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# Esquivel v. State Respondent's Brief Dckt. 35792

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

CARLOS ESQUIVEL, )

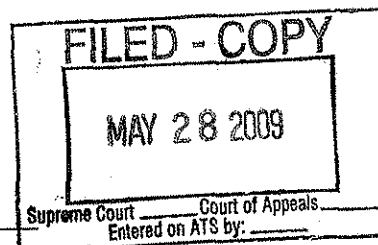
Petitioner-Appellant, )

NO. 35792

vs. )

STATE OF IDAHO, )

Respondent. )



**BRIEF OF RESPONDENT**

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

**HONORABLE CHERI C. COPSEY  
District Judge**

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## STATEMENT OF THE CASE

### Nature Of The Case

Carlos Esquivel appeals from the order of the district court summarily dismissing his second amended petition for post-conviction relief.

### Statement Of The Facts And Course Of The Underlying Criminal Proceedings

The factual background and course of the criminal proceedings are set forth by the Idaho Court of Appeals in State v. Esquivel, Docket No. 30424, 2004 Unpublished Opinion, No. 706, \*1-2 (Idaho Ct. App. December 2, 2004) (referred to herein as "Esquivel I"):

The victim in this case was a close friend of Esquivel's stepdaughter. Between 1999 and June 2001, when the victim was approximately eight and nine years old, Esquivel repeatedly engaged in lewd conduct with the victim when she visited Esquivel's home. The victim disclosed this conduct to a family friend in 2002 and authorities were notified. As a result, 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 minor under the age of sixteen, I.C. § 18-1506. Esquivel denied all allegations, and the case proceeded to trial. Following verdicts of guilty on all charges, Esquivel filed a motion for acquittal, alleging that there was insufficient evidence to support the jury's verdicts as to counts one and three--that Esquivel had genital-to-genital contact with the victim. [footnote omitted] The district court denied Esquivel's motion. 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 a Rule 35 motion requesting reduction of his sentences, which was denied. Esquivel appeals, arguing that the district court erred in denying his motion for judgment of acquittal, that his sentences are excessive, and that the denial of his Rule 35 motion was in error.

The court of appeals affirmed the trial court's denial of Esquivel's motion for acquittal, explaining:

The victim testified that she frequently spent the night at Esquivel's home and that on these visits, she would sleep on her stomach in a bed by herself. During the night, Esquivel would enter the room without clothing, pull down the victim's pajamas, lay on top of her, and "use his private to touch hers." The victim testified that Esquivel rubbed his private on her bottom and indicated that by "private," she meant Esquivel's penis and that by "bottom," she meant in between her legs. The victim responded affirmatively when the prosecutor asked her whether in between her legs also was called "vagina." However, the victim further stated that Esquivel placed his penis between her legs, that she did not feel his penis touching her vaginal area, and that he would rub his penis between her legs where her bottom was. On cross-examination, Esquivel attempted to clarify whether the victim meant the "part she poops with" or the "part she pees with" when testifying about her bottom.

Esquivel asserts that, although the victim's testimony supports the claim Esquivel had contact with the victim's anus, it was unreasonable for the jury to conclude that Esquivel had contact with the victim's genital area. We disagree. Genitalia is defined as "the organs of the reproductive system; esp[ecially]: the external genital organs." WEBSTER'S NEW INTERNATIONAL DICTIONARY 946 (3d ed. 1993). Therefore, the victim's statement that she did not feel Esquivel touch her vagina is not inconsistent with genital-to-genital contact having occurred. Further, the jury could have reasonably concluded that, when Esquivel rubbed his penis in between the victim's legs, Esquivel's genitals came into contact with the genitals of the victim. Finally, the jury could have also reasonably concluded that the victim, who was eleven years old at the time of trial, possessed an unsophisticated understanding of human anatomy and was confused and embarrassed when trying to clarify where Esquivel touched her. It was within the province of the jury to decide what inferences were to be drawn from the evidence and to resolve any conflicts in the testimony. We conclude that there was substantial evidence to support the jury's finding that Esquivel had genital-to-genital contact with the victim. Therefore, the district court did not error in denying Esquivel's motion for judgment of acquittal.

