new psychosexual evaluation. **The record before this Court on appeal demonstrates that the results of Esquivel's psychosexual evaluation were considered by the district court in making its sentencing decision and was a factor contributing to the length of his sentence.**

> Esquivel's application does not set forth all the elements necessary to succeed in an ineffective assistance of counsel claim, nor is his claim clearly or artfully worded. However, in seeking appointment of counsel to assist him in pursuing a post-conviction claim, Esquivel does not need posit a complete claim in his application because it is understood that a pro se applicant rarely has the skill or knowledge to do so. *See Charboneau,* 140 Idaho at 729-93, 102 P.3d at 1111-12. Instead, Esquivel's application needed only to allege facts that might *possibly* give rise to a valid claim. *See id.* at 793, 102 P.3d at 1112. While we offer no opinion on the appropriateness of his trial counsel's conduct, the facts alleged by Esquivel, combined with the record, raises the *possibility* of a valid claim as to counsel's inaction regarding the psychosexual evaluation. Therefore, we conclude that the district court erred in denying the request for appointment of counsel to pursue this specific post-conviction claim. Accordingly, we reverse the district court's summary dismissal and denial of counsel as to this claim. On remand, we instruct the district court to appoint counsel to assist Esquivel in pursuing the post-conviction claim that his counsel was ineffective in failing to arrange an independent psychosexual evaluation or otherwise mitigate the effects of the court-ordered evaluation.

Esquivel v. State, 2007 Unpublished Opinion No. 541, p. 6-7 (bold added; italics original).

This decision by this Court specifically finds that the results of the psychosexual evaluation were considered by the district court in making its sentencing decision and were a factor contributing to the length of Carlos's sentence. Under the law of the case doctrine, therefore, the district court erred when it determined on remand that the psychosexual evaluation was irrelevant to its sentencing decision and had no influence on the length of the sentence. "The psychosexual evaluation did not increase or reduce his sentence. Esquivel did not receive a different sentence, either enhanced or reduced, based on his refusal to cooperate in the psychosexual evaluation or because of its contents." CR 92 (underscore original).

The state attempts to avoid this result by arguing that this Court, the Court of Appeals, was really only considering whether the psychosexual evaluation might have affected the sentencing decision, and therefore its statement that the evaluation was considered and was a

factor contributing to the length of the sentence really meant something quite different from this Court's literal words – that the evaluation might have had an effect but that the district court was free to come to a conclusion quite opposite and find that the psychosexual evaluation was irrelevant to its actions in sentencing Carlos. Respondent's Brief at 12-13.

In short, the state is asking this Court to find that it could not write a straightforward sentence and that when it wrote: "The record before this Court on appeal demonstrates that the results of Esquivel's psychosexual evaluation were considered by the district court in making its sentencing decision and was a factor contributing to the length of his sentence," it actually meant something like, "The record before this Court on appeal demonstrated that the results of Esquivel's psychosexual evaluation might have been considered in the imposition of sentence, but the district court should revisit that issue and make its own determination." This suggested incapacity on the part of this Court is incorrect.

Rather, the only logical conclusion is that this Court meant what it said and that the district court's finding in direct opposition violates the law of the case doctrine. That being so, Carlos now asks that the order dismissing his petition be reversed.

B. In the First Alternative, the District Court's Finding that it did not Rely upon the Psychosexual Evaluation in Sentencing Carlos is Clearly Erroneous.

As set out in Carlos's Opening Brief and above, reversal of the decision dismissing his petition is required by the law of the case doctrine. Moreover, the district court decision must also be reversed because it is clearly erroneous. I.R.C.P. 52(a); *Queen v. State,* 146 Idaho 502, 503, 198 P.3d 731, 732 (Ct. App. 2008); Appellant's Opening Brief at 9-10.

At the time Carlos was sentenced, the state made a long argument for the sentence

ultimately given by the court based largely upon the psychosexual evaluation:

> [H]e continues to pose a more significant risk. He went to SANE and was evaluated, although he was not particularly forthcoming in the SANE evaluation. He refused to answer the MSI questions because he said he just didn't like the questions and thought that they were just, in his words, sick or perverted or something along those lines. He wouldn't appropriately answer the Millon and so that test couldn't be scored. Unfortunately the examination doesn't give the evaluation – doesn't give the Court as much information as you might have liked, but that is the defendant's doing and he chose not to be cooperative with that. It is interesting to note that Dr. Engle . . . immediately detects that [Carlos] has an attitude of arrogance and an attitude that conveys clearly that he is a victim of the instant offense, the criminal justice system, and the evaluation process and that's reflected in Dr. Engle's evaluation of the defendant.
>
> . . .
>
> So looking at the risk, Judge, I think when Dr. Engel says he's at least a medium risk to reoffend, that's in the best light given that the defendant doesn't finish on testing in this case. He's in total denial of what happened. . . .
>
> Given all that, Your Honor, the State in evaluating this case knows that this is a situation that calls out for a prison sentence. There are issues which involve punishment and retribution. There are concerns that the defendant is not a rehabilitation candidate at this time because he is in total denial[.]

