1-9-2009

Esquivel v. State Clerk's Record v. 1 Dckt. 35792

LAW CLERK

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

CARLOS ESQUIVEL,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon CHERI C. COPSEY, *District Judge*

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

35792

IN THE SUPREME COURT OF THE STATE OF IDAHO

CARLOS ESQUIVEL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35792

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE CHERI C. COPSEY

STATE APPELLATE PUBLIC DEFENDER	LAWRENCE G. WASDEN
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

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In the Supreme Court of the State of Idaho

CARLOS ESQUIVEL,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

ORDER TAKING JUDICIAL NOTICE

Supreme Court Docket No. 35792-2008
Ada County Docket # 2005-561

The Notice of Appeal was filed in the District Court October 24, 2008. A Reporter's Transcript and Clerk's Record was filed July 5, 2007 in related appeal No. 32689, Esquivel v. State; therefore good cause appearing,

IT HEREBY IS ORDERED that this Court shall take JUDICIAL NOTICE of the Clerk's Record and Reporter's Transcript filed in prior appeal No. 32689, Esquivel v. State.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare and file a LIMITED CLERK'S RECORD with this Court, which shall contain the documents requested in the Notice of Appeal, together with a copy of this Order, but shall not duplicate any documents filed in prior appeal No. 32689.

IT FURTHER IS ORDERED that the District Court Reporter shall prepare and lodge a SUPPLEMENTAL REPORTER'S TRANSCRIPT, which shall include the proceedings requested in the Notice of Appeal, but shall not duplicate any proceedings included in the Reporter's Transcript filed in prior appeal No. 32689. The LIMITED CLERK'S RECORD and REPORTER'S TRANSCRIPT shall be filed with this Court after settlement.

DATED this 10th day of November 2008.

For the Supreme Court

Dorothy Beaver for
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Reporter

4th Judicial District Court - Ada County

ROA Report

Case: CV-PC-2005-22055 Current Judge: Cheri C. Copsey

Carlos Esquivel, Plaintiff vs State Of Idaho, Defendant

Carlos Esquivel, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
7/13/2005	NEWC	CCCOLEMJ	New Case Filed	Cheri C. Copsey
		CCCOLEMJ	Post Conviction Relief Filing	Cheri C. Copsey
	MOAF	CCCOLEMJ	Motion & Affidavit For Fee Waiver	Cheri C. Copsey
	MOAF	CCCOLEMJ	Motion & Affidavit For Appointment Of Counsel	Cheri C. Copsey
	CERT	CCCOLEMJ	Certificate Of Mailing	Cheri C. Copsey
7/20/2005	ORDR	CCGROSPS	Order Denying Mtn For Appt Of Counsel	Cheri C. Copsey
7/26/2005	MISC	CCBLACJE	Verified Mtn For Enlargement Of Time	Cheri C. Copsey
8/9/2005	ORDR	CCGROSPS	Order Granting Mtn For Enlargement Of Time	Cheri C. Copsey
8/15/2005	AMEN	CCRIVEDA	Amen Apllication For Post Conviction Relief	Cheri C. Copsey
	MOTN	CCRIVEDA	Petitioners Renewed Motn For Apntmnt Of Couns	Cheri C. Copsey
	MOTN	CCRIVEDA	Motn For Leave To Conduct Discovery	Cheri C. Copsey
8/24/2005	ORDR	DCANDEML	Order Denying Request For Discovery	Cheri C. Copsey
	ORDR	DCANDEML	Second Order Denying Appointment Of Counsel	Cheri C. Copsey
9/12/2005	MOTN	CCMARTLG	Motion To Reconsider	Cheri C. Copsey
9/27/2005	ORDR	CCGROSPS	Order Denying Mtn To Reconsider Request For	Cheri C. Copsey
	CONT	CCGROSPS	Appt Of Counsel	Cheri C. Copsey
	ORDR	CCGROSPS	Order Cond.dismissing Amended Ptition For Pc	Cheri C. Copsey
10/12/2005	MISC	CCMARTLG	Declaration For Entry Of Default	Cheri C. Copsey
10/20/2005	RPLY	CCMARTLG	Reply To Ordr Denying Motn To Reconsider	Cheri C. Copsey
	CONT	CCMARTLG	Requests For Disc & Appt Counsel, & Ordr	Cheri C. Copsey
	CONT	CCMARTLG	Cond Dismiss Amed Petn Post Cnvctn Relief	Cheri C. Copsey
	CONT	CCMARTLG	& Petnr's Motn Dq Cause Verified	Cheri C. Copsey
10/27/2005	MOTN	CCWATSCL	State's Motion To Dismiss The Amended Petn	Cheri C. Copsey
11/18/2005	HRSC	CCGROSPS	Notice Of Hearing - (12/12/2005) Cheri C. Copsey	Cheri C. Copsey
12/12/2005	HRHD	CCGROSPS	Hearing Held	Cheri C. Copsey
12/13/2005	DSBT	CCGROSPS	Order Dismissing Amended Petition For Pc	Cheri C. Copsey
12/16/2005	MOTN	CCMARTLG	Motion For Evid Hearing	Cheri C. Copsey
12/19/2005	ORDR	CCGROSPS	Order Denying Mtn For Evid Hearing	Cheri C. Copsey
12/27/2005	MOTN	CCMARTLG	Motion For Enlargement Of Time	Cheri C. Copsey
	RSPS	CCMARTLG	Petnr's Response To State's Motn Dsmss Amend	Cheri C. Copsey
	CONT	CCMARTLG	Petn Post Cnvctn Relf Failure State Claim	Cheri C. Copsey
	AFSM	CCMARTLG	Affidavit In Support Petnr's Rsps State's	Cheri C. Copsey
	CONT	CCMARTLG	Motn Dsmss Amend Petn Post Cnvctn Relf	Cheri C. Copsey
	CONT	CCMARTLG	Failure State Claim Relf Granted	Cheri C. Copsey
1/23/2006	NOTC	CCTHIEBJ	Notice Of Appeal	Cheri C. Copsey
	MOAF	CCTHIEBJ	Motion & Affidavit For Appointment Of Counsel	Cheri C. Copsey
	MOAF	CCTHIEBJ	Motion & Affidavit For Fee Waiver	Cheri C. Copsey

Carlos Esquivel, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
1/31/2006	ORDR	CCGROSPS	Order Denying Mtn for Appt of Counsel on Appeal	Cheri C. Copsey
2/1/2006	ORDG	DCANDEML	Order Granted Waiver of Fees	Cheri C. Copsey
8/8/2007	OPIN	CCLUNDMJ	Opinion filed - Supreme Ct #32689	Cheri C. Copsey
8/29/2007	REMT	CCTHIEBJ	Remittitur - Remanded Supreme Court Docket No. 32689	Cheri C. Copsey
	MOTN	CCDWONCP	Motion for Appointment of Counsel	Cheri C. Copsey
9/4/2007	ORDR	DCANDEML	Order Appointing Counsel	Cheri C. Copsey
10/19/2007	NOAP	CCBLACJE	Notice Of Appearance (Davis for Carlos Esquivel)	Cheri C. Copsey
10/22/2007	HRSC	DCANDEML	Hearing Scheduled (Status 11/29/2007 02:00 PM)	Cheri C. Copsey
	NOTC	DCANDEML	Notice of Hearing 11/29/07 @ 2 p.m.	Cheri C. Copsey
10/24/2007	MOTN	CCMARTLG	Respondent's Motion To Release Defense File To The State for UPCPA Action	Cheri C. Copsey
11/14/2007	ORDR	DCANDEML	Order Waiving Confidentiality of the Public Defender and the Criminal File in H0300476	Cheri C. Copsey
11/29/2007	HRHD	TCWEATJB	Hearing result for Status held on 11/29/2007 02:00 PM: Hearing Held	Cheri C. Copsey
1/31/2008	AMEN	CCMARTLG	Second Amended Petn And Affd For Post Conviction Relief	Cheri C. Copsey
2/13/2008	ANSW	CCEARLJD	Respondents Answer to the Second Amended Petition for Post Conviction Relief	Cheri C. Copsey
	BREF	CCEARLJD	Brief in Support of Summary Dismissal	Cheri C. Copsey
2/14/2008	MOTN	CCMARTLG	Motion To Dismiss Second Amended Petn For Post Conviction Relief	Cheri C. Copsey
	AFFD	CCMARTLG	Affidavit Of Eric Rolfsen	Cheri C. Copsey
3/4/2008	ORDR	DCDANSEL	Order to Transport 6/4/08	Cheri C. Copsey
	HRSC	DCDANSEL	Hearing Scheduled (Post Conviction Relief 06/04/2008 11:00 AM) Evidentiary Hearing	Cheri C. Copsey
3/6/2008	HRVC	DCDANSEL	Hearing result for Post Conviction Relief held on 06/04/2008 11:00 AM: Hearing Vacated Evidentiary Hearing	Cheri C. Copsey
	ORDR	DCDANSEL	Scheduling Order	Cheri C. Copsey
	ORDR	DCDANSEL	Order to Rescind Transport Order	Cheri C. Copsey
4/7/2008	BREF	CCDWONCP	Petitioner's Brief in Opposition to Motion for Summary of Dismissal	Cheri C. Copsey
5/1/2008	HRSC	CCBARCCR	Notice of Hearing (Status by Phone 06/04/2008 11:00 AM)	Cheri C. Copsey
5/22/2008	MOTN	CCTEELAL	Motion for Transport	Cheri C. Copsey
6/4/2008	AFFD	TCWEATJB	Affidavit of Dennis Benjamin in Support of Second Amended Petition and Affidavit for Post Conviction Relief	Cheri C. Copsey
	AFFD	MCBIEHKJ	Affidavit of Dennis Benjamin in Support of Second Amended Petition for PC	Cheri C. Copsey

Carlos Esquivel, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/4/2008	MISC	DCDANSEL	Supplemental Brief in Response to Petitioner's Opoostion to State's Motion to Dismiss	Cheri C. Copsey
	DCHH	TCWEATJB	Hearing result for Motion to Dismiss held on 06/04/2008 11:00 AM: District Court Hearing Hel Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Under 100 Pages	Cheri C. Copsey
6/6/2008	PROS	PRROOTSM	Prosecutor assigned Jean Fisher	Cheri C. Copsey
7/15/2008	COND	DCDANSEL	Order Conditionally Dismissing Second Amended Petition for Post-Conviction Relief	Cheri C. Copsey
8/5/2008	RSPN	CCWRIGRM	Petitioners Response to Order Conditionally Dismissing Second Amended Petition for Post Conviction Relief	Cheri C. Copsey
9/16/2008	CDIS	DCDANSEL	Order Dismissing Second Amended Petition for Post Conviction Relief	Cheri C. Copsey
	STAT	DCDANSEL	STATUS CHANGED: Closed	Cheri C. Copsey
10/24/2008	APSC	CCTHIEBJ	Appealed To The Supreme Court	Cheri C. Copsey
	MOAF	CCTHIEBJ	Motion & Affidavit To Appoint State Appellate Public Defender	Cheri C. Copsey
10/28/2008	ORDR	TCWEATJB	Order Appointing State Appellate Public Defender on Direct Appeal	Cheri C. Copsey

Dennis Benjamin
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(208) 345-8274 (f)

Appointed counsel for petitioner on appeal

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

FOR THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL, Petitioner, vs. STATE OF IDAHO, Respondent.	NO. SP OT 0500~~516~~ **MOTION FOR APPOINTMENT OF COUNSEL**

Petitioner, Carlos Esquivel, moves this Court for an order appointing him counsel to represent him in this post-conviction proceeding.

This motion is made pursuant to I.C. § 19-4904 and the Court of Appeals's decision in *Esquivel v. State*, 2007 Unpublished Decision No. 541 (August 3, 2007), which "reverse[d] in part [this Court's] order dismissing Esquivel's application for post-conviction relief" and further "remand[ing] the case to the district court for further proceedings, wherein the district court is instructed to appoint counsel to assist Esquivel in pursuing his single, potentially valid claim." Slip Op., at 8. (A copy of the unpublished opinion is attached as Exhibit A.) The Remittitur, which was issued on August 28, 2007, ordered "that the District Court shall forthwith comply

with the directive of the unpublished Opinion[.]" (A copy of the Remittitur is attached as Exhibit B.)

Respectfully submitted this 29th day of August, 2007.

Dennis Benjamin
(Appointed Counsel on Appeal)
for Carlos Esquivel

CERTIFICATE OF MAILING

I CERTIFY that on August 27th, 2007, I caused a true and correct copy of the foregoing document to:

___ mailed

X hand delivered

___ faxed

to: Jean Fisher
Deputy Ada County Prosecuting Attorney
Ada County Courthouse
Boise, ID 83702

Dennis Benjamin

AUG 06 2007

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32689

CARLOS ESQUIVEL,	)	2007 Unpublished Opinion No. 541
	)	
Petitioner-Appellant,	)	Filed: August 3, 2007
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed in part, reversed in part, and remanded.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph R. Blount, Deputy Attorney General, Boise, for respondent.

PERRY, Chief Judge

Carlos Esquivel appeals from the district court's order summarily dismissing his application for post-conviction relief. Specifically, Esquivel challenges the district court's denial of his request for appointment of counsel and the adequacy of the district court's notice of intent to dismiss. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

I.