(Esquivel I, pp.3-4.) The court of appeals affirmed Esquivel's concurrent unified sentences of thirty years, with fifteen years fixed, and the trial court's order denying Esquivel's motion for reduction of sentence. (Esquivel I, pp.4-5.)



### Statement Of The Facts And Course Of Prior Post-Conviction Proceedings

On July 13, 2005, Esquivel filed a petition for post-conviction relief, alleging seventeen claims of ineffective assistance of counsel (#32689 R., pp.4-10), and a motion for appointment of counsel (#32689 R., pp.41-44). The district court denied Esquivel's motion for appointment of counsel (#32689 R., pp.53-61), concluding: "[B]ased on the record, Esquivel's Petition and the law, the Court finds that the Petition is frivolous on its face and is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." (#32689 R., p.60 (internal citation and repeated text omitted).)

Esquivel subsequently filed an amended petition for post-conviction relief, alleging six claims of ineffective assistance of trial counsel: (1) failing to request an order for a polygraph examination (#32689 R., pp.73, 74); (2) failing to "subpoena witnesses, introduce props, and abuse of discretion" (#32689 R., pp.73, 74-75, 79); (3) failing to ask CARES unit staff about the number of interviews in sex abuse cases each had conducted and the use of stuffed animals rather than anatomically correct dolls in the CARES video (#32689 R., pp.73, 75-80); (4) failing to object to the use of stuffed animals in the CARES video; (5) failing to request an independent expert on the frequency of children's false abuse claims (#32689 R., pp.73, 80); and (6) failing to request an independent psychosexual evaluation (#32689 R., pp.73, 80-82). Esquivel also alleged his appellate counsel was ineffective in not arguing abuse of discretion on appeal. (#32689 R., pp.74, 82.) Esquivel filed a renewed motion for appointment of counsel (#32689 R., pp.84-86), which the district court denied,

concluding, in light of the record of the criminal case, that Esquivel's amended petition was frivolous and the court "does not find any claim of possible merit has been alleged" (#32689 R., pp.93-100). The district court gave notice of its intent to dismiss the amended petition (#32689 R., pp.108-117), and two-and-one-half months later, the district court summarily dismissed Esquivel's petition (#32689 R., pp.132-142).

Esquivel appealed, arguing the district court erred in denying his motion for appointment of counsel because two of his arguments raised the possibility of valid claims that entitled him to counsel. (#32689 R., pp.159-164) In State v. Esquivel, Docket No. 32689, 2007 Unpublished Opinion No. 541 (Idaho Ct. App. August 3, 2007) (referred to herein as "Esquivel II"), the court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. The court concluded 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 II, pp.7-8.) The court did conclude, however, that the district court erred in denying Esquivel's request for appointment of counsel to assist him in pursuing his claim of ineffective assistance of counsel regarding his claim that his attorney should have requested an independent psychosexual evaluation. (Esquivel II, pp.7-8.) Specifically, the court found the district court erred because Esquivel's application "allege[d] facts which raise the possibility of a valid ineffective assistance of counsel claim in regard to his psychosexual evaluation." (Esquivel II, p.8.) The court of appeals reasoned that Esquivel's

"application alleges facts indicating the possibility that his court-ordered psychosexual evaluation was inadequately conducted" and that "[t]he 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 the sentence." (Esquivel II, pp.6-7.)

As a result, the court of appeals reversed "the district court's summary dismissal and denial of counsel as to this claim" and instructed the "district court to appoint counsel to assist Esquivel in pursuing the post-conviction claim that his counsel was ineffective for failing to arrange an independent psychosexual evaluation or otherwise mitigate the effects of the court-ordered evaluation." (Esquivel II, p.7.)