T (30424) pg. 256-258. (In this regard the state is too modest because the record shows the trial court adopted its argument.)

In giving Carlos the precise sentence recommended by the state, the district court specifically referred to Dr. Engel's report as a basis for its sentence.

> So when I look at all these facts and I look at the fact that Mr. Esquivel was really not cooperative in that evaluation and I realize that there's an argument to be made that a person does this if they are innocent of the charge, but I was concerned when I saw that he didn't complete the part of the test and I don't buy the whole idea that he was uncomfortable with answering questions about his own sexual interests. *He was aware that this was an important evaluation that the Court was going to take into consideration in deciding what to do.* I'm concerned again with the guarded nature in which he answered some of the questions by the evaluator. True it is that – it's not to be unexpected that an individual will get an

> evaluation of a moderate level of risk because of denial, *but the fact of the matter is that the Court cannot ignore the fact that he was evaluated as having a moderate level of risk.* Although today he's indicated that he's interested in having and attending the appropriate therapy, I want to note that it's easy to come into this Court and make those kinds of assertions, but all along in his comments to the evaluator he made it clear that he was not interested in having any sort of treatment.

T (30242) pg. 270 (italics added).

Then, in denying Carlos's Rule 35 motion, the district court specifically cited the psychosexual evaluation as a reason to deny relief. It stated:

> The S.A.N.E. evaluation stated Esquivel was a moderate risk to roffend and the evaluator opined he was not amenable to treatment because in part he denied an offense occurred and was uninterested and unwilling to participate in sex offender treatment.

CR (30424) 121; Memorandum Decision (denying Rule 35 Motion), pg. 4. *Esquivel v. State,* Docket No. 32689, Appellant's Opening Brief at pages 21-22.

Then, after this Court remanded with instructions to the district court to appoint counsel to assist Carlos in pursing the claim of ineffective assistance of counsel, the district court again dismissed his petition, finding, in opposition to everything it had previously stated on the topic, that:

> While the Court of Appeals suggests in its decision that the mention of the psychosexual evaluation implied that the Court relied on the report, that is not the case.

CR 92.

This finding, *i.e.*, that the psychosexual evaluation played no part in the determination of Carlos's sentence, is clearly erroneous. Even though the state urges this Court on appeal to find that the district court's conclusion on remand that the psychosexual report was merely mentioned

and not relied upon in sentencing is accurate, it is not consistent with the record. The record is clear. The state argued extensively based upon the psychosexual report, and the district court did not merely mention the report, it specifically stated that it was going to take the report into consideration in imposing a sentence, that it could not ignore the report's conclusion about risk to reoffend, that despite Carlos's in-court statements about his desire for therapy, the psychosexual report proved those statements to be false, and that the report was a primary reason for denial of Rule 35 relief. T (30424) pg. 256-258, T (30242) pg. 270, CR (30424) 121. Despite the district court's statements upon remand and the state's arguments now offered, the record obviously establishes, just as this Court earlier held, that the psychosexual report was considered and was a factor in determining the length of sentence imposed.

The state also argues that "to the extent any inference of prejudice could be made from the mention of the psychosexual evaluation by the district court or by the prosecutor, the district court itself 'clearly disproved' that claim" when it wrote on remand that it had "determined Esquivel's sentence based on the testimony he gave and the evidence produced at trial and not on the psychological evaluation." Respondent's Brief at 16. The problem for the state is that this argument is circular and establishes nothing. The state is saying that the district court's holding on remand that there was no prejudice as a result of the ineffective assistance of counsel cannot be found to be contrary to the record because the district court says that it is not inconsistent with the record. This argument is logically flawed and should be rejected.

The record clearly establishes that the psychosexual evaluation was used to determine the proper sentence to impose in this case. The district court's holding to the contrary was clearly erroneous.

C. In the Second Alternative, Reversal is Required Because the State Did Not and Cannot Demonstrate Beyond a Reasonable Doubt that the Error in Denying Carlos his State and Federal Constitutional Rights to Remain Silent was Harmless.

As set out in the Opening Brief, the dismissal of Carlos's petition must be reversed because it violates the law of the case doctrine and is clearly erroneous. It must also be reversed because in accord with *DeRushé v. State,* 146 Idaho 699, 200 P.3d 1148 (2009), the error in denying Carlos his right to remain silent must be analyzed under the constitutional error standard of *Chapman v. California,* 386 U.S. 18, 82 S.Ct. 824, *reh'g denied,* 386 U.S. 987, 87 S.Ct. 1283 (1967), a standard the state did not and cannot meet. Appellant's Opening Brief at pages 10-12.