FACTS AND PROCEDURE

Esquivel was charged with three counts of lewd conduct with a minor under the age of sixteen, I.C. § 18-1508, and one count of sexual abuse of a child under the age of sixteen, I.C. § 18-1506. At the completion of trial, a jury found him guilty of all charges. Prior to sentencing, the district court ordered Esquivel to undergo a psychosexual evaluation to be conducted by a psychologist. The results of Esquivel's psychosexual evaluation were included in the

EXHIBIT A

presentence investigation report (PSI) and considered by the district court at sentencing. Esquivel was sentenced to concurrent unified terms of thirty years, with minimum periods of confinement of fifteen years, for lewd conduct and a concurrent unified term of fifteen years, with a minimum period of confinement of five years, for sexual abuse. Esquivel filed an I.C.R. 35 motion which was denied by the district court. On appeal, this Court affirmed Esquivel's judgment of conviction, sentences, and the district court's denial of his Rule 35 motion in an unpublished opinion. *State v. Esquivel,* Docket No. 30424 (Ct. App. Dec. 2, 2004).

Esquivel filed an application for post-conviction relief seeking a vacation of his judgment of conviction and a new trial. Esquivel's application alleged sixteen distinct claims of ineffective assistance of trial counsel and one claim of ineffective assistance of appellate counsel. Esquivel also requested that the district court appoint an attorney to represent him in his post-conviction claims. The district court denied Esquivel's request for appointment of an attorney, holding that his claims were frivolous and without merit. Esquivel then filed an amended application for post-conviction relief with only six of the original claims of ineffective assistance of counsel alleged. Esquivel also renewed his request for the appointment of an attorney. The district court again denied Esquivel's request for an attorney.

The district court filed a notice of intent to dismiss Esquivel's application for post-conviction relief and gave both Esquivel and the state twenty days to respond. Neither Esquivel nor the state responded and, more than two months later, the district court dismissed Esquivel's application. Esquivel appeals.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be

verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of

reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177.

III.

ANALYSIS

On appeal, Esquivel asserts the district court erred in denying his request for appointment of counsel. Esquivel argues that two of his post-conviction ineffective assistance of counsel claims--counsel's failure to request a polygraph and an independent psychosexual evaluation--were valid and merited the assistance of counsel to pursue. Furthermore, Esquivel also argues that the district court's notice of intent to dismiss did not address the grounds for the dismissal of one of his claims.

A. Appointment of Counsel

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642,

644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau,* 140 Idaho at 793, 102 P.3d at 1112.

1. Polygraph examination

Esquivel asserts the district court erred in denying his request for appointment of counsel to assist him in his post-conviction claim that trial counsel was ineffective for failing to arrange for him to undergo a polygraph examination. On appeal, Esquivel admits that the results of a polygraph examination would not have been admissible at trial. Instead, Esquivel argues that a favorable polygraph examination might have resulted in the state offering an acceptable plea agreement or the sentencing court may have given him a lesser sentence.

Initially, we note that Esquivel's first application appears to indicate his claim is challenging his trial counsel's failure to obtain a polygraph test to use at trial. In contrast, the issues Esquivel raises on appeal clearly challenge his trial counsel's failure to obtain polygraph results for potential use during pre-trial negotiations or at sentencing. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). However, Esquivel's amended application briefly mentions that favorable polygraph results may have also been utilized at sentencing. Nowhere, though, does Esquivel's amended petition challenge his trial counsel's efforts, or lack thereof, to obtain a plea agreement. Accordingly, we now consider only the sentencing issues he raises on appeal as related to the specific post-conviction claim of counsel's failure to arrange for Esquivel to take a polygraph exam.

In reviewing ineffective assistance of counsel claims, this Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Not introducing the results of an already existing, favorable polygraph examination at sentencing, in a child sexual abuse case, can be considered a tactical decision as such defendants often receive harsher sentences for refusing responsibility. *See Fodge v. State*, 125 Idaho 882, 887, 876 P.2d 164, 169 (Ct. App. 1994).

Here, considering the substantial evidence against Esquivel, the record does not indicate that the results of a polygraph test likely would have been favorable, or that the failure to obtain such an examination prejudiced his sentencing. Even if Esquivel's trial counsel had obtained a favorable polygraph examination of Esquivel, no facts are alleged in his application, or established in the record, indicating such results would have had a positive effect on his sentencing. Moreover, even a favorable polygraph result could potentially have a negative effect on Esquivel's sentencing if the district court chose to view such evidence, after a finding of guilt at trial, as indicative of Esquivel refusing to accept responsibility for his crimes.

Therefore, the decision whether to obtain a polygraph examination of Esquivel, after he had been found guilty by the jury, was a tactical decision that cannot form the basis for a claim of ineffective assistance of counsel. Esquivel's application provided no facts that would raise the possibility of a valid claim and, accordingly, the district court did not err in denying appointment of counsel to assist him in pursuing this claim.

2. Psychosexual evaluation

Esquivel asserts 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 to 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 792-93, 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.

B. Notice of Intent to Dismiss

On appeal, Esquivel also argues that the district court's notice of intent to dismiss failed to address the deficiencies in his claim that trial counsel was ineffective for failing to arrange an independent psychosexual evaluation. However, we have already concluded that the facts alleged in Esquivel's application regarding this issue raised the possibility of a valid claim. As a result, the district court erred in denying appointment of counsel to assist Esquivel, and we remand for further proceedings on this claim alone. Therefore, we need not address this issue on appeal.

IV.
CONCLUSION

The district court did not err in denying appointment of counsel to assist Esquivel in his post-conviction claim of ineffective assistance of counsel based upon counsel's failure to request

Esquivel undergo a polygraph examination. Esquivel's application does, however, allege facts which raise the possibility of a valid ineffective assistance of counsel claim in regard to his psychosexual evaluation. Therefore, the district court erred in denying Esquivel's request for appointment of counsel to assist him in pursuing this claim. Accordingly, we affirm in part and reverse in part the district court's order dismissing Esquivel's application for post-conviction relief. Furthermore, we remand this case to the district court for further proceedings, wherein the district court is instructed to appoint counsel to assist Esquivel in pursing his single, potentially valid claim. No costs or fees are awarded to either party on appeal.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**

AUG 29 2007

In the Court of Appeals of the State of Idaho

CARLOS ESQUIVEL,	)	
	)	
Petitioner-Appellant,	)	REMITTITUR
	)	
v.	)	NO. 32689
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

TO: FOURTH JUDICIAL DISTRICT, COUNTY OF ADA.

The Court having announced its unpublished Opinion in this cause August 3, 2007, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the unpublished Opinion, if any action is required.

DATED this 28 day of August, 2007.

Stephen Kenyon
Clerk of the Court of Appeals
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

I, Stephen W. Kenyon, Clerk of the Court of Appeals of the State of Idaho, do hereby certify that the above is a true and correct copy of the Remittitur entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 8/29/07

STEPHEN W. KENYON
Clerk
By: Deputy

EXHIBIT B

NO. _____
A.M. 11:23 FILED P.M. _____

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Ada County Clerk

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J. DAVID NAVARRO, Clerk
By Tiffani Anderson
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL, Petitioner, vs. STATE OF IDAHO, Respondent.	NO. SP OT 0500~~516~~ 561 **ORDER APPOINTING COUNSEL**

The Court, having considered the Court of Appeals's decision in this case (*Esquivel v. State*, 2007 Unpublished Opinion No. 541, issued on August 3, 2007) and the Remittitur of that Court, issued on August 28, 2007, it is hereby ordered that conflict counsel, as assigned by the Ada County Public Defenders, be and hereby is appointed to represent the petitioner.

Dated this 31st day of Aug, 2007.

Cheri Copsey
Hon. Cheri C. Copsey
District Judge

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Respondent, vs. CARLOS ESQUIVEL, Petitioner,	**Case No. SPOT 0500561** **RESPONDENT'S MOTION TO RELEASE DEFENSE FILE TO THE STATE FOR UPCPA ACTION**

COMES NOW, Jean M. Fisher, Deputy Ada County Prosecutor, and files this Motion requesting the Court to Order the public defender's office to officially waive the attorney-client privilege and to turn-over the original defense case file to the State for the underlying criminal case in H0300476. There is a pending UPCPA action involving the single issue regarding ineffective assistance of counsel in regard to the psychosexual evaluation.

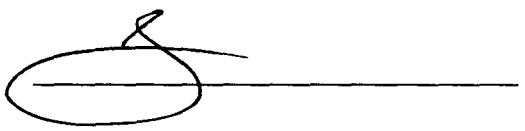
In order for the State to effectively prepare for this matter, the State needs to access to the public defender's file and to open communication with the defense attorney, Eric Rolfsen, in this matter.

Respectfully submitted this 24th day of October, 2007.

Jean M. Fisher
Deputy Ada County Prosecutor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24 day October 2007, I provided a true and correct copy of the foregoing to: J. Layne Davis, Attorney at Law, 200 N. 4TH ST., STE. 302, BOISE, ID 83702, by faxing to (208) 429-1100 and then mailing via United States mail, postage prepaid.



GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Respondent, vs. CARLOS ESQUIVEL, Petitioner,	**Case No. SPOT 0500561** **ORDER WAIVING CONFIDENTIALITY OF THE PUBLIC DEFENDER AND THE CRIMINAL FILE IN H0300476**

The Petitioner, having raised an issue of ineffective assistance of counsel claim in a post-conviction relief action involving the petitioner's participation in a psychosexual evaluation, this Court ORDERS that the public defender's criminal file in H0300476 be copied and/or made available to the Ada County Prosecutor's Office. The Court orders that the attorney/client

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privilege is hereby waived as to the public defender's representation of Carlos Esquivel in all matters relating to the H0300476 criminal case.

Dated this 13th day of ~~October~~ Nov, 2007.

Olive Copsey
District Court Judge

00024

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, ID 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500561 **SECOND AMENDED PETITION AND AFFIDAVIT FOR POST CONVICTION RELIEF**

COMES NOW the Petitioner, Carlos Esquivel, by and through his attorney of record, Layne Davis of Davis & Walker, and pursuant to Idaho Code §§ 19-4903 and 19-4906, amends the Petition and Affidavit for Post Conviction Relief filed on or about July 15, 2005.

The proceeding in which the Petitioner was convicted is *State of Idaho vs. Carlos Esquivel,* Ada County Case No. H0300476. The Petitioner filed an Amended Petition for Post Conviction Relief on or about August 15, 2005, which was summarily dismissed. On January 23, 2006, the Petitioner appealed the courts summary dismissal of the Petitioner's Amended Post Conviction Petition.

The Court of Appeals issued its unpublished opinion #541 on August 8, 2007, which affirmed a portion of the court's Summary Dismissal, reversed the Dismissal as to one remaining issue, and remanded back to the District Court for further proceedings.

This Second Amended Petition for Post Conviction Relief addresses the sole issue of the Petitioner's ineffective assistance of counsel claim with regard to the psychosexual evaluation contained in the Presentence report, dated January 6, 2004.

The Petitioner alleges the following grounds upon which the application is based:

1. Ineffective assistance of counsel. Specifically, Petitioner asserts that his trial counsel's failure to properly advise him regarding his Fifth Amendment Rights in submitting to a psychosexual evaluation amounted to deficient performance. A psychosexual evaluation conducted for sentencing purposes is considered a critical stage of the Defendant's case. *Estrada vs. State* 143 Idaho 558, 149#P.3d#833(2006). Petitioner asserts that he voiced his concerns about the evaluation to his trial counsel, and his trial counsel failed to question the conduct of the expert who performed the evaluation, to request a different expert to conduct a psychosexual evaluation, independently of Doctor Robert Engle, or to advise Petitioner he could have simply chosen not to participate at all in the evaluation.

The evaluation by Dr. Engle, among other things, indicates the Petitioner to not be a candidate for outpatient sex offender treatment, in part because of the Petitioner's denial during the examination, that he had sexually abused the alleged victim in the substantive case.

The Sentencing Court relied on the evaluation in part in its sentencing decision, and as a result, trial counsel's deficient performance provides the basis for Petitioners application in this instance.

2. The conviction and its sentence is in violation of the Constitution of The United States and/or the Constitution of the laws of The State of Idaho.

3. Trial counsel's deficient performance, requires vacating the sentence in the interest of justice.

4. This Second Amended Petition is supported by the original Petition for Post Conviction and First Amended Petition, previously on file, and is incorporated herein by reference as if fully set forth herein.

DATED this 31 day of January, 2008.

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of January, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor 200 W. Front St., Rm. 3191 Boise, ID 83702	[ ] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL

DAVIS & WALKER

Layne Davis
Conflict Counsel for Petitioner

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
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200 West Front Street, Room 3191
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL, Petitioner, vs. STATE OF IDAHO, Respondent	**Case No. SPOT 0500561D** (61) **Respondent's Answer to the Second Amended Petition for Post Conviction Relief**

1. As to paragraph one, the State admits that defense counsel at trial did not advise the petitioner of his Fifth Amendment Right regarding the psychosexual evaluation; The State, however, denies that the failure to do so was so deficient as to change the outcome of the petitioner's sentencing;

2. As to paragraph two, the State denies that the conviction and the sentence violated the Constitution of the United States;

3. As to paragraph three, the State denies that there was such deficient performance as to disrupt the original sentence;

4. The State denies that the second amended petition is supported by appropriate legal documentation, affidavit or law to support post conviction relief.

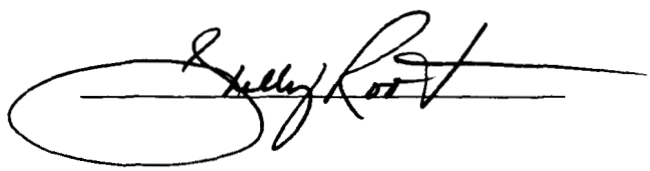
The State respectfully requests that this second motion for relief be summarily denied. The State shall a brief in support of this motion for dismissal.