#### Statement Of The Facts And Course Of Current Post-Conviction Proceedings

On remand, the district court appointed counsel, who filed an amended post-conviction petition alleging ineffective assistance of counsel because trial counsel failed to properly advise Esquivel regarding his Fifth Amendment rights in submitting to a psychosexual evaluation. (#35792 R., pp.25-27.) In response, the state conceded "the defense attorney in this case did not advise [Esquivel] of [his] Fifth Amendment Right to silence during the psychosexual examination." (#35792 R., p.35.) The state asserted, however, that Esquivel's claim should be dismissed because Esquivel failed to meet his burden of showing prejudice "as a result of that failure by defense counsel." (#35792 R., p.35.)

On July 15, 2008, following briefing, the district court filed an Order Conditionally Dismissing Second Amended Petition For Post-Conviction Relief. (#35792 R., pp.66-77.) In that order the district court noted "Esquivel made no incriminating statements to the psychosexual evaluator and, in fact, he continued to deny responsibility, just as he had at trial" and that the "statements he made to the examiner were consistent with those made at trial." (#35792 R., p.68.) The district court further concluded "the Court learned nothing it did not already know" in reviewing the psychosexual evaluation and, therefore, that Esquivel had not shown a reasonable probability that, "but for his trial counsel's professional errors, the result of the proceeding would have been different as required by *Strickland*." (#35792 R., p.77.) In his response to the order, Esquivel did not directly address the district court's conditional dismissal, but rather "adopt[ed] all prior pleadings and arguments advanced by the Petitioner in support of the Petition for Post-Conviction Relief . . . ." (#35792 R., p.79.)

On September 16, 2008, the district court dismissed Esquivel's second amended petition. (#35792 R., pp.81-94.) The district court specifically stated that although it mentioned the psychosexual evaluation at sentencing it did not rely on the report. (#35792 R., p.92.) The trial court explained:

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.

(#35792 R., p.92 (emphasis in original).) Accordingly, the district court dismissed Esquivel's post-conviction petition. (#35792 R., p.93.)

Esquivel timely appealed. (#35792 R., p.95.)

## ISSUES

Esquivel states the issues on appeal as:

1. Does the law of the case doctrine prohibit the district court from deciding in direct opposition to the Court of Appeals' holding that counsel's deficient performance was not prejudicial?
2. In the first alternative, given the record, did the district court *err in determining that counsel's deficient performance was not prejudicial?*
3. In the second alternative, should this case be analyzed, not as an ineffective assistance of counsel case, but rather as a case involving a denial of the state and federal constitutional rights against compelled testimony, and under such analysis, is reversal required because the state cannot show beyond a reasonable doubt that denying Carlos his constitutional right to remain silent was harmless error?

(Appellant's Brief, p.6.)

The state rephrases the issues as:

1. Has Esquivel failed to establish that the district court committed reversible error in summarily dismissing his claim for post-conviction relief?
2. Esquivel claims the district court erred because his attorney's failure to advise him prior to taking the psychosexual is not ineffective assistance of counsel but an independent violation of his right to silence. Where Esquivel failed to raise this claim below, should this Court decline to consider the merits? Alternatively, even if Esquivel had raised this issue below, has Esquivel failed to show that his right to remain silent was violated or that the deprivation was not harmless?

## ARGUMENT

### I.

#### The District Court Properly Determined That Esquivel Failed To Meet His Burden Of Establishing Prejudice

##### A. Introduction

Esquivel contends the district court's determination that Esquivel was not prejudiced by his trial counsel's failure to advise him of his right to remain silent during his psychological evaluation was in error. Esquivel makes two arguments regarding this claim. First, Esquivel argues the Idaho Court of Appeals already ruled on the issue and, therefore, under the law of the case doctrine, the district court was precluded from concluding there was no prejudice. (Appellant's Brief, pp.6-9.) Second, Esquivel argues the district court's determination that there was no prejudice is clearly erroneous. (Appellant's Brief, pp.9-10.) Both claims fail.