As discussed in the Opening Brief, DeRushé had filed a petition alleging ineffective assistance of counsel in that trial counsel had deprived him of the right to testify in his own behalf. And, even though DeRushé framed this issue as a claim of ineffective assistance of counsel and there is no reference in any of the appellate opinion to any record below indicating that DeRushé ever framed the issue in any other way at any time in the post-conviction proceedings, the Supreme Court held, "The District Court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify in his own defense." *DeRushé v. State,* 146 Idaho at 603-4, 200 P.3d at 1152-53. Carlos has argued by analogy that likewise a claim that counsel deprived a defendant of his right to remain silent, must also be analyzed as a denial of a constitutional right and subjected to the *Chapman* harmless error standard rather than the ineffective assistance standard set out in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). *Chapman v. California, supra.*

The state has chosen not to respond to this argument. The state's brief does not cite *DeRushé*, nor does it make any argument that *DeRushé* was wrongly decided or that it does not

apply to this case. *See* Respondent's Brief, p. iii-iv (Table of Cases does not include any reference to *DeRushé* or any case which itself cites *DeRushé*) and pages 17-21. Rather, the state cites pre-*DeRushé* case law and asserts that under those cases the district court should not have applied the *Chapman* standard because the claim was not framed as a constitutional claim in the petition.

The logical conclusion to be drawn from the state's failure to discuss *DeRushé* and its applicability to this case is that the state believes Carlos's analysis of the case and its applicability to his case are correct. If the state did not believe that *DeRushé* holds that constitutional issues must be analyzed as Carlos argues, it would certainly have cited the case and argued either that the case does not hold that the *Chapman* standard must be applied even when the issue is not so framed by the petitioner, or that somehow *DeRushé,* despite its holding, does not apply to Carlos's case.

The only argument the state makes that could be, if more completely made, construed to argue against an application of *DeRushé* to this case, so as to require an application of the *Chapman* harmless error analysis, is its argument that *Estrada v. State,* 143 Idaho 558, 149 P.3d 833 (2006), dealt only with the right to advice of counsel regarding submission to a psychosexual evaluation. From this the state concludes that because Carlos cited *Estrada* in his petition, he was only asserting the denial of the assistance of counsel, and was not asserting an "invasion on any decision that Esquivel alone was required to make, e.g., whether he would testify at trial." Respondent's Brief at pages 19-20.

This argument fails in two ways. First, while *Estrada* does hold that a defendant has the right to the advice of counsel with regard to participation in a psychosexual evaluation, 143 Idaho

at 563, 194 P.3d at 838, the case also holds that the Fifth Amendment right against self-incrimination applies to psychosexual evaluations. In other words, contrary to the state's argument, *Estrada* holds not only that a defendant has a right to counsel at the time of an evaluation, but also that a defendant has the right against self-incrimination at the time of an evaluation. Therefore, a reference to *Estrada* in Carlos's petition does not imply a reference only to the right to assistance of counsel, but also implies a reference to the constitutional right to remain silent, a decision that Carlos alone was required to make – specifically whether he would waive that right.

And, second, even if a reference to *Estrada* in a petition for post-conviction relief could somehow be interpreted as limiting any potential claims related to the denial of counsel at a critical stage, rather than the denial of the right against self-incrimination, *Estrada* was decided well before *DeRushé*, and when *DeRushé* is considered, the result is that the *Chapman* harmless error standard must be applied in this case.

Finally, the state argues that even if the *Chapman* standard is applied, relief is not appropriate because "It is clear from the district court's statements that its sentencing decision was not based on the psychosexual evaluation but on other factors." Respondent's Brief at 20-21. Again, however, this is a circular argument. The record from the sentencing makes very clear that the district court did rely on the psychosexual evaluation in imposing sentence and denying Rule 35 relief. Likewise, the Court of Appeals found that the psychosexual evaluation was considered and was a factor contributing to the length of the sentence. It was only on remand from the Court of Appeals that the district court made statements that it did not rely on the evaluation, and it is that finding that is being appealed here. Simply repeating statements

made by the district court on remand that are unsupported by the record cannot make those statements true or valid, nor can it overcome the fact that the error in denying Carlos his right to remain silent at the time of the evaluation was not harmless beyond a reasonable doubt.

III. CONCLUSION

As set out in the Opening Brief and above, the order denying post-conviction relief must be reversed for three reasons: 1) because the district court's finding that it did not rely upon the psychosexual evaluation in sentencing or denying Rule 35 relief, and thus there was no prejudice for purposes of establishing ineffective assistance of counsel, violated the law of the case doctrine; 2) because the district court's finding that it did not rely upon the psychosexual evaluation in sentencing or denying Rule 35 relief, and thus there was no prejudice for puposes of establishing ineffective assistance of counsel, was clearly erroneous; and 3) because the denial of the constitutional right to remain silent should have been analyzed under the *Chapman* standard of harmless error, a standard the state did not and cannot meet.

For these reasons, Carlos asks this Court to reverse the order denying post-conviction relief and remand for further proceedings.

Respectfully submitted this 6th day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2009, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid addressed to:

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