Respectfully submitted this 11th day of February, 2008.

Jean M. Fisher
Deputy Ada County Prosecutor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12 day February 2008, I provided a true and correct copy of the foregoing to: **Layne Davis Attorney at Law, 200 North 4th St., Ste. 302, Boise, ID 83702**, by depositing in the United States mail, postage prepaid.



GREG H. BOWER
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL , Petitioner, vs. STATE OF IDAHO, Respondent	**Case No. SPOT 0500516D** **Respondent's Brief in Support of Summary Dismissal**

COMES NOW, the State of Idaho, by and through Jean M. Fisher, Deputy Ada County Prosecutor, and does hereby provide this brief in support of the state's motion for summary dismissal of Carlos Esquivel's second amended petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

I.
Factual And Procedural History

Esquivel was charged and convicted by a jury of three counts of lewd conduct with a minor and one count of sexual abuse of a minor under sixteen. Before sentencing, he was ordered to obtain a psychosexual evaluation for sentencing. The basic facts are as set forth by the Idaho

Court of Appeals in an unpublished opinion number 541 filed Augus 3, 2007 under Docket number 32689.

On January 31, 2008, Esquivel filed the instant second amended petition for post-conviction relief. The state filed an answer on February 8, 2008 and a motion to take judicial notice of the record, transcripts, and exhibits in the underlying criminal case. Presently, the state has filed a motion for summary dismissal and this brief in support of the state's motion for summary dismissal.

II.
Applicable Legal Standards

A. General Standards

An application for post-conviction relief initiates a proceeding which is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); Murray v. State, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App.1992). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990).

The post-conviction petitioner must make factual allegations showing each essential element of the claim, and a showing of admissible evidence must support those factual allegations. Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 651 (Ct. App. 1982); Stone v. State, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct. App. 1985). The district court may take judicial notice of the record of the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 745 P.2d 758, 761 (Ct. App. 1987), *aff'd* 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds* State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

B. Legal Standards Applicable To Esquivel's Burden Of Making Out A Prima Facie Case Of Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate both that (a) his counsel's performance fell below an objective standard of reasonableness and (b) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); LaBelle v. State, 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct. App. 1997). "Because of the distorting effects of hindsight in reconstructing the circumstances of counsel's challenged conduct, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance -- that is, 'sound trial strategy.'" Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989) (quoting Strickland, 466 U.S. at 689-90); Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). A petitioner must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was "outside the wide range of professionally competent assistance." Claibourne v. Lewis, 64 F.3d 1373, 1377 (9th Cir.1995) (quoting, Strickland, 466 U.S. at 690).

Thus, the first element – deficient performance – "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The second element – prejudice – requires a showing that counsel's deficient performance actually had an adverse effect on his defense; i.e., but for counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been different. Strickland, 466 U.S. at 693; Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Regarding the second element, Esquivel has the burden of showing that his trial counsels' deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

It is upon this second prong that Esquivel's claim of ineffective assistance of counsel fails. The State admits that the defense attorney in this case did not advise his client of the client's Fifth Amendment Right to silence during the psychosexual examination. However, the petitioner cannot assert any prejudice as a result of that failure by defense counsel.

Court and counsel have copies of the psychosexual evaluation previously prepared in this case for the original sentencing. In reviewing the psychosexual evaluation, it is clear that the petitioner did not cooperate with all of Dr. Engle's psychometric testing. On page 4 of his evaluation, Dr. Engle states that the "Esquivel declined to complete any of the items on the Multiphasic Sex Inventory for reasons detained under the "notification" portion of the present evaluation." On the Millon Clinical Multiaxial Inventory, Esquivel omitted to answer enough questions that Dr. Engle was unable to validate any of the testing (page 5). On page 6, Dr. Engle stated " Mr. Esquivel's reluctance to complete the psychological testing or to complete the psychological testing in a valid manner has caused clinically significant information to be lost."

While Dr. Engle clearly indicates that sexual offender treatment is needed at "face" value, Dr. Engle also informs the court in the psychosexual evaluation that he cannot determine if the Esquivel is sexually obsessed, that he continually denied committing an offense, that he was unwilling and uninterested in treatment (because he denied the offense).

The evaluation, in essence, was of very little value to the Court. When compared to the sitting trier of fact, the judge had ability to judge the credibility of the witnesses, the State's case, and weigh that against Esquivel's case. The trial judge in this case had the ability to assess credibility and she acknowledged in her sentencing how important this actually was to her. Beginning on page 265 of the sentencing transcript at lines 17 – 20, the Court states: "In particular I've also relied very heavily on what happened in the trial itself, my own recollection of it, my own assessment of the credibility of the witnesses in arriving at this decision." The Court goes on to say that she found the child victim "quite credible" (p. 266, ll:17). The Court also found "Miss Witty's testimony to very credible. I don't find that some of the other witnesses, for example, the defendant's wife, she may very well be credible, but what I also want to point out is that these kinds of crime are crimes of secrecy. It is common for people who are around an individual to know about the activities that may be taking place."

The Court went further in her analysis informing all partys that she watched the CARES tape of the child witness and, again, she did not believe that the child was coached. (sentencing transcript, p. 267)

As to the value of the psychosexual evaluation, it is clear that the court relied very little on the evaluation. The Court notes at page 270 of the sentencing transcript that Esquivel was uncooperative for the evaluation. However, her comments regarding the psychosexual evaluation are dwarfed by the magnitude of consideration that she considered coming from the testimony of the case itself. While she mentions that the evaluation came back with a "moderate

risk," she also acknowledges that Esquivel's refusal to cooperate was because he was maintaining his innocence.

Sentencing a defendant is within the discretion of the trial judge. In this case, the defendant faced potential life sentences on three counts of lewd conduct. Esquivel received considerably less than the maximum allowable by the sentencing judge. He cannot, with the exception of pointing at the psychosexual evaluation, articulate any real prejudice in light of the sentencing judge's remarks regarding credibility of witnesses. The psychosexual evaluation carried very little, if any value. Should the Court, however, conclude that the psychosexual evaluation in this case was prejudicial, it is noteworthy to point out that Esquivel could be resentenced to include life.

C. Legal Standards Applicable To Summary Dismissal Under Idaho Code § 19-4906(c)

Idaho Code Section 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. § 19- 4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. State v. LePage, 138 Idaho 803, 806, 69 P.3d 1064, 1067 (Ct. App. 2003). I.C. § 19-4906(c) provides:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a genuine issue of material fact is presented, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App.

1991); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); Ramirez v. State, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Conversely, the "application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." Goodwin v. State, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002) *review denied* (2003); LePage, 138 Idaho at 807, 69 P.3d at 1068 (citing Roman 125 Idaho at 647, 873 P.2d at 901). Follinus v. State, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995) (Follinus's claim that his attorney had been ineffective in failing to obtain a *Franks* hearing to contest the veracity of statements by the search warrant affiant was properly summarily dismissed where the court found that trial counsel did obtain, in effect, a *Franks* hearing at the suppression hearing); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985) (record of extradition proceedings disproved applicant's claim that he was denied right to counsel in those proceedings). Allegations are insufficient for the grant of relief when they do not justify relief as a matter of law. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Remington v. State, 127 Idaho 443, 446-47 901 P.2d 1344, 1347-48 (Ct. App. 1995); Dunlap v. State, 126 Idaho 901, 906, 894 P.2d 134, 139 (Ct. App. 1995) (police affidavit was sufficient to support issuance of search warrant, and defense attorney therefore was not deficient in failing to move to suppress evidence on the ground that warrant was illegally issued).

Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone, 108 Idaho at 826, 702 P.2d at 864. If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary dismissal is appropriate. Mata v. State, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Where petitioner's affidavits are based upon hearsay

rather than personal knowledge, summary disposition without an evidentiary hearing is appropriate. Ivey v. State, 123 Idaho 77, 844 P .2d 706 (1993).

D. Standard Of Review Applied By The Appellate Court

Summary disposition under Idaho Code § 19-4906(b) is the procedural equivalent of summary judgment under I.R.C.P. 56. Ramirez v. State, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). On review of a dismissal of a post-conviction application, the appellate court will review the entire record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require that relief be granted. Nellsch v. State, 122 Idaho 426, 430, 835 P.2d 661, 665 (Ct. App. 1992). The appellate court will freely review this court's application of the law. Nellsch, 122 Idaho at 430, 835 P.2d at 665.

The issues on appeal are, first, whether the petition alleges facts which, if true, would entitle the applicant to relief. Griffith v. State, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992). Second, whether those allegations are "supported by written statements from witnesses who are able to give testimony themselves as to facts within their knowledge, or [are] based upon otherwise verifiable information." Drapeau, 103 Idaho at 617, 651 P.2d at 551. In this case, Esquivel cannot provide facts that prove any prejudice on the ineffective assistance of counsel based solely on the psychosexual evaluation issue. The Court gave it very little, if any, real weight. This case was about credibility of witnesses. Esquivel denied what he was convicted

and he continued to deny at the psychosexual evaluation and at sentencing.

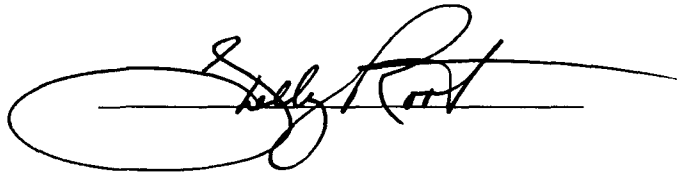
The State respectfully requests that this second motion for relief be summarily denied.

Respectfully submitted this 12th day of February, 2008.

Jean M. Fisher
Deputy Ada County Prosecutor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12 day February 2008, I provided a true and correct copy of the foregoing to: **Layne Davis Attorney at Law, 200 North 4th St., Ste. 302, Boise, ID 83702**, by depositing in the United States mail, postage prepaid.



GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
602 West Idaho Street
Boise, Idaho 83702-5954
Telephone: (208) 364-2121

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	**Case No. SPOT 0500516D** **MOTION TO DISMISS SECOND AMENDED PETITION FOR POST CONVICTION RELIEF**

COMES NOW, Jean M. Fisher, Deputy Ada County Prosecutor, and motions this Court to Dismiss the Second Amended Petition for Post Conviction Relief.

The State respectfully submits that that the Petitioner's Amended Petition for Relief be dismissed.

DATED this 12th day of February, 2008.

GREG BOWER
Ada County Prosecutor

Jean M. Fisher
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of February, 2008, I served a true and correct copy of the foregoing Motion to Dismiss Second Amended Petition for Post Conviction Relief to **Layne Davis, Attorney at Law, 200 North 4th St., Ste. 302, Boise, ID 83702**, through the United States Mail, postage prepaid.

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL,,	
Petitioner,	**Case No. SPOT 0500516D (H0300476)**
vs.	
STATE OF IDAHO,	**AFFIDAVIT OF ERIC ROLFSEN**
Respondent	

Hereby this Affidavit, I, Eric Rolfsen, swear to the following contents:

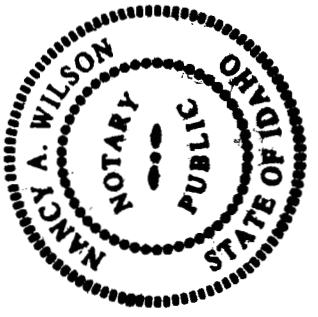
1. I was the legal defense attorney for Carlos Esquivel in case number H0300476;
2. I was the legal representative for Carlos Esquivel for the entirety of the criminal proceedings before Judge Cheri Copsey;
3. I represented Carlos Esquivel at a jury trial for multiple counts of lewd conduct with a minor under sixteen pursuant to I.C. 18-1508 and a count of sexual abuse of a child under sixteen pursuant to I.C. 18-1506;
4. My client was convicted at the jury trial;

5. My client was ordered to obtain a psychosexual evaluation prior to sentencing;
6. I did not tell my client that he had a fifth amendment right not to participate in that psychosexual evaluation;
7. My client denied committing any of the acts he was charged and convicted of and maintained his innocence before the psychosexual evaluator.

Respectfully submitted this 12th day of February 2008.

Eric Rolfsen

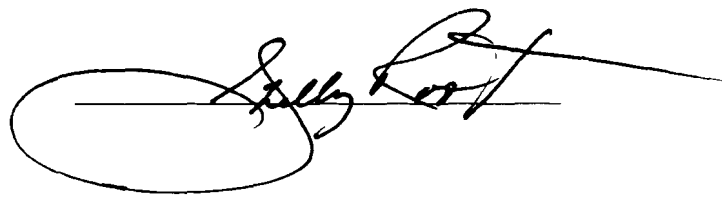
SUBSCRIBED AND SWORN to before me this 12th day of FEBRUARY 2008.



Nancy A. Wilson
Notary Public for Idaho
Residing at: Nampa, Idaho
Commission Expires: Dec. 14, 2011.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of February, 2008, I served a true and correct copy of the foregoing to **Layne Davis, Attorney at Law, 200 North 4th St., Ste. 302, Boise, ID 83702**, through the United States Mail, postage prepaid.



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL,

Petitioner,

vs.

THE STATE OF IDAHO

Respondent.