Esquivel's argument that the law of the case doctrine applies fails because the Idaho Court of Appeals did not articulate a principle or rule of law that controls the present issue. Here, under the summary dismissal standard, it was Esquivel's burden to show that his sentence would have been different if he would have been advised of his rights prior to his completing the psychosexual evaluation. The court of appeals did not previously address whether Esquivel had met this burden.

Esquivel's argument that he established a claim of prejudice fails because the district court's determination that Esquivel failed to meet his burden of showing that his sentence would have been different had he been informed of his

rights regarding the psychosexual evaluation was correct. Esquivel failed to present evidence creating a material issue of fact on whether he would have received a different sentence had he been advised of his rights prior to completing the psychosexual evaluation. The district court explicitly stated in its order summarily dismissing Esquivel's claim, that "[t]he psychosexual evaluation did not increase or reduce [Esquivel's] sentence." (#35792., p.92.) Accordingly, Esquivel's claims of error are without merit.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. The Law Of The Case Doctrine Is Not Applicable Where The Idaho Court Of Appeals' Determination Was Made Pursuant To A Different Legal Standard Applied To A Different Legal Issue

Esquivel first argues that the district court's determination that there was no prejudice was in error because, he claims, the Idaho Court of Appeals already ruled on the matter. (Appellant's Brief, pp.6-9.) Esquivel claims that pursuant to the "law of the case" doctrine, the district court was required to find prejudice because of this Court's prior ruling that Esquivel raised "the possibility of a valid



claim.” (Esquivel II, p.5.) Esquivel’s argument lacks factual and legal merit. Esquivel mistakenly believes that by meeting the low burden for having counsel appointed, he has also met the higher and different burden necessary to avoid summarily dismissal.

The “law of the case” doctrine provides that when an appellate court, “in deciding a case presented, states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.” Taylor v. Maile, --- Idaho ---, ---, 201 P.3d 1282, 1286 (2009) (citing Suitts v. First Sec. Bank of Idaho, N.A., 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985)).

As a threshold matter, there is no “principle or rule of law” articulated by the Idaho Court of Appeals that is contrary to the district court’s ruling that Esquivel had failed to meet his burden of showing, by competent evidence, that his attorney’s claimed deficiency resulted in a different sentence. The issue and associated burden at play in the earlier proceeding was different than the issue and associated burden presented by Esquivel’s second amended petition.

The issue before the Idaho Court of Appeals in Esquivel II was whether Esquivel was entitled to appointment of counsel. In order to prevail on this claim, Equivel was required to raise the mere possibility of a valid claim: “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 v. State, 140

Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The result of meeting this standard -- by alleging facts that raise the mere *possibility* of a valid claim -- is that counsel is appointed to help the petitioner meet the next, different standard required to be met to continue prosecuting his claim -- to submit verified facts within his personal knowledge and produce admissible evidence sufficient to establish a *prima facie* case as to each essential element of the claim. See Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998) ("A claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 if the applicant "has not presented evidence making a *prima facie* case as to each essential element of the claims upon which the applicant bears the burden of proof.")

Furthermore, even where the applicant does submit *competent evidence*, a *district court* may also grant summary dismissal where post-conviction allegations are affirmatively disproved by the record. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Small v. State, 132 Idaho 327, 333-34, 971 P.2d 1151, 1157-58 (Ct. App. 1998).

Thus, before the district court, where the present assertion is ineffective assistance of counsel and Esquivel's claim is that he was prejudiced by his attorney's failure to advise him of his right to remain silent during the psychosexual evaluation, Esquivel's burden is to demonstrate this prejudice by a preponderance of evidence with *competent evidence*. Because it is possible to assert facts that establish the *possibility* of a claim of ineffective assistance of counsel and still not establish that claim by preponderance of evidence and with *competent evidence*, the district court's ruling is not in contradiction with the

Idaho Court of Appeals' opinion. As such the "law of the case" doctrine is not applicable and Esquivel's claim fails.