CASE NO. SPOT-0500561D

SCHEDULING ORDER

After reviewing the Amended Petition and the State's response, the Court finds no evidentiary hearing is necessary and, therefore, cancels the evidentiary hearing currently scheduled. Eric Rolfsen, Esquivel's trial attorney, testified in his affidavit that he did not advise Esquivel of his constitutional right to remain silent during the S.A.N.E. evaluation. Therefore, the first prong of an ineffective assistance of counsel has been met; his representation fell below an objective standard of reasonableness. *Estrada v. State*, 143 Id. 558, 149 P.3d 833 (2007); *Matthews v. State,* 136 Idaho 46, 49, 28 P.3d 387, 390 (Ct.App. 2001); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). The remaining question, however, is whether Esquivel was prejudiced by the this failure. The State moved to dismiss the Petition. The Court hereby orders the following briefing schedule:

Esquivel shall file any response no later than April 1, 2008, and the State shall file any reply no later than April 20, 2008. If the parties request oral argument, they shall notice one.

IT IS SO ORDERED.

Dated this 5th day of March 2008.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of March 2008, I mailed (served) a true and correct copy of the within instrument to:

LAYNE DAVIS
DAVIS AND WALKER
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BOISE, IDAHO 83702

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

CARLOS ESQUIVEL, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. SPOT-0500561D **PETITIONER'S BRIEF IN OPPOSITION TO MOTION FOR SUMMARY OF DISMISSAL**

COMES NOW, the Petitioner, by and through his attorney of record, Layne Davis, with the firm DAVIS & WALKER, and herby submits this brief in opposition of the State's Motion for Summary Dismissal in the above entitled matter.

In light of the Trial Court's scheduling order, dated March 6, 2008, which indicates that the Petitioner has met his burden of the first prong of ineffective assistance of counsel (that Petitioner's trial counsel's representation fell below an objective standard of reasonableness) the remaining question for the court is in determining whether the Petitioner was prejudiced by this failure. Strickland v. Washington, 466 U.S., (1984).

In the State's brief in Support of Summary Dismissal, the State concedes that the Trial Court relied on the Psychosexual Evaluation at the time of sentencing but that such reliance was slight and that the court's consideration of the Psychosexual Evaluation carried very little value

in the overall sentencing analysis conducted by the Trial Court. In the final analysis, however, the question is not ***how much***, but ***whether***, the Petitioner was prejudiced by trial counsel's failure to advise Petitioner of his right to remain silent during the SANE evaluation.

The second part of the *Strickland* test is that the Petitioner must show his attorney's deficient performance prejudiced him. Prejudice is shown if there is a "reasonable probability" that Petitioner would have received a more favorable sentence had the Court not considered Dr. Engle's report. Strickland, 687-688. Prejudice in this case is clear because the psychosexual report was heavily relied upon by the State in recommending a lengthy prison sentence and, at least in some way, the District Court in determining the sentence and in denying the Rule 35 motion.

At sentencing, the State argued that the evaluation showed Mr. Esquivel needed to be punished severely. It stated:

> [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, nor cooperative. He refused to answer MSI questions because he said he just didn't like the questions and he thought that 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 [Mr. Esquivel] 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. Engle says he's at least a medium risk to reoffend, that's in the best light given that the defendant doesn't finish out 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, ln. 21 - pg. 258, ln. 18.

The Court imposed the precise sentence recommended by the state and in doing so relied upon Dr. Engle's report.

> 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 (30424) pg. 270, ln. 2-22.

Along these same lines, the Court relied upon Dr. Engle's evaluation in denying Mr. Esquivel's Rule 35 motion. It wrote:

> The S.A.N.E. evaluation stated Esquivel was at moderate risk to re-offend 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.

In light of the sentencing court's reliance upon Dr. Engle's report, it is clear that Mr. Esquivel was prejudiced by his counsel's failure to obtain an independent psychosexual evaluation or at least suppress the court-ordered one. The analysis of the reliance on the psychosexual evaluation by the sentencing court should not be a quantitative one. In other words, the question of prejudice is not resolved by the suggestion that the evaluation was not relied on heavily by the court or that there are other factors in sentencing which would have led to the same result. Given the state's sentencing argument, the court's reference to the evaluation in its sentencing, and the given the court's imposition of the state's recommendation makes it clear

that the Petitioner was prejudiced by his trial counsel's ineffective assistance of counsel. The Petitioner is entitled to be sentenced without such prejudice.

For the reasons above, this Court should conclude that the Petitioner was prejudiced by his trial counsel's failure to advise him of his Fifth Amendment privilege with regard to the psychosexual evaluation, and should order a resentencing before a different judge.

Oral argument is requested.

DATED this 7th day of April, 2008.

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front St., Ste. 3191
Boise, ID 83702

[ ] U.S. MAIL
[X] HAND DELIVERED
[ ] FACSIMILE
[ ] OVERNIGHT MAIL

DAVIS & WALKER

_____
Layne Davis

RECEIVED

MAY 22 2008

Ada County Clerk

FILED
A.M. 10:50 P.M.

MAY 22 2008

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Carlos Esquivel 72486
Inmate(s) Name IDOC#
BCDC Correctional Center
Housing Unit: E-3-152
1600 SO. SUNSET AVE
LITTLEFIELD, TX 79339

(Petitioner) X Plaintiff [ ] pro se

IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Ada

Carlos Esquivel,

PETITIONER,

-vs-

STATE OF IDAHO

DEFENDANT.

Case No. SPOT0500561

MOTION FOR TRANSPORT

COMES NOW CARLOS ESQUIVEL, the ~~Defendant~~ [ ]

(Petitioner) X Plaintiff [ ], in the above-entitled cause, who, Respectfully moves this Honorable Court to: TRANSPORT PETITIONER TO ADA COUNTY, IDAHO IMMEDIATELY OR AS SOON AS POSSIBLE TO BE PRESENT AS MANDATED BY LAW, AT EVIDENTIARY HEARING TO BE HELD ON JUNE 4TH, 2008 AT 11:00 A.M. AT THE ADA COUNTY

MOTION FOR Transport Page-1

COURTHOUSE, 200 W. FRONT ST. BOISE, IDAHO.

I AM CURRENTLY BEING HOUSED AT THE BILL CLAYTON DETENTION CENTER IN LITTLEFIELD, TEXAS, SO TRANSPORT TO BOISE, IDAHO IS NECESSARY AND HEREBY REQUESTED.

Further your affiant sayeth naught.

DATED This 16th day of May, 2008

Signature

SUBSCRIBED AND SWORN To before me this 16 day of May, 2008

HAYLEE KATHERINE FRENCH
Notary Public, State of Texas
My Commission Expires
June 18, 2008

Notary Public for ~~MINNESOTA~~ TEXAS
Commission expires: 6/18/08

MOTION FOR TRANSPORT

~~AFFIDAVIT OF~~ _____ - pg. 3

Revised 10/24/05

Layne Davis
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Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500561 **AFFIDAVIT OF DENNIS BENJAMIN IN SUPPORT OF SECOND AMENDED PETITION AND AFFIDAVIT FOR POST CONVICTION RELIEF**

Dennis Benjamin, being first duly sworn upon oath, hereby deposes and says:

1. I am over eighteen years of age and am competent to testify about the matters herein.

2. I was appointed counsel for the petitioner on appeal and am familiar with the files and record in his criminal and post-conviction cases.

3. Based on my experience, observations and conversations with other attorneys who handle post-conviction cases, I believe that the general practice in cases where there has been a resentencing ordered pursuant to *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006), *rehearing denied* (2007), *certiorari denied Idaho v. Estrada*, 128 S.Ct. 51 (2007) is to assign a new sentencing judge who has not been exposed to either the improperly obtained evaluation or the presentence report.

4. In particular, I am currently the attorney of record in two criminal cases which are set for resentencing due to successful post-conviction proceedings. In both cases the District Court granted the post-conviction petition finding ineffective assistance of counsel under *Estrada v. State*.

5. In both cases, the post-conviction court sealed the psychosexual evaluation and the Presentence Investigation Report and the sentencing was set before a District Judge who had not read either of the sealed documents.

6. In the first case, *State v. Estrada*, Twin Falls Co. No. CR-2001-0544, the original sentencing judge was the Honorable Nathan Higer and the post-conviction petition was heard by the Honorable G. Richard Bevan. Upon remand from the Idaho Supreme Court, Judge Bevan sealed the psychosexual evaluation and the presentence report and assigned the case to the Honorable Randy J. Stoker for resentencing.

7. In the other case, *State v. Herrera*, Bannock Co. No. CR-2003–19657-FE, the Honorable Ronald E. Bush was the original sentencing judge. However, the resentencing was assigned to the Honorable David C. Nye by Administrative Judge Peter McDermott.

8. In my opinion, it is in the best interests of judicial economy and fairness to have a new sentencing judge assigned because it is difficult, if not impossible, for the original sentencing court to put aside the material which has been obtained in violation of *Estrada* and which has been or should be sealed. A reasonable person might conclude that any sentence imposed by such a court has been affected, whether consciously or unconsciously, by the improperly obtained material. Again, in my opinion, because this common sense conclusion, whether true or false in any particular case, undermines the public's confidence in the integrity and impartiality of the courts, the policy of assigning a new sentencing judge in such cases is wise and fulfils the goals of Idaho Code of Judicial Conduct Canon 2A.

This ends my affidavit.

Dennis Benjamin

SUBSCRIBED AND SWORN to before me this 20th day of June, 2008.

Notary Public for Idaho
Residing at: Boise, ID
My commission expires: 6/20/2011

ELLY G. DAVIS NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of June, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor 200 W. Front St., Rm. 3191 Boise, ID 83702	[ ] [ ] [✓] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL

DAVIS & WALKER

Layne Davis
Conflict Counsel for Petitioner

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

State of Idaho, Respondent, vs. CARLOS ESQUIVEL, Petitioner.	**Case No. SPOT 0500561D** Supplemental Brief in Response to Petitioner's Opposition to State's Motion to Dismiss

COMES NOW, Jean M. Fisher, Deputy Ada County Prosecutor, and files this supplemental brief in response to the opposition brief filed in this matter. The State herein incorporates all other State briefs and filings within this supplemental response as well. In the petitioner's brief, he suggests that there is a bright line analysis when determining if there was any error at all by the sentencing judge and if there is, then he suggests that a bright line rule

articulating that the judge should be disqualified from the case and a new judge should be appointed for re-sentencing. This is NOT the law.

Strickland requires that the petitioner must show with particularity how his attorney's deficient performance prejudiced him. It is not enough to merely allege prejudice without providing an adequate showing. Thus, the first element – deficient performance – "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The second element – prejudice – requires a showing that counsel's deficient performance actually had an adverse effect on his defense; i.e., but for counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been different. Strickland, 466 U.S. at 693; Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Regarding the second element, Esquivel has the burden of showing that his trial counsels' deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

As explained in Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992), "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better."

In this case, Esquivel cannot satisfy the second prong of the Strickland test. Idaho has long stood for the proposition that its sentencing judges are granted discretion in sentencing. In State v. Pierce, 100 Idaho 57, 58, 593 P.l2d 392 (1979); State v. Campbell, 123 Idaho 922, 926, 854 P.2d 265 (Ct.App. 1993), Courts have presumed that a sentencing court is able to ascertain

the relevancy and reliability of the broad range of information and material which was presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict.

In this case, the district court judge heard all of the evidence presented to the jury in this case. Additionally, she was able to review evidence that the jury did not see – the CARES interview of the young child. As the sitting judge, she was able to see the case unfold and to evaluate the State's case and compare it against the defendant's case. The judge is in a position to also determine and assess credibility. In this case, she heard from the child, the child's family, law enforcement and its investigation. She also heard the defendant's side of the case. She also already knew that the defendant denied ever committing these offenses and acknowledged so at the time of sentencing.

At the time of sentencing however the defendant no longer stands before the court with a presumption of innocence cloaking him. He was found guilty by a jury. The judge did order the defendant to participate in a psychosexual evaluation. However, the defendant was not particularly cooperative and much of the value of the evaluation was lost. At sentencing, on pages 265 through 270, the Court lists all of the factors that she considered at the time of sentencing. In particular she spoke of 1. the CARES tape; 2. the consistency and manner in which Angie was able to testify about where and how the assaults took place; 3. she specifically rejected the defendant's theory that Angie was "coached"; 4. the judge saw and believed that Angie was scared and will be affected by the abuse for years to come; 5. the court recognized that he was guarded in the evaluation but rejected his reasoning for being guarded (that he was "not comfortable with the sexual nature of the questions"); 6. the court recognized that the defendant

himself said he was not interested in any treatment despite the jury's opinion; 7. his substance abuse history.

Looking at all of that, it is clear that this court considered far more factors than merely the psychosexual evaluation. The district court judge did "ascertain the relevancy and reliability of the broad range of information and material which was presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict." State v. Pierce, 100 Idaho 57, 58, 593 P.2d 392 (1979).

C. Legal Standards Applicable To Summary Dismissal Under Idaho Code § 19-4906(c)

Idaho Code Section 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. § 19- 4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. State v. LePage, 138 Idaho 803, 806, 69 P.3d 1064, 1067 (Ct. App. 2003). I.C. § 19-4906(c) provides:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a genuine issue of material fact is presented, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); Ramirez v. State, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Conversely, the "application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." Goodwin v. State, 138

Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002) *review denied* (2003); LePage, 138 Idaho at 807, 69 P.3d at 1068 (citing Roman 125 Idaho at 647, 873 P.2d at 901). Follinus v. State, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995) (Follinus's claim that his attorney had been ineffective in failing to obtain a *Franks* hearing to contest the veracity of statements by the search warrant affiant was properly summarily dismissed where the court found that trial counsel did obtain, in effect, a *Franks* hearing at the suppression hearing); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985) (record of extradition proceedings disproved applicant's claim that he was denied right to counsel in those proceedings). Allegations are insufficient for the grant of relief when they do not justify relief as a matter of law. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Remington v. State, 127 Idaho 443, 446-47 901 P.2d 1344, 1347-48 (Ct. App. 1995); Dunlap v. State, 126 Idaho 901, 906, 894 P.2d 134, 139 (Ct. App. 1995) (police affidavit was sufficient to support issuance of search warrant, and defense attorney therefore was not deficient in failing to move to suppress evidence on the ground that warrant was illegally issued).

Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone, 108 Idaho at 826, 702 P.2d at 864. If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary dismissal is appropriate. Mata v. State, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Where petitioner's affidavits are based upon hearsay rather than personal knowledge, summary disposition without an evidentiary hearing is appropriate. Ivey v. State, 123 Idaho 77, 844 P .2d 706 (1993).

The State respectfully requests that this claim be dismissed. In the alternative, if the claim is not dismissed, the State respectfully requests that this court deny the relief sought in obtaining a new judge for sentencing. To grant such relief would seriously jeopardize the State. This is a case that went to jury trial where this court had the advantage of determining credibility of a young child. This court also had a number of other family members to compare and contrast the testimony of the child in determining the credibility.

Under the court decisions previously articulated (State v. Pierce, State v. Campbell, State v. Bundy, State v. Holmes), the Court in its discretion is presumed to have the ability to sort through relevant and unreliable evidence. This court did so in this case.

Dated this 3rd day of June, 2008.

Jean M. Fisher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of June, 2008, I served a true and correct copy of the foregoing Supplemental Brief to the following person(s) by the following method:

___ Hand Delivery "Layne Davis"

___ U.S. Mail "Next Line Enter Names Sent To"

___ Certified Mail "Next Line Enter Names To"

___ Facsimile "Next Line Enter Names To"

___ Interoffice Mail "Next Line Enter Names To"

_____

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL,

Petitioner,

vs.

THE STATE OF IDAHO

Defendant.

Case No. SPOT 0500561

ORDER CONDITIONALLY DISMISSING SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF

This Petition for Post-Conviction Relief is before the Court after the Court of Appeals in an unpublished decision affirmed the Court, in part, and, reversed it in part, and remanded the case for further proceedings consistent with the Court of Appeals' ruling.

Upon remand, the Court appointed counsel on September 4, 2007, and held a status conference on November 29, 2007. On January 31, 2008, Esquivel filed a Second Amended Petition alleging ineffective counsel in Case No. H0300476, based on his claim his counsel failed to advise him of his Fifth Amendment right to remain silent during his psychosexual evaluation. Esquivel supported his Second Amended Petition with an affidavit from his trial counsel in which his trial counsel testified that he did not advise Esquivel of his Fifth Amendment right to remain silent. Esquivel also indicated no evidentiary hearing was necessary.

The State moved to summarily dismiss Esquivel's Second Amended Petition on February 13, 2008, and the Court heard oral argument on June 4, 2008, and took the matter under advisement on June 11, 2008.

Having reviewed the Second Amended Petition and any evidence in a light most favorable to Esquivel, the Court finds that it is satisfied that Esquivel is not entitled to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material fact and no purpose would be served by any further proceedings. Therefore, by this order, the Court is indicating its intention to dismiss Esquivel's Petition.

Esquivel and the State may reply to the Court's notice of the proposed dismissal within 20 days.[1] In light of his reply, if any, or any failure to reply, the Court may order the Second Amended Petition dismissed, grant leave to file an amended application or, direct that the proceedings otherwise continue.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Esquivel with three counts of Lewd Conduct with a Minor Under Sixteen, Felony, I.C. § 18-1508 and one count of Sexual Abuse of a Minor, Felony, I.C. § 18-1506.

At trial, the young victim testified that the sexual abuse began when she was eight years old and involved genital to genital contact, both vaginal and anal. She testified that it continued until she was ten years old when she began to avoid seeing him. Esquivel was her cousin's step-father. Once the abuse began, it continued and was repeated. The victim described her beddings as being wet after he would finish abusing her. She described in detail an attack that occurred in Esquivel's bedroom and described the lubricant next to the bed.

To avoid the continued sexual abuse, she stopped visiting her cousin who was her best friend. The child was traumatized and will never be the same. Esquivel's actions violated her trust and tore the entire family apart. Now sisters do not speak to one another. The child testified that she did not tell anyone until she became convinced Esquivel would begin abusing her cousin, his step-daughter.

At trial, the State attempted to introduce the CARES tape of the interview with the child victim. At counsel's request, the Court viewed the tape and denied the State's request. The tape demonstrated the consistencies in the child's testimony.

Esquivel testified at trial after being advised on the record of his Fifth Amendment right to remain silent and further advised that anything he said could be used against him. More specifically, the Court advised him as follows:

> THE COURT: Now, you've indicated the defendant is going to testify. I want to make sure – I would like to inquire directly of the defendant. I need to make sure that you understand that you do have the right not to testify, but you also

---

[1] "Where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice." *Workman v. State*, 144 Idaho 518, __, 164 P.3d 798, 804 (2007) (citing *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995)).

have the right to testify under our constitution and it is not for your attorney to decide whether you testify. You need to understand that anything you say on the stand can be used against you. So I need to inform you it is your decision to make it and it – I'm going to ask you at this time is it your decision to testify today?

THE DEFENDANT: Yes, it is.

Esquivel testified that he had not committed any of the acts testified to by the child. He unequivocally denied responsibility for the crime.

The jury found Esquivel guilty on all counts. The Court ordered a pre-sentence report and ordered a psychosexual evaluation. Esquivel's trial counsel testified on post-conviction that he did not advise Esquivel about his Fifth Amendment right to remain silent during the psychosexual evaluation.

Esquivel made no incriminating statements to the psychosexual evaluator and, in fact, he continued to deny responsibility, just as he had at trial. The statements he made to the examiner which were reported in the psychosexual evaluation were consistent with those made at trial. He did not complete a number of the tests causing the examiner to note that clinically significant information had been lost. The examiner also noted that Esquivel's continuing denial and lack of interest in sex offender treatment made him unacceptable for out-patient treatment. Based on these factors, the examiner opined that Esquivel was at a moderate risk to re-offend.

As Esquivel's trial attorney correctly noted at sentencing, when a defendant who has been found guilty of a sex offense continues to maintain innocence, the psychosexual examiner will always conclude that the offender is at moderate risk to reoffend because he is not amenable to treatment.

At the outset of the Court's pronouncement of sentence, the Court stated as follows:

> In particular, I've also relied very heavily on what happened in the trial itself, my own recollection of it, my own assessment of the credibility of the witnesses in arriving at this decision. . . .
>
> I want to make it clear that I sat through this trial. I also observed the CARES tape at the request of both counsel because there was a request to have the CARES tape introduced at some point in the trial which I denied, and what I found is that – I would make a specific finding that I found the child victim in this case quite credible.

The Court continued for some time detailing the testimony it heard and why that testimony suggested the child's testimony was credible and Esquivel's was not. *See* Transcript pp. 266-269. For example, the Court stated as follows:

> There were a couple of things that I found interesting. I know that the Defendant claims in this case the child in his view was coached, but in listening to her testimony both here in court and on the CARES tape, there were a couple of things that struck me. First, I noticed – that there was consistency, but it wasn't consistency like you see with someone who was coached. In my private practice I observed children who have been coached and one of the things that I noticed was that they repeat the exact same words over and over again. And, furthermore, the other things that I have noticed with children who have been coached is generally they are coached to use a much more sophisticated set of words than I saw that Angie used. The words she used were the words of a young child and in many ways a child, even though she was older at the time she was testifying, they were the words of a child who is fairly – clear to the Court fairly unsophisticated. What I found particularly important is, as the prosecutor pointed out, she credibly described ejaculate. She described it as a wet bed. Now, if she were being coached, she would have described it differently and I think it is something that the jury picked up on. It's certainly something that I picked up on in listening to her. She did not seem to know what it was, but she described pretty accurately what it would be like if there was ejaculate on the bed.

The Court carefully observed how consistent the child's testimony was, finding no evidence to suggest she had been coached. In particular, the Court noted that the child was able to describe the lubricant Esquivel used and where it was in his bedroom. The Court observed:

> Furthermore, I noticed that while the majority of the times that she said that she was sexually assaulted occurred in the one bedroom, there was one incident which she described in the master bedroom. I found that rather significant because the description in that case was significantly different. She was able to describe where the lubricant was kept, something a child normally would not even know about in going into a room unless she's seen someone take it down and use it in a specific way. Children, and, quite frankly, even I as an adult am not observant enough to notice when someone has lubricant in their bedroom, but she was able to describe that and describe how it was used.

The Court also found that the child's difficulty in describing anatomical parts was consistent with her age and suggested she had not been coached, contrary to Esquivel's claims.

> When I looked at all those things, I came to the conclusion that contrary to what the Defendant says, this is not a child who's –who has been coached. This was a child who was, I think, credibly testifying to what she observed and as I indicated, she didn't really waiver too much in what she was describing and she had difficulty in describing the anatomical parts which I found to be interesting, too.

The Court observed the real fear that the child victim experienced and noted that her manner of disclosure was consistent with the typical way in which these kinds of crimes are discovered. The Court stated as follows:

> I thought, again, her testimony was quite – was quite understandable and when I looked at the CARES tape, it was interesting, again, that she testified there that she was very – she was fearful for Marissa [her cousin] and that in part this is what caused her to come forward. I also found that the way in which the report came out, a spontaneous report at a friend's house with a person with whom she felt comfortable, is a fairly typical way things like this would come out and she made it clear it was not something she wanted to do, she didn't plan it, and she didn't report to her adoptive mother, instead she reported to a friend, and a friend, like I said, that she felt comfortable with. She was obviously uncomfortable discussing it with her adoptive mother and I think in listening to her, that she was – it seemed to me anyway that she was concerned about the impact because she's not stupid, she's a very bright young person, the impact this potentially was going to have on her family.

The Court also discussed the impact this crime would have on the victim and on her family.

> In looking at what she has written and what she testified to, it is clear that she is still scared. This has impacted her in ways that will come out and unfold over the years. She has been changed forever. Hopefully she will survive this and become a stronger person. But let's make no bones about it, this is a young girl whose life has been changed forever and I would suggest that this entire family's life has been changed forever. It was an extreme violation of the child's trust and it's the result of a series and continual bad choices that I believe were made on the part of the Defendant.

The Court also noted that while Esquivel's lack of cooperation with the psychosexual examiner could be consistent with someone who was innocent of the charges, his continued denial made treatment and rehabilitation problematic. The Court stated: "I will also note that I did take into account that his lack of amenability to treatment and also his clear use of illegal substances" including heroin.

Given all of this, this Court imposed a thirty (30) year aggregate sentence with fifteen (15) year(s) fixed and fifteen (15) year(s) indeterminate on each of the three counts of Lewd Conduct with a Minor Under Sixteen. On the Sexual Abuse of a Child Under the Age of Sixteen, the Court imposed fifteen (15) years aggregate with five (5) years fixed and ten (10) years indeterminate. All sentences were to run concurrently.

Esquivel moved the Court to reconsider, and the Court denied his Motion. Esquivel appealed and the Idaho Court of Appeals affirmed the jury's verdict and the Court's sentence in an unpublished opinion.

On July 15, 2005, Esquivel, filed a Petition for Post Conviction Relief, claiming ineffective trial counsel based on several allegations. On December 12, 2005, after numerous motions, the Court dismissed his Amended Petition and Esquivel appealed. On August 3, 2007, in an unpublished decision, the Court of Appeals affirmed the Court, in part, and, reversed it in part, remanding the case for further proceedings consistent with the Court of Appeals' ruling. The Court of Appeals instructed this 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."

The Court appointed counsel to pursue the only remaining claim, ". . . that his counsel was ineffective in failing to arrange an independent psychosexual evaluation or otherwise mitigate the effects of the court-ordered evaluation," as provided by the Court of Appeals decision. Esquivel filed a Second Amended Petition and on remand, in addition to claiming his counsel ineffective for failing to question the conduct of the exam or to request a different expert to conduct an independent examination, he now asserts for the first time that his counsel was ineffective because he failed to advise Petitioner that he could simply chosen not to participate at all in the evaluation.

Esquivel abandoned his claims that his counsel was ineffective for failing to question the conduct of the psychosexual evaluation or to request a different expert to conduct an independent examination, because he presented no argument or evidence regarding these claims to the Court.

ANALYSIS

A petition for Post Conviction Relief can be filed at any time within one year from the expiration of the time for appeal or from the determination of a proceeding following appeal, which ever is later. I.C. §19-4902. In this case, Esquivel was sentenced on January 13, 2004. The Court of Appeals affirmed his sentence on December 3, 2004, and filed the Remittitur March 2, 2005. Esquivel timely filed his post-conviction Petition on July 13, 2005.

Esquivel appealed the Court's decision dismissing his Amended Petition and on August 3, 2007, in an unpublished decision, the Court of Appeals affirmed the Court, in part, and, reversed it

in part, remanding the case for further proceedings consistent with the Court of Appeals' ruling. In particular, the Court of Appeals ruled as follows:

> 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 a different expert conduct a new psychosexual evaluation. . . .
>
> 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. . . . 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.

(Emphasis in the opinion.)

Esquivel filed a Second Amended Petition and on remand, in addition to claiming his counsel ineffective for failing to question the conduct of the exam or to request a different expert to conduct an independent examination, he now asserts for the first time that his counsel was ineffective because he failed

> . . . to advise Petitioner he have could simply chosen not to participate at all in the evaluation.
>
> The evaluation by Dr. Engle, among other things, indicates the Petitioner to not be a candidate for outpatient sex offender treatment, in part because of the Petitioner's denial during the examination, that he had sexually abused the alleged victim in the substantive case.

Esquivel relied on *Estrada v. State*, 143 Idaho 558, 563, 149 P.3d 833, 838 (2006), decided after this Court's decision dismissing his Amended Petition. Esquivel supported his Second Amended Petition with an affidavit from his trial counsel in which his trial counsel testified that he did not advise Esquivel of his Fifth Amendment right to remain silent during the psychosexual evaluation. Esquivel also indicated no evidentiary hearing was necessary.

The State moved to summarily dismiss Esquivel's Second Amended Petition on February 13, 2008, and filed additional argument on June 4, 2008. Esquivel filed argument on April 7, 2008. The Court heard oral argument on June 4, 2008, and took the matter under advisement.

An application for post-conviction relief is in the nature of a civil proceeding, entirely distinct from the underlying criminal proceeding. *Ferrier v. State,* 135 Idaho 797, 798, 25 P.3d 110, 111 (2001). An application for post-conviction relief differs from a complaint in an ordinary

civil action, however, because an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Hernandez v. State*, 133 Idaho 794, 797, 992 P.2d 789, 792 (Ct.App. 1999). The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Id.* Finally, a petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claims are based. I.C.R. 57(c).[2]

In this case, Esquivel's claim is ineffective counsel. Esquivel does not claim the sentence imposed was illegal or that there were any grounds to suppress evidence.

A. Ineffective Assistance of Counsel Standard.

To prevail on a claim of ineffective assistance of counsel, an applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006).

First, to establish a deficiency, Esquivel has the burden of showing that his attorney's representation fell below an objective standard of reasonableness. *Matthews v. State,* 136 Idaho 46, 49, 28 P.3d 387, 390 (Ct.App. 2001); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As the *Estrada* court held, an attorney's performance falls below the objective standard of reasonableness and is, thus, deficient if he or she fails to inform his client of the right to remain silent or right to not participate in a court ordered psychosexual evaluation. *Estrada*, 143 Idaho at 564, 149 P.3d at 839. Esquivel's attorney testified he did not inform Esquivel of his right to remain silent during the psychosexual evaluation. Thus, Esquivel has proven by a preponderance of the evidence that his attorney's advice, or lack of advice, was deficient. That does not end the inquiry. The *Estrada* court did not change the requirement that Esquivel prove he was prejudiced by the deficient advice.

Second, in order to succeed on post-conviction, Esquivel must show, by a preponderance of the evidence, that he was prejudiced by his attorney's deficiency or that the sentence would have been different. *Strickland*, 466 U.S. at 691-92; *Ramirez v. State*, 119 Idaho 1037, 1041, 812

[2] I.C.R. 57(c). Burden of Proof. The petitioner shall have the burden of proving the petitioner's grounds for relief by a

P.2d 751, 755 (Ct.App.1991). "To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." *Gilpin-Grubb v. State,* 138 Idaho 76, 81, 57 P.3d 787, 792 (2002) (quoting *Jakoski v. State,* 136 Idaho 280, 282, 32 P.3d 672, 674 (Ct.App.2001)). In order to properly consider his claim, the Court must analyze *Estrada* and compare the facts in *Estrada* to those here.

B. Esquivel cannot show the requisite prejudice.

The Idaho Supreme Court in *Estrada* recognized that prior to sentencing, the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel apply to psychosexual evaluations ordered by the court to be conducted prior to sentencing. *Estrada*, 143 Idaho at 563-64, 149 P.3d at 838-89. An attorney's performance falls below the objective standard of reasonableness and is, thus, deficient if he or she fails to inform the client of the right to remain silent or right to not participate in a court ordered psychosexual evaluation. *Estrada*, 143 Idaho at 564, 149 P.3d at 839.

However, the Supreme Court did not change the rule that once a defendant proves the attorney failed to properly advise the defendant, the defendant must still prove by a preponderance of the evidence "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 565, 149 P.3d at 840 (quoting *Strickland,* 466 U.S. at 694). "[R]easonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The facts in *Estrada* are important. In *Estrada*, unlike this case, the defendant pled guilty, thus admitting responsibility. Esquivel, on the other hand, was found guilty after a jury trial in which he testified repeatedly that he was innocent after being properly advised of his right to remain silent.

Moreover, Estrada was initially uncooperative in the psychosexual evaluation and, in fact, he wrote to the district court, asserting that the evaluation was unnecessary and caused a frustrating delay in his sentencing. Estrada's attorney responded by writing a letter to Estrada advising him that the evaluation was not a delay tactic, but "must be completed before sentencing." The attorney

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preponderance of the evidence.

also commented, "I want every single good piece of evidence that I can get my hands on to be able to argue at your sentencing." Based on the letter, Estrada decided to participate in the evaluation.

Later, however, Estrada again became uncooperative and failed to complete certain evaluation forms, which prompted the evaluator to contact Estrada's attorney to relay Estrada's refusal to cooperate. The attorney sent Estrada another letter, in which he noted that the evaluation was ordered by the district court. The attorney wrote, "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." Thereafter, Estrada participated in the evaluation, which took place in the county jail. The evaluation was filed with the district court and included a number of unfavorable and derogatory comments about Estrada, including references to his potential for future violent actions.

Unlike Estrada, Esquivel never cooperated in his psychosexual evaluation. He refused to complete psychometric testing making the evaluator conclude that "clinically significant information had been lost." He maintained his innocence throughout the testing, made no incriminating statements and, in fact, the reported statements in the evaluation are consistent with those he made at trial.

While in *Estrada* the sentencing judge[3] made specific, repeated references to the psychosexual evaluation and its finding that Estrada was a violent person and clearly relied on it in arriving at the sentence, that did not happen in this case. In this case, the only reason this Court discussed the psychosexual evaluation at all was because the Court had ordered the evaluation. This Court, at sentencing, only noted several times that Esquivel continued to maintain his innocence during the psychosexual evaluation causing the evaluator to conclude that he was not amenable to treatment placing him at moderate risk to reoffend. However, the Court already knew he was not amenable to rehabilitation, because he denied culpability at trial. The psychosexual evaluation itself added no new information to what this Court already knew based on Esquivel's testimony at trial. In fact, his lack of participation in the psychosexual evaluation was predictable

[3] The judge who decided the post-conviction petition in *Estrada* was a different judge. Therefore, any findings by the post-conviction judge were not based on personal knowledge, unlike in this case.

given his trial testimony.[4] In view of Esquivel's testimony, there is nothing in the psychosexual evaluation that could have affected the Court's sentence.

While the Court of Appeals suggests in its decision that the mention[5] of the psychosexual evaluation implied that the Court relied on the report, that is not the case. This Court determined Esquivel's sentence based on the testimony he gave and the evidence produced at trial and not on the psychosexual evaluation. 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. It was his failure to accept responsibility that demonstrated rehabilitation was unlikely.

It is well established that Idaho trial courts may consider a defendant's failure to accept responsibility in determining whether rehabilitation efforts would be fruitful when imposing sentence. *See State v. Murphy*, 133 Idaho 489, 494, 988 P.2d 715, 720 (Ct.App.1999); *State v. Brown*, 131 Idaho 61, 73, 951 P.2d 1288, 1300 (Ct.App.1998); *State v. Wheeler*, 129 Idaho 735, 932 P.2d 363 (Ct.App.1997); *State v. Smith*, 127 Idaho 632, 903 P.2d 1329 (Ct.App.1995); *State v. Fertig*, 126 Idaho 364, 883 P.2d 722 (Ct.App.1994); *State v. Nooner*, 114 Idaho 654, 656, 759 P.2d 945, 947 (Ct.App.1988). A trial court may consider the failure to take responsibility for crimes committed in considering the defendant's potential for rehabilitation. *See Murphy*, 133 Idaho at 494, 988 P.2d at 720.

In reviewing the record, it is clear that this Court's references to the psychosexual evaluation were limited to its conclusion regarding his amenability to treatment and rehabilitation, a matter long held to be appropriate to sentencing, and a conclusion clearly predicted by his own testimony at trial. Therefore, Esquivel cannot establish that this Court's exercise of its discretion in sentencing and in considering his lack of amenability to treatment was caused by any violation of his fifth amendment rights; he cannot prove prejudice, the second prong of *Strickland*.

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[4] Following this trial, the Court no longer orders psychosexual evaluations where the defendant testifies that he is innocent, because the result is predictable, just as Esquivel's attorney opined at Esquivel's sentencing.

[5] At sentencing trial courts frequently identify those things the court has read or reviewed. That does not mean, however, those items were factors in the sentence. For example, the trial court may read and consider the numerous letters received in support of a defendant or letters from victims but that does not mean those letters have great impact on the sentence.

Likewise, if Esquivel had actually incriminated himself by making unwarned statements during the psychosexual evaluation that caused the Court to learn something it did not already know, the result may have been different on post-conviction. However, the fact is Esquivel made no incriminating statements and the Court learned nothing it did not already know; Esquivel proclaimed his innocence and did not cooperate in the psychosexual evaluation. He was not prejudiced by his counsel's actions. Therefore, the Court finds Esquivel cannot establish a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceeding would have been different as required by *Strickland.*

CONCLUSION

Having reviewed the Second Amended Petition and any evidence in a light most favorable to Esquivel, the Court finds that it is satisfied that Esquivel is not entitled to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material fact and no purpose would be served by any further proceedings. Therefore, by this order, the Court is indicating its intention to dismiss Esquivel's Petition.

Esquivel and the State may reply to the Court's notice of the proposed dismissal within 20 days. In light of his reply, if any, or any failure to reply, the Court may order the Second Amended Petition dismissed, grant leave to file an amended application or, direct that the proceedings otherwise continue.

IT IS SO ORDERED.

Dated this 15th day of July 2008.

Cheri C. Copsey

Cheri C. Copsey
District Judge

I, J. David Navarro, the undersigned authority, do hereby certify that on July 15, 2008 I mailed, by United States Mail, one copy of the **ORDER conditionally DISMISSING SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF** as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

GREG H. BOWER
ADA COUNTY PROSECUTING ATTORNEY
JEAN FISHER
DEPUTY PROSECUTING ATTORNEY
200 W. FRONT STREET
BOISE, IDAHO 83702-5954

LAYNE DAVIS
DAVIS & WALKER
200 NORTH 4TH STREET, SUITE 302
BOISE, IDAHO 83702

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 7/15/08

By _____
Deputy Clerk

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, ID 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

ORIGINAL

Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	SP OT Case No. CV PC 0500561 **PETITIONER'S RESPONSE TO ORDER CONDITIONALLY DISMISSING SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF**

COMES NOW the Petitioner, Carlos Esquivel, by and through his attorney of record, Layne Davis, of the firm Davis & Walker, conflict counsel for the Ada County Public Defender's Office, and hereby responds to the Court's Order Conditionally Dismissing Second Amended Petition for Post-Conviction Relief, dated July 15, 2008.

The Petitioner, for the sake of clarity and for preservation of the record, hereby adopts all prior pleadings and arguments advanced by the Petitioner in support of the Petition for Post-Conviction Relief, and maintains his position that he is entitled to be re-sentenced before a different judge, based on the claims made in the Petition.

DATED this 5th day of ~~July~~ August, 2008.

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of ~~July~~ August, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor's Office
200 W. Front St., Rm. 3191
Boise, ID 83702

[ ] U.S. MAIL
[X] HAND DELIVERED
[ ] FACSIMILE
[ ] OVERNIGHT MAIL

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

NO. _____ FILED
A.M. _____ P.M. 3:36

SEP 16 2008

J. DAVID NAVARRO, Clerk
By _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL,

Petitioner,

vs.

THE STATE OF IDAHO

Defendant.

Case No. SPOT 0500561

ORDER DISMISSING
SECOND AMENDED PETITION
FOR POST-CONVICTION RELIEF

This Petition for Post-Conviction Relief is before the Court after the Court of Appeals in an unpublished decision affirmed the Court, in part, and, reversed it in part, and remanded the case for further proceedings consistent with the Court of Appeals' ruling.

Upon remand, the Court appointed counsel on September 4, 2007, and held a status conference on November 29, 2007. On January 31, 2008, Esquivel filed a Second Amended Petition alleging ineffective counsel in Case No. H0300476, based on his claim that his counsel failed to advise him of his Fifth Amendment right to remain silent during his psychosexual evaluation. Esquivel supported his Second Amended Petition with an affidavit from his trial counsel in which his trial counsel testified that he did not advise Esquivel of his Fifth Amendment right to remain silent. Esquivel also indicated no evidentiary hearing was necessary.

The State moved to summarily dismiss Esquivel's Second Amended Petition on February 13, 2008, the Court heard oral argument on June 4, 2008, and took the matter under advisement on June 11, 2008. On July 15, 2008, the Court conditionally dismissed Esquivel's Second Amended Petition and gave all parties twenty days to respond. Esquivel replied on August 5, 2008.

Having reviewed the Second Amended Petition and any evidence in a light most favorable to Esquivel, the Court finds that it is satisfied that Esquivel is not entitled to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material fact and no purpose

would be served by any further proceedings. Therefore, the Court dismisses Esquivel's Second Amended Petition.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Esquivel with three counts of Lewd Conduct with a Minor Under Sixteen, Felony, I.C. § 18-1508 and one count of Sexual Abuse of a Minor, Felony, I.C. § 18-1506.

At trial, the young victim testified that the sexual abuse began when she was eight years old and involved genital to genital contact, both vaginal and anal. She testified that it continued until she was ten years old when she began to avoid seeing Esquivel. Esquivel was her cousin's step-father. Once the abuse began, it continued and was repeated. The victim described her beddings as being wet after he would finish abusing her. She described in detail an attack that occurred in Esquivel's bedroom and described the lubricant next to the bed.