D. The District Court's Determination That Esquivel Did Not Meet His Burden Of Submitting Facts Supporting His Claim Is Correct

Esquivel also contends the district court erred in determining that Esquivel failed to establish a prima facie claim of prejudice from his counsel's claimed deficient performance. Idaho Code § 19-4906(c) authorizes a district court to summarily dismiss a post-conviction petition upon motion by a party if it appears there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In order to survive summary dismissal, a post-conviction petitioner must present evidence in support of his petition sufficient to make "a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998).

In determining whether an applicant's claim for post-conviction relief is subject to summary dismissal, the court is not required to accept a petitioner's factual allegations under three circumstances. First, the court is not required to accept an applicant's mere conclusory allegations, unsupported by admissible evidence. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); State v. Roman, 125 Idaho 646, 647, 873 P.2d 898, 901 (Ct. App. 1994). To the contrary, it is always the applicant's burden to place in evidence the affidavits, records (including all relevant transcripts) or other evidence supporting his post-conviction claims. I.C. § 19-4903; Roman, 125 Idaho at 648, 873 P.2d at 902.

Second, allegations need not be accepted where they are affirmatively disproved by the record of the original criminal proceedings. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Small v. State, 132 Idaho 327, 333-34, 971 P.2d 1151, 1157-58 (Ct. App. 1998). Thus, a district court properly dismisses a petition where at least one element the petitioner must establish is “clearly disproved” by the record of the underlying criminal case. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Chouinard v. State, 127 Idaho 836, 839, 907 P.2d 813, 816 (Ct. App. 1995); Remington v. State, 127 Idaho 443, 446-47, 901 P.2d 134, 137-38 (Ct. App. 1995).

Finally, because the judge in a post-conviction proceeding “will be the trier of fact in the event of an evidentiary proceeding, summary disposition is possible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences.” Hayes v. State, 146 Idaho 353, \_\_\_, 195 P.3d 712, 714 (Ct. App. 2008).

Application of these legal principles to this case shows that Esquivel has failed to show reversible error. As set forth above, the district court recognized that at sentencing it had mentioned that it had read the psychosexual evaluation in preparation for sentencing and that this was the factual basis that Esquivel was relying on to establish prejudice. (#35792 R., pp.92-93.) The district court explained that just because it reviewed the psychosexual report, “does not mean, however, [that] those items [in the report] become factors in the sentence.” (#35792 R., p.92.) Indeed, the district court specifically stated that it “determined

Esquivel's sentence based on the testimony he gave and the evidence produced at trial and *not* on the psychological evaluation" (#35792 R., p.92 (emphasis added)), and that the psychosexual told the Court "nothing it did not already know" from the trial (#35792 R., p.77). Accordingly, the district court determined that Esquivel was not prejudiced by anything in the psychosexual evaluation and that his attorney's failure to inform him of his rights prior to completion of that evaluation did not constitute facts establishing a reasonable probability that but for counsel's deficient performance the results of the sentencing hearing would have been different. (#35792 R., p.77.).

Esquivel has failed to show how this determination was in error. As explained by the district court, the fact that the district court mentioned having reviewed the psychosexual report is simply not a factual basis sufficient to meet his burden of establishing prejudice. As explained by the district court, the mere fact that a report is mentioned does not mean that the district court considered the report in determining the sentence. (#35792 R., p.92.) Courts review many documents, reports, and letters prior to sentencing and just because the court states that it has reviewed these items does not necessarily mean that the document report or letter influenced the final judgment of the court. Consequently, Esquivel has failed to meet his burden of establishing a prima facie case of ineffective assistance of counsel because he has failed to allege facts that create an issue of fact on the question of prejudice. The fact that the state cited the report and that the court mentioned that it had reviewed it in preparation for the hearing does not create a genuine issue of material fact.

Additionally, the district court's ruling clearly explained that the court did not consider the information in the psychosexual report in sentencing him: "This Court determined Esquivel's sentence based on the testimony he gave and the evidence produced at trial and not on the psychological evaluation." (#35792 R., p.92.) Further, the court found that the psychosexual evaluation did not provide the Court with any information "it did not already know from the trial." (#35792 R., p.77.) Consequently, to the extent any inference of prejudice could be made from mention of the psychosexual evaluation by the district court or by the prosecutor, the district court itself "clearly disproved" that claim.

Moreover, regardless of the district court judge's affirmative statement that it did not consider the psychosexual evaluation, the district court judge would also have been the judge at an evidentiary hearing. Consequently, the judge was free to grant summary disposition "despite the possibility of conflicting inferences to be drawn from the facts," in this case the fact that the psychosexual evaluation was referenced by the court. See Hayes, 146 Idaho at \_\_\_\_, 195 P.3d at 714. Thus, even if there were conflicting inferences that could be drawn from the fact that trial court mentioned the psychosexual evaluation, it was entirely proper for the district court, the court that actually imposed the sentence as well as the court that would hold the evidentiary hearing, to resolve those inferences.

In sum, Esquivel's allegations that he was prejudiced by his attorney's failure inform him of his rights prior to the psychosexual evaluation fail because they do not show his sentence would have been any different. His claim that the district court considered the psychosexual evaluation and that consideration

prejudiced him, was affirmatively disproved by the underlying criminal record and was based on inferences properly rejected by the district court. Thus, the district court properly dismissed his petition.

## II.

### Esquivel Failed To Preserve An Independent Constitutional Issue For Appeal And, Even If He Had, That Argument Lacks Basis In Law

#### A. Introduction

In addition to arguing the district court erred in summarily dismissing Esquivel's petition, Esquivel also asserts, for the first time on appeal, that his right to remain silent was violated: "[T]he denial must also be reversed because . . . the error in denying Carlos [Esquivel] his right to remain silent must be analyzed under the constitutional error standard . . ." (Appellant's Brief, p.10.) Esquivel argues that this was not an ineffective assistance of counsel claim but a constitutional violation that merely required him to show a deprivation of that right occurred, shifting the burden to the state to show harmless error. (Appellant's Brief, p.10.) This Court should decline to consider the merits of Esquivel's claim because, as a threshold matter, Esquivel never asserted his "right to remain silent" was violated below. Additionally, even if Esquivel had raised this issue below, Esquivel's allegations do not show his right to remain silent was violated and, even if it were, the deprivation was harmless.

#### B. Esquivel Failed To Raise A Right To Remain Silent Claim Below And, Therefore, Failed To Preserve The Issue For Appeal

It is a long-standing rule in Idaho that an appellate court will not consider issues, including constitutional issues, which are presented for the first time on

appeal. State v. Martin, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991); State v. Mauro, 121 Idaho 178, 181, 824 P.2d 109, 112 (1991); Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998); State v. Smith, 130 Idaho 450, 454, 942 P.2d 574, 578 (Ct. App. 1997). Failure to raise an issue in the district court, thereby denying the trial court the opportunity to rule on the alleged error, constitutes a waiver of those issues on appeal. Martin, 119 Idaho at 579, 808 P.2d at 1324; Mauro, 121 Idaho at 181, 824 P.2d at 112; Smith, 130 Idaho at 454, 942 P.2d at 578.

A review of the record shows Esquivel never claimed that his “right to silence” was violated. Esquivel’s second amended petition specifically argued “ineffective assistance of counsel” claiming “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.” (#35792 R., p.26.)

There was no “right to silence” claim or any independent constitutional violation asserted. Consequently, the district court never ruled on the matter and there was no factual development of this claim at the district court level. Having failed to even alert the district court to this claim, much less provide the district court the opportunity to address the alleged claim, Esquivel failed to preserve his claim of error for appellate review.

C. Even If Esquivel Had Preserved A Separate Constitutional Claim, The Claim Has No Basis In Law And To The Extent That It Has A Basis, The Claimed Error Was Harmless

Even if Esquivel preserved this argument it is an argument without basis in law. In support of his claim that his attorney’s failure to advise him is not a



proper ineffective assistance of counsel claim but an independent constitutional violation, Esquivel relies on State v. Darbin, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985). In Darbin, on direct appeal, the defendant asserted ineffective assistance of counsel claiming his attorney deprived him of “the right to testify on his own behalf.” Id. at 520, 708 P.2d at 925. The Idaho Court of Appeals determined that a claim regarding a defendant’s right to testify was not a proper ineffective assistance of counsel claim because “the decision whether a defendant should testify in his own behalf was personal to the defendant and could not be made by his counsel as a matter of trial strategy.” Id. at 521, 708 P.2d at 926. Accordingly, the court of appeals concluded that the claim was not a claim of ineffective assistance of counsel and, as a result, should be evaluated as an independent constitutional violation.

Here, however, there is no invasion on any decision that Esquivel alone was required to make, e.g., whether he would testify at trial. It is uncontroverted that Esquivel’s claim is based on Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006). Indeed, it was the only authority cited by Esquivel in his amended second petition. (#35792 R. p.26.) Estrada, however, did not deal with an individual’s right to testify, but rather a defendant’s right to be advised by counsel prior to taking a psychosexual examination. In fact, the Idaho Supreme Court was explicit that its ruling was “limited to the finding that a defendant has a Sixth Amendment right to counsel regarding only the decision of whether to submit to a psychosexual exam.” Id. at 562, 149 P.3d at 838. Furthermore, the Idaho Supreme Court made clear that an Estrada violation was properly considered an

ineffective assistance claim: "We affirm the district court's conclusion that Estrada's attorney was deficient in failing to inform his client of this right." Id. at 564, 149 P.3d at 839. Consequently, because Esquivel's "right to testify" was not implicated and because the Idaho Supreme Court has evaluated this right only in the context of ineffective assistance of counsel, there is no legal basis for Esquivel's claim of error.

Even if Esquivel could establish a constitutional violation regarding his psychosexual evaluation, thereby shifting the burden to the state to show harmless error, that burden has been met. Error is not reversible unless it is prejudicial. State v. Stoddard, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. Id. Thus, courts examine whether the alleged error complained of is harmless. See State v. Poland, 116 Idaho 34, 37, 773 P.2d 651, 654 (Ct. App. 1989). An error is harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury [or fact finder] would have reached the same result absent the error. State v. Boman, 123 Idaho 947, 950-51, 854 P.2d 290, 293-94 (Ct. App. 1993). In sentencing, error is harmless "if it is plain from the judge's reasoning that the result would not change or if it appears that any different result would represent an abuse of the judge's discretion." Id.


In this case, as set forth above, there was no prejudice and no harm resulting from the claimed error. It is clear from the district court's statements that its sentencing decision was not based on the psychosexual evaluation but on other factors. The sentencing court "determined Esquivel's sentence based

on the testimony he gave and the evidence produced at trial and *not* on the psychological evaluation.” (#35792 R., p.92 (emphasis added).) Consequently, regardless of any error associated with the psychosexual evaluation, the district court would have imposed the same sentence. Because the district court would have imposed the same sentence, there is no prejudice and any error claimed is harmless. Consequently, there is no basis for reversal.

#### CONCLUSION

The state respectfully requests this Court to affirm the district court's orders dismissing Esquivel's second amended petition for post-conviction relief.


DATED this 28th day of May 2009.

  
DANIEL W. BOWER  
Deputy Attorney General

#### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of May 2009, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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