To avoid the continued sexual abuse, she stopped visiting her cousin who was her best friend. The child was traumatized and will never be the same. Esquivel's actions violated her trust and tore the entire family apart. Now sisters do not speak to one another. The child testified that she did not tell anyone until she became convinced Esquivel would begin abusing her cousin, his step-daughter.

At trial, the State attempted to introduce the CARES tape of the interview with the child victim. At counsel's request, the Court viewed the tape and denied the State's request. The tape demonstrated the consistencies in the child's testimony.

Esquivel testified at trial after being advised on the record of his Fifth Amendment right to remain silent and further advised that anything he said could be used against him. More specifically, the Court advised him as follows:

> THE COURT: Now, you've indicated the defendant is going to testify. I want to make sure – I would like to inquire directly of the defendant. I need to make sure that you understand that you do have the right not to testify, but you also have the right to testify under our constitution and it is not for your attorney to decide whether you testify. You need to understand that anything you say on the stand can be used against you. So I need to inform you it is your decision to make it and it – I'm going to ask you at this time is it your decision to testify today?
>
> THE DEFENDANT: Yes, it is.

Esquivel testified that he had not committed any of the acts testified to by the child. He unequivocally denied responsibility for the crime.

The jury found Esquivel guilty on all counts. The Court ordered a pre-sentence report and ordered a psychosexual evaluation. Esquivel's trial counsel testified on post-conviction that he did not advise Esquivel about his Fifth Amendment right to remain silent during the psychosexual evaluation.

Esquivel made no incriminating statements to the psychosexual evaluator and, in fact, he continued to deny responsibility, just as he had at trial. The statements he made to the examiner which were reported in the psychosexual evaluation were consistent with those made at trial. He did not complete a number of the tests causing the examiner to note that clinically significant information had been lost. The examiner also noted that Esquivel's continuing denial and lack of interest in sex offender treatment made him unacceptable for out-patient treatment. Based on these factors, the examiner opined that Esquivel was at a moderate risk to re-offend.

As Esquivel's trial attorney correctly noted at sentencing, when a defendant who has been found guilty of a sex offense continues to maintain innocence, the psychosexual examiner will always conclude that the offender is at moderate risk to reoffend because he is not amenable to treatment.

At the outset of the Court's pronouncement of sentence, the Court stated as follows:

> In particular, I've also relied very heavily on what happened in the trial itself, my own recollection of it, my own assessment of the credibility of the witnesses in arriving at this decision. . . .
>
> I want to make it clear that I sat through this trial. I also observed the CARES tape at the request of both counsel because there was a request to have the CARES tape introduced at some point in the trial which I denied, and what I found is that – I would make a specific finding that I found the child victim in this case quite credible.

The Court continued for some time detailing the testimony it heard and why that testimony suggested the child's testimony was credible and Esquivel's was not. *See* Transcript pp. 266-269. For example, the Court stated as follows:

> There were a couple of things that I found interesting. I know that the Defendant claims in this case the child in his view was coached, but in listening to her testimony both here in court and on the CARES tape, there were a couple of things that struck me. First, I noticed – that there was consistency, but it wasn't consistency like you see with someone who was coached. In my private practice I observed children who have been coached and one of the things that I noticed was that they repeat the exact same words over and over again. And, furthermore, the

other things that I have noticed with children who have been coached is generally they are coached to use a much more sophisticated set of words than I saw that Angie used. The words she used were the words of a young child and in many ways a child, even though she was older at the time she was testifying, they were the words of a child who is fairly – clear to the Court fairly unsophisticated. What I found particularly important is, as the prosecutor pointed out, she credibly described ejaculate. She described it as a wet bed. Now, if she were being coached, she would have described it differently and I think it is something that the jury picked up on. It's certainly something that I picked up on in listening to her. She did not seem to know what it was, but she described pretty accurately what it would be like if there was ejaculate on the bed.

The Court carefully observed how consistent the child's testimony was, finding no evidence to suggest she had been coached. In particular, the Court noted that the child was able to describe the lubricant Esquivel used and where it was in his bedroom. The Court observed:

> Furthermore, I noticed that while the majority of the times that she said that she was sexually assaulted occurred in the one bedroom, there was one incident which she described in the master bedroom. I found that rather significant because the description in that case was significantly different. She was able to describe where the lubricant was kept, something a child normally would not even know about in going into a room unless she's seen someone take it down and use it in a specific way. Children, and, quite frankly, even I as an adult am not observant enough to notice when someone has lubricant in their bedroom, but she was able to describe that and describe how it was used.

The Court also found that the child's difficulty in describing anatomical parts was consistent with her age and suggested she had not been coached, contrary to Esquivel's claims.

> When I looked at all those things, I came to the conclusion that contrary to what the Defendant says, this is not a child who's –who has been coached. This was a child who was, I think, credibly testifying to what she observed and as I indicated, she didn't really waiver too much in what she was describing and she had difficulty in describing the anatomical parts which I found to be interesting, too.

The Court observed the real fear that the child victim experienced and noted that her manner of disclosure was consistent with the typical way in which these kinds of crimes are discovered. The Court stated as follows:

> I thought, again, her testimony was quite – was quite understandable and when I looked at the CARES tape, it was interesting, again, that she testified there that she was very – she was fearful for Marissa [her cousin] and that in part this is what caused her to come forward. I also found that the way in which the report came out, a spontaneous report at a friend's house with a person with whom she felt comfortable, is a fairly typical way things like this would come out and she made it

> clear it was not something she wanted to do, she didn't plan it, and she didn't report to her adoptive mother, instead she reported to a friend, and a friend, like I said, that she felt comfortable with. She was obviously uncomfortable discussing it with her adoptive mother and I think in listening to her, that she was – it seemed to me anyway that she was concerned about the impact because she's not stupid, she's a very bright young person, the impact this potentially was going to have on her family.

The Court also discussed the impact this crime would have on the victim and on her family.

> In looking at what she has written and what she testified to, it is clear that she is still scared. This has impacted her in ways that will come out and unfold over the years. She has been changed forever. Hopefully she will survive this and become a stronger person. But let's make no bones about it, this is a young girl whose life has been changed forever and I would suggest that this entire family's life has been changed forever. It was an extreme violation of the child's trust and it's the result of a series and continual bad choices that I believe were made on the part of the Defendant.

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Given all of this, this Court imposed a thirty (30) year aggregate sentence with fifteen (15) year(s) fixed and fifteen (15) year(s) indeterminate on each of the three counts of Lewd Conduct with a Minor Under Sixteen. On the Sexual Abuse of a Child Under the Age of Sixteen, the Court imposed fifteen (15) years aggregate with five (5) years fixed and ten (10) years indeterminate. All sentences were to run concurrently.

Esquivel moved the Court to reconsider, and the Court denied his Motion. Esquivel appealed and the Idaho Court of Appeals affirmed the jury's verdict and the Court's sentence in an unpublished opinion.

On July 15, 2005, Esquivel filed a Petition for Post Conviction Relief, claiming ineffective trial counsel based on several allegations. On December 12, 2005, after numerous motions, the Court dismissed his Amended Petition and Esquivel appealed. On August 3, 2007, in an unpublished decision, the Court of Appeals affirmed the Court in part and, reversed it in part,

remanding the case for further proceedings consistent with the Court of Appeals' ruling. The Court of Appeals instructed this 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."

The Court appointed counsel to pursue the only remaining claim, ". . . that his counsel was ineffective in failing to arrange an independent psychosexual evaluation or otherwise mitigate the effects of the court-ordered evaluation," as provided by the Court of Appeals decision. Esquivel filed a Second Amended Petition and on remand, in addition to claiming his counsel was ineffective for failing to question the conduct of the exam or to request a different expert to conduct an independent examination, he now asserts for the first time that his counsel was ineffective because he failed to advise Petitioner that he could have simply chosen not to participate at all in the evaluation.

Esquivel abandoned his claims that his counsel was ineffective for failing to question the conduct of the psychosexual evaluation or to request a different expert to conduct an independent examination, because he presented no argument or evidence regarding these claims to the Court.

ANALYSIS

A petition for Post Conviction Relief can be filed at any time within one year from the expiration of the time for appeal or from the determination of a proceeding following appeal, which ever is later. I.C. §19-4902. In this case, Esquivel was sentenced on January 13, 2004. The Court of Appeals affirmed his sentence on December 3, 2004, and filed the Remittitur March 2, 2005. Esquivel timely filed his post-conviction Petition on July 13, 2005.

Esquivel appealed the Court's decision dismissing his Amended Petition and on August 3, 2007, in an unpublished decision, the Court of Appeals affirmed the Court in part and, reversed it in part, remanding the case for further proceedings consistent with the Court of Appeals' ruling. In particular, the Court of Appeals ruled as follows:

> 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 a different expert conduct a new psychosexual evaluation. . . .
>
> 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. . . . 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.

(Emphasis in the opinion.)

Esquivel filed a Second Amended Petition and on remand, in addition to claiming his counsel ineffective for failing to question the conduct of the exam or to request a different expert to conduct an independent examination, he now asserts for the first time that his counsel was ineffective because he failed

> to advise Petitioner he could have simply chosen not to participate at all in the evaluation.
>
> The evaluation by Dr. Engle, among other things, indicates the Petitioner to not be a candidate for outpatient sex offender treatment, in part because of the Petitioner's denial during the examination, that he had sexually abused the alleged victim in the substantive case.

Esquivel relied on *Estrada v. State*, 143 Idaho 558, 563, 149 P.3d 833, 838 (2006), decided after this Court's decision dismissing his Amended Petition. Esquivel supported his Second Amended Petition with an affidavit from his trial counsel in which his trial counsel testified that he did not advise Esquivel of his Fifth Amendment right to remain silent during the psychosexual evaluation. Esquivel also indicated no evidentiary hearing was necessary.

The State moved to summarily dismiss Esquivel's Second Amended Petition on February 13, 2008, and filed additional argument on June 4, 2008. Esquivel filed argument on April 7, 2008. The Court heard oral argument on June 4, 2008, and took the matter under advisement.

An application for post-conviction relief is in the nature of a civil proceeding, entirely distinct from the underlying criminal proceeding. *Ferrier v. State,* 135 Idaho 797, 798, 25 P.3d 110, 111 (2001). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, because an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Hernandez v. State*, 133 Idaho 794, 797, 992 P.2d 789, 792 (Ct. App. 1999). The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject

to dismissal. *Id.* Finally, a petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claims are based. I.C.R. 57(c).[1]

In this case, Esquivel's claim is ineffective counsel. Esquivel does not claim the sentence imposed was illegal or that there were any grounds to suppress evidence.

A. Ineffective Assistance of Counsel Standard.

To prevail on a claim of ineffective assistance of counsel, an applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006).

First, to establish a deficiency, Esquivel has the burden of showing that his attorney's representation fell below an objective standard of reasonableness. *Matthews v. State*, 136 Idaho 46, 49, 28 P.3d 387, 390 (Ct. App. 2001); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As the *Estrada* court held, an attorney's performance falls below the objective standard of reasonableness and is thus deficient if he fails to inform his client of the right to remain silent or right to not participate in a court ordered psychosexual evaluation. *Estrada*, 143 Idaho at 564, 149 P.3d at 839. Esquivel's attorney testified that he did not inform Esquivel of his right to remain silent during the psychosexual evaluation. Thus, Esquivel has proven by a preponderance of the evidence that his attorney's advice, or lack of advice, was deficient. That does not end the inquiry. The *Estrada* court did not change the requirement that Esquivel prove he was prejudiced by the deficient advice.

Second, in order to succeed on post-conviction, Esquivel must show, by a preponderance of the evidence, that he was actually prejudiced by his attorney's deficiency or, in this case, that his sentence would have been different. *Strickland*, 466 U.S. at 691-92; *Ramirez v. State*, 119 Idaho 1037, 1041, 812 P.2d 751, 755 (Ct. App.1991). "To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." *Gilpin-Grubb v. State*, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002) (quoting *Jakoski v. State*, 136 Idaho 280, 282, 32 P.3d 672, 674 (Ct. App.2001)). In other words,

[1] I.C.R. 57(c). Burden of Proof. The petitioner shall have the burden of proving the petitioner's grounds for relief by a

it is not enough for Esquivel to simply show that the attorney's error had some conceivable effect on his sentence as virtually every act or omission of counsel would meet that test. *Strickland*, 466 U.S. at 693.

B. Esquivel cannot show the requisite prejudice.

The Idaho Supreme Court in *Estrada* recognized that prior to sentencing, the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel apply to psychosexual evaluations ordered by the court to be conducted prior to sentencing. *Estrada*, 143 Idaho at 563-64, 149 P.3d at 838-389. An attorney's performance falls below the objective standard of reasonableness and is thus deficient if he fails to inform the client of the right to remain silent or the right to not participate in a court ordered psychosexual evaluation. *Estrada*, 143 Idaho at 564, 149 P.3d at 839.

However, the Idaho Supreme Court did not change the long standing rule that even if a defendant proves the attorney failed to properly advise the defendant, the defendant must still prove by a preponderance of the evidence "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 565, 149 P.3d at 840 (quoting *Strickland,* 466 U.S. at 694). "[R]easonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* And as the United States Supreme Court continued in *Strickland*: "In making this determination [referring to the prejudice prong], a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." 466 U.S. at 696. The United States Supreme Court in *Strickland* carefully analyzed the prejudice required in order to support a finding of ineffective assistance of counsel as follows:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Cf. United States v. Morrison*, 449 U.S. 361, 364-365, 101 S.Ct. 665, 667- 668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.
>
> ***

---

preponderance of the evidence.

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

466 U.S. at 691-93 (emphasis added).

Significantly, the United States Supreme Court in addressing the prejudice component of an ineffective assistance of counsel claim makes the following observation:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. at 697 (emphasis added).

Because this case is not one where prejudice is presumed,[2] Esquivel must affirmatively prove prejudice. Actual ineffectiveness claims alleging a deficiency in attorney performance, such as Esquivel's, are inherently fact sensitive. Because errors by counsel are just as likely to be harmless in a particular case as they are to be prejudicial, they cannot be classified according to likelihood of causing prejudice. They must be considered on a case-by-case basis. *See Strickland*, 466 U.S. at 693. In order to properly consider Esquivel's claim, the Court must analyze *Estrada* and compare the *Estrada* facts to those here.

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[2] In certain contexts prejudice is presumed. These include: actual or constructive denial of the assistance of counsel altogether, state interference with counsel's assistance, and actual conflicts of interest. *See Strickland*, 466 U.S. at 692. None of these apply in Esquivel's case.

The facts in *Estrada* are important. In *Estrada*, unlike this case, the defendant pled guilty, thus admitting responsibility. Esquivel, on the other hand, was found guilty after a jury trial in which he testified repeatedly that he was innocent after being properly advised of his right to remain silent.

Moreover, Estrada was initially uncooperative in the psychosexual evaluation and, in fact, he wrote to the district court, asserting that the evaluation was unnecessary and caused a frustrating delay in his sentencing. Estrada's attorney responded by writing a letter to Estrada advising him that the evaluation was not a delay tactic, but "must be completed before sentencing." The attorney also commented, "I want every single good piece of evidence that I can get my hands on to be able to argue at your sentencing." Based on the letter, Estrada decided to participate in the evaluation.

Later, however, Estrada again became uncooperative and failed to complete certain evaluation forms, which prompted the evaluator to contact Estrada's attorney to relay Estrada's refusal to cooperate. The attorney sent Estrada another letter, in which he noted that the evaluation was ordered by the district court. The attorney wrote, "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." Thereafter, Estrada participated in the evaluation, which took place in the county jail. The evaluation was filed with the district court and included a number of unfavorable and derogatory comments about Estrada, including references to his potential for future violent actions.

Unlike Estrada, Esquivel never cooperated in his psychosexual evaluation. He refused to complete psychometric testing making the evaluator conclude that "clinically significant information had been lost." He maintained his innocence throughout the testing, made no incriminating statements and, in fact, the reported statements in the evaluation are consistent with those he made at trial.

While in *Estrada* the sentencing judge[3] made specific, repeated references to the psychosexual evaluation and its finding that Estrada was a violent person and clearly relied on it in arriving at the sentence, that did not happen in this case. In this case, the only reason this Court

[3] The judge who decided the post-conviction petition in *Estrada* was a different judge. Therefore, any findings by the post-conviction judge were not based on personal knowledge, unlike in this case.

discussed the psychosexual evaluation at all was because the Court had ordered the evaluation. This Court, at sentencing, only noted several times that Esquivel continued to maintain his innocence during the psychosexual evaluation causing the evaluator to conclude that he was not amenable to treatment placing him at moderate risk to reoffend. However, the Court already knew he was not amenable to rehabilitation, because he denied culpability at trial. The psychosexual evaluation itself added no new information to what this Court already knew based on Esquivel's testimony at trial. In fact, his lack of participation in the psychosexual evaluation was predictable given his trial testimony.[4] In view of Esquivel's testimony, there is nothing in the psychosexual evaluation that could have affected the Court's sentence.

While the Court of Appeals suggests in its decision that the mention[5] of the psychosexual evaluation implied that the Court relied on the report, that is not the case. This Court determined Esquivel's sentence based on the testimony he gave and the evidence produced at trial and not on the psychosexual evaluation. 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. It was his failure to accept responsibility that demonstrated rehabilitation was unlikely.

It is well established that Idaho trial courts may consider a defendant's failure to accept responsibility in determining whether rehabilitation efforts would be fruitful when imposing sentence. *See State v. Murphy*, 133 Idaho 489, 494, 988 P.2d 715, 720 (Ct. App.1999); *State v. Brown*, 131 Idaho 61, 73, 951 P.2d 1288, 1300 (Ct. App.1998); *State v. Wheeler*, 129 Idaho 735, 932 P.2d 363 (Ct. App.1997); *State v. Smith*, 127 Idaho 632, 903 P.2d 1329 (Ct. App.1995); *State v. Fertig*, 126 Idaho 364, 883 P.2d 722 (Ct. App.1994); *State v. Nooner*, 114 Idaho 654, 656, 759 P.2d 945, 947 (Ct. App.1988). A trial court may consider the failure to take responsibility for

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[4] Following this sentencing, the Court no longer orders psychosexual evaluations where the defendant either testifies that he is innocent or enters an *Alford* plea, because the result is predictable, just as Esquivel's attorney opined at Esquivel's sentencing.

[5] At sentencing trial courts frequently identify those things the court has read or reviewed. A trial court is required to reflect on everything in a pre-sentence report and cannot simply ignore material. That does not mean, however, those items become factors in the sentence. For example, the trial court reads and considers the numerous letters often received in support of a defendant or letters from victims but that does not mean those letters change the sentence in every case.

crimes committed in considering the defendant's potential for rehabilitation. *See Murphy*, 133 Idaho at 494, 988 P.2d at 720. That is what happened here.

In reviewing the record, it is clear that this Court's references to the psychosexual evaluation were limited to its conclusion regarding Esquivel's amenability to treatment and rehabilitation, a matter long held to be appropriate to sentencing, and a conclusion clearly predicted by his own testimony at trial. Therefore, Esquivel cannot establish that this Court's exercise of its discretion in considering his lack of amenability to treatment and in sentencing was caused by any violation of his Fifth Amendment rights; he cannot prove prejudice, the second prong of *Strickland.*

Likewise, if Esquivel had actually incriminated himself by making unwarned statements during the psychosexual evaluation that caused the Court to learn something it did not already know, the result may have been different on post-conviction. Esquivel was clearly exercising his constitutional rights and the Court did not hold that against him. However, the fact is Esquivel made no incriminating statements and the Court learned nothing it did not already know; Esquivel continued to proclaim his innocence and did not cooperate in the psychosexual evaluation. He was not prejudiced by his counsel's actions. Therefore, the Court finds Esquivel cannot establish a reasonable probability that, but for his trial counsel's unprofessional errors, the sentence would have been different as required by *Strickland.*

CONCLUSION

Having reviewed the Second Amended Petition and any evidence in a light most favorable to Esquivel, the Court finds that it is satisfied that Esquivel is not entitled to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material fact and no purpose would be served by any further proceedings. Therefore, by this order, the Court dismisses Esquivel's Petition. At the same time, the Court has ordered the psychosexual evaluation removed from the pre-sentence report in Case No. H0300476 and sealed.

IT IS SO ORDERED.

Dated this 12th day of September, 2008.

Cheri C. Copsey
District Judge

I, J. David Navarro, the undersigned authority, do hereby certify that on September 16, 2008 I mailed, by United States Mail, one copy of the **ORDER DISMISSING SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF** as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

GREG H. BOWER
ADA COUNTY PROSECUTING ATTORNEY
JEAN FISHER
DEPUTY PROSECUTING ATTORNEY
200 W. FRONT STREET
BOISE, IDAHO 83702-5954

LAYNE DAVIS
DAVIS & WALKER
200 NORTH 4TH STREET, SUITE 302
BOISE, IDAHO 83702

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 9/16/08

By _____
Deputy Clerk

ORIGINAL

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, ID 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT 05-00561 **NOTICE OF APPEAL**

TO: ALL PARTIES, THEIR ATTORNEYS OF RECORD, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Petitioner, Carlos Esquivel, appeals against the above named Respondent to the Idaho Supreme Court from District Court in the Judgment and Order Dismissing Second Amended Petition for Post-Conviction Relief, entered in the above-entitled action on September 16, 2008, the Honorable Judge Cheri Copsey presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgments or Orders described in Paragraph 1 above are appealable Orders under and pursuant to Rule 11 (c) I.A.R.

3. Whether the denial for the Petitioner's Post Conviction Relief application violated the procedural and substantive due process standards guaranteed by the U.S. and Idaho Constitutions.

4. An order dated September 15, 2008 removed the psychosexual evaluation from the pre-sentence report and further ordered that it be sealed. No Order has been entered sealing any portion of the record.

5. A reporter's transcript is requested.

6. Petitioner, Carlos Esquivel, requests the preparation of the following portions of the reporter's transcript: The entire standard transcript as defined in Idaho Appellant Rules 25(a). In addition to the standard transcript, the Appellant requests the preparation of the reporter's transcript for the Evidentiary Hearing held on June 4, 2008.

7. I certify:

a. That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

1. Kim Madsen, 200 W. Front St., Boise, Idaho 83702

b. That Petitioner, Carlos Esquivel, is exempt from paying the estimated transcript fee because he is an indigent person.

c. That Petitioner, Carlos Esquivel, is exempt from paying the estimated fee for preparation of the record because he is an indigent person.

d. That service has been made upon all parties required to be served pursuant to Idaho Appellant Rules Rule 20 and the Attorney General.

DATED this 23rd day of October, 2008.

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of October, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor's Office 200 W. Front St., Rm. 3191 Boise, ID 83702	[ ] [X] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
Kim Madsen Court Reporter 200 W. Front St. Boise, ID 83702	[X] [X] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
Attorney General's Office Statehouse, Room 210 P.O. Box 83720 Boise, ID 83720-0010	[X] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
State of Idaho Office of State Appellant Public Defender 3647 Lake Harbor Ln. Boise, ID 83703	[X] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

ORIGINAL

NO. _____
FILED
A.M. _____ P.M. 4:00
OCT 24 2008
J. DAVID NAVARRO, Clerk
By BRADLEY J. THIES
DEPUTY

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, ID 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT 05-00561 **MOTION AND AFFIDAVIT TO APPOINT STATE APPELLATE PUBLIC DEFENDER**

COMES NOW the Petitioner, Carlos Esquivel, by and through his attorney of record, Layne Davis of Davis & Walker, conflict counsel for the Ada County Public Defender's Office, and hereby moves this Honorable Court to appoint the State Appellate Public Defender's Office to represent the above-named Petitioner in the above-entitled matter for the reasons set forth in this Affidavit attached hereto.

DATED this 23rd day of October, 2008.

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

STATE OF IDAHO)
)ss
County of Ada`)

LAYNE DAVIS, first being duly sworn upon oath, deposes and states as follows:

1. I am an attorney with Davis & Walker, conflict counsel for the Ada County Public Defender's Office, in this case.

2. Counsel for the above-named Petitioner filed a Notice of Appeal from the Order Denying Petition for Post-Conviction Relief, entered in the above-entitled action on October 23, 2008.

3. The general practice in the Ada County Public Defender's Office, as well as in our office as conflict counsel for the Public Defender, is to submit a Motion and Order appointing State Appellate Public Defender concurrently with filing the Notice of Appeal on appeals filed after September 15, 1998.

4. Ada County is participating fully in the State Appellate Public Defender program.

5. Petitioner is entitled to counsel on appeal and is entitled to the services of the State Appellate Public Defender.

DAVIS & WALKER

By_____
Layne Davis
Conflict Counsel for Petitioner

SUBSCRIBED AND SWORN TO before me on this 23rd day of October, 2008.

JENNIFER CHARTERS NOTARY PUBLIC OF IDAHO

_____
NOTARY PUBLIC for IDAHO
Residing at: Ada County
My Commission Expires: 2/1/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of October, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor's Office 200 W. Front St., Rm. 3191 Boise, ID 83702	[ ] [X] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
Kim Madsen Court Reporter 200 W. Front St. Boise, ID 83702	[X] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
Attorney General's Office Statehouse, Room 210 P.O. Box 83720 Boise, ID 83720-0010	[X] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL
State of Idaho Office of State Appellant Public Defender 3647 Lake Harbor Ln. Boise, ID 83703	[X] [ ] [ ] [ ]	U.S. MAIL HAND DELIVERED FACSIMILE OVERNIGHT MAIL

DAVIS & WALKER

By _____
Layne Davis
Conflict Counsel for Petitioner

ORIGINAL

NO. _____
A.M. 10 — FILED
P.M. _____

OCT 28 2008

J. DAVID NAVARRO, Clerk
By J. WEATHERBY
DEPUTY

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
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Conflict Counsel for Petitioner

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

CARLOS ESQUIVEL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT 05-00561 **ORDER APPOINTING STATE APPELLATE PUBLIC DEFENDER ON DIRECT APPEAL**

The above-named Petitioner, Carlos Esquivel, being indigent and having heretofore been represented by the Ada County Public Defender's Office in the District Court, and said Petitioner/Appellant having elected to pursue a direct appeal in the above-entitled matter;

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that the Idaho State Appellate Public Defender is appointed to represent the above-named Petitioner/Appellant, Carlos Esquivel, in all matters pertaining to the direct appeal.

DATED this 28th day of October, 2008.

BY Cheri Copsey
The Honorable Judge Cheri Copsey

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

CARLOS ESQUIVEL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35792 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 8th day of December, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICTOF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CARLOS ESQUIVEL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35792 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

STATE APPELLATE PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
BOISE, IDAHO

LAWRENCE G. WASDEN
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: DEC 0 9 2008

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

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

CARLOS ESQUIVEL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35792 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 24th day of October, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL