3-7-2012

Dursunov v. State Respondent's Brief Dckt. 38885

IN THE SUPREME COURT OF THE STATE OF IDAHO

ILDAR DURSUNOV,	)	
	)	
Petitioner-Appellant,	)	NO. 38885
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Ildar Dursunov appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The Idaho Court of Appeals previously related the factual background of this case as follows:

> The fourteen-year-old victim in this case stated that Dursunov, who was twenty-one, invited her to a party where he served her alcohol and then had sexual intercourse with her. Dursunov was charged with, and pleaded guilty to, lewd conduct with a minor under sixteen, Idaho Code § 18-1508.
>
> Before sentencing, the district court ordered a psychosexual evaluation. Dursunov, whose native language is not English, was provided a Russian interpreter for the psychosexual examination that included a polygraph test. At sentencing, Dursunov told the district court judge that he disagreed with the characterization of some of his words at the psychosexual examination but made it clear that he was not contending the characterization of his words made the evaluation invalid. Dursunov was sentenced to a twenty-year term of imprisonment with six years determinate.
>
> Dursunov then filed an Idaho Criminal Rule 35 motion, arguing that his sentences were imposed in an illegal manner because the interpreter for his psychosexual evaluation was deficient and the polygraph was not performed properly. Additionally, Dursunov argued for leniency based on the same information and the testimony of a licensed professional counselor, Gail Ater, that Dursunov was amenable to rehabilitation.

(R., pp.77-78 (footnote omitted).) The district court denied Dursunov's Rule 35 motion (R., pp.114-25), and Dursunov appealed (R., pp.320-22). In an unpublished opinion filed on March 17, 2010, the Idaho Court of Appeals affirmed Dursunov's sentence and the district court's denial of his Rule 35 motion. (R., pp.77-84.)

Dursunov filed a petition for post-conviction relief on February 2, 2011, alleging numerous instances of ineffective assistance of trial counsel. (R., pp.4-8.) On March 31, 2011, the district court issued its notice of intent to dismiss Dursunov's petition. (R., pp.334-43.) On March 30, 2011, the state also moved the court for summary dismissal. (R., pp.148-66.) At a hearing on summary disposition held on May 9, 2011, the district court reiterated its grounds for dismissing the petition without an evidentiary hearing and summarily dismissed the petition. (Tr., p.5, L.20 – p.10, L.13; R., p.366.) Dursunov filed a timely notice of appeal. (R., pp.369-71.)

ISSUE

Dursunov states the issue on appeal as:

> Did the district court err when it summarily dismissed Mr. Dursunov's post-conviction claim?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Dursunov failed to show error in the district court's summary dismissal of his petition for post-conviction relief?

ARGUMENT

Dursunov Has Failed To Show Error In The District Court's Summary Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

The district court, adhering to the procedures set forth in Idaho Code § 19-4906, summarily dismissed Dursunov's petition for post-conviction relief. (R., p.366.) Dursunov argues that the district court erred in summarily dismissing his petition for post-conviction relief, asserting that he made a *prima facie* showing of ineffective assistance of counsel. (Appellant's brief, pp.9-14.) Application of relevant legal standards to the facts alleged in Dursunov's petition, however, shows that he failed to establish a *prima facie* case of ineffective assistance of counsel. His claims were either affirmatively disproved by the record or did not justify relief as a matter of law. The district court therefore properly dismissed Dursunov's petition for post-conviction relief.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file ...." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Properly Dismissed Dursunov's Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of

establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the "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)." Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that "specifically set[s] forth the grounds upon which the application is based." Id. (citing I.C. § 19-4903). "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

A district court may summarily dismiss a petition for post-conviction relief when it "is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief," by indicating its intention to dismiss and giving the parties an opportunity to respond within 20 days. I.C. § 19-4906(b). "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's

claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner's unrebutted allegations as true, 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. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

Dursunov's petition alleged that his attorney was ineffective for failing to inform him of his rights under Estrada v. State, 143 Idaho 158, 149 P.3d 833 (2006); for failing to obtain a confidential psychosexual evaluation prior to advising him to enter a guilty plea; for allowing the court-ordered psychosexual evaluation to be disclosed to the court without knowing its results; for failing to inform him that he could obtain his own confidential psychosexual evaluation; and for failing to object to Dr. Horton's psychosexual evaluation. (R., pp.4-7.)

Where the petitioner alleges entitlement to relief based upon ineffective assistance of counsel, he must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-

77 (1988). To show deficient performance, the petitioner must "overcome the strong presumption that counsel's performance was adequate by demonstrating 'that counsel's representation did not meet objective standards of competence.'" Vick v. State, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct. App. 1998) (quoting Roman v. State, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994). Appellate courts "will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." State v. Chapman, 120 Idaho 466, 469-470, 816 P.2d 1023, 1026-27 (Ct. App. 1991) (citing State v. Larkin, 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981); State v. Elisondo, 97 Idaho 425, 426, 546 P.2d 380, 381 (1976)). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 1485 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)). Application of these relevant legal standards shows that Dursunov failed to present a *prima facie* case that his attorney was ineffective.

The district court, after articulating the relevant legal standards, carefully addressed each of Dursunov's claims in its "Notice of Intent to Dismiss Post Conviction Petition," correctly explaining why each failed to establish ineffective assistance of counsel. (R., pp.334-43.) During a hearing on summary disposition, the district court

reiterated its positions on the various claims alleged in Dursunov's petition, and found additional support for its conclusions in Gonzales v. State, 151 Idaho 168, 254 P.3d 69 (Ct. App. 2011). (See Tr., p.6, L.3 – p.10, L.13.) Dursunov has failed to show error in the district court's application of the law to the facts alleged in his petition for post-conviction relief. The state adopts as part of its argument on appeal the district court's analysis as set forth at pages 5-10 of its well-reasoned notice of intent to dismiss, which is attached as "Appendix A."

On appeal, Dursunov argues that "his attorney was ineffective for failing to ensure that any psychosexual evaluation that he participated in was confidential unless and until he decided to disclose it to the district court and the State." (Appellant's brief, p.11.) Dursunov appears to be conflating multiple claims from his petition for post-conviction relief to arrive at this novel argument (see R., pp.4-8), which still fails to establish deficient performance. Dursunov pled guilty to lewd and lascivious conduct, a crime for which a court may order a psychosexual evaluation. I.C. § 18-8316. The psychosexual evaluation of which Dursunov complains was ordered by the district court. (See Order for Psychosexual Evaluation (Court's Exhibit 1).) Dursunov has failed to present any authority that an attorney is required, much less able, to prevent a court-ordered psychosexual evaluation in which a defendant voluntarily participates from being disclosed to the district court. Consequently, this argument is waived. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (arguments not supported by citations to authority are waived). Defendants do have a right under Estrada to not participate in court-ordered psychosexual evaluations, but the record clearly establishes that Dursunov's counsel made him aware of that right. (See 6/9/2008 Tr., p.10, Ls.15-

23 (Court's Exhibit 3).) Dursunov has failed to show deficient performance from any failure to prevent the court from receiving the evaluation it ordered.

Relying on Hughes v. State, 148 Idaho 448, 224 P.3d 515 (Ct. App. 2009), Dursunov also argues on appeal that the district court was incorrect to hold that he had failed to show prejudice. (Appellant's brief, pp.11-14.) Hughes is not applicable to this case. In Hughes, the defendant claimed that his counsel was deficient, *inter alia*, for failing to inform him of his right to remain silent. Hughes, 148 Idaho at 462-63, 224 P.3d at 529-30. Thus, the defendant's prejudice argument relied on the inference that, had he been properly informed, there would have been no psychosexual evaluation for the court to consider. Hughes is therefore inapposite to this case, where Dursunov was informed of his right to refuse to participate in the psychosexual evaluation, and then participated in that court-ordered exam.

Even were Hughes applicable to this case, Dursunov has still failed to establish prejudice. In Hughes, the Court concluded that three factors make up the prejudice determination in the context of psychosexual evaluations.

> The first factor is whether the content of the PSE itself is materially unfavorable.... If the PSE is not materially unfavorable, then the second prong of the Strickland standard has not been met. If the PSE is materially unfavorable to the applicant, the level of its negativity will then be weighed with two additional factors. The second factor is the extent of the sentencing court's reliance on the PSE if it can be demonstrated from the record. The third factor is the totality of the evidence before the sentencing court.

Id., at 464, 224 P.3d at 531. This three factor test, taken together, requires the petitioner to show "that there is a reasonable probability that the PSE resulted in a greater sentence." Id., at 465, 224 P.3d at 531.

Dursunov asserts that the court-ordered psychosexual evaluation was materially unfavorable. (Appellant's brief, p.12.) Even assuming unfavorability, Dursunov still failed to show that the district court extensively relied on the psychosexual evaluation. In fact, the record affirmatively disproves that the sentencing judge based its sentence primarily on the psychosexual evaluation. In its order denying Dursunov's Rule 35 motion, the sentencing judge explained, "there is nothing in Dr. Horton's evaluation or the polygraph which, if disregarded, would change the court's view [on the sentence imposed]." (R., p.119.) While the court had referenced the psychosexual evaluation at sentencing, its primary focus was on Dursunov's lack of remorse and deflecting blame for his conduct onto his child victim. (Id.) The court noted:

> While Horton's report references this fact, the report is not the sole source of such information. The letters from Dursunov's family and the court's conclusion that the family received its information from Dursunov himself provided ample evidence of Dursunov's lack of remorse and therefore, his lack of amenability to treatment.

(R., pp.119-20.)

Dursunov failed to present a *prima facie* case that his attorney was deficient and that he was prejudiced by any alleged deficiency. Dursunov therefore failed to establish a claim of ineffective assistance of counsel. The district court properly dismissed Dursunov's petition for post-conviction relief under Idaho Code § 19-4906, and its order summarily dismissing the petition should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Dursunov's petition for post-conviction relief.

DATED this 7th day of March, 2012.

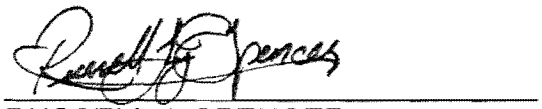
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of March, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm

APPENDIX A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Ildar Dursunov,

Petitioner,

vs.

State of Idaho,

Respondent.

Case No. CV 11-506

NOTICE OF INTENT TO DISMISS POST CONVICTION PETITION

INTRODUCTION

Petitioner Ildar Dursunov ("Dursunov") pled guilty to the charge of Lewd Conduct with a minor and was sentenced to a unified sentence of twenty years (six fixed, fourteen indeterminate) on October 20, 2008 by the Honorable Richard Bevan. He subsequently filed a Rule 35 Motion which was denied. Dursunov appealed his case and the Court of Appeals in an unpublished opinion filed on March 17, 2010 affirmed the sentence and the denial of his Rule 35 Motion. He timely filed his petition for post conviction relief on February 2, 2011 raising numerous issues concerning the performance of his attorney Dan Brown ("Brown"). He seeks to have his sentence modified to a unified sentence of 10 years, 2 years fixed, 8 years indeterminate.[1]

[1] Preliminarily the Court notes that it is without authority to grant this request even if Dursunov were to prevail on his ineffective assistance of counsel claims. At most the Court could grant Dursunov a new sentencing. The Court will assume that this is what the petitioner requests in this case.

GOVERNING AUTHORITY

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the 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; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The 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). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application 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 § 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 is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary

dismissal . . . 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." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

When considering dismissal of a post-conviction relief application without an evidentiary hearing, the Court must determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); *see also Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in

the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, 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. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

A claim of ineffective assistance of counsel may properly be brought under the Uniform 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). It is presumed that trial counsel was competent and that trial tactics were based on sound legal strategy. *State v. Wood,* 132 Idaho 88 (1988)

RECORD BEFORE THE COURT

Dursunov appends to his petition a transcript of his October 20, 2008 sentencing hearing, a transcript of his April 6, 2009 Rule 35 hearing and a copy of the aforementioned Court of Appeals decision affirming his sentence. This Court's pre-trial

procedural order directed that any amendments to the petition must be filed within 28 days of February 2, 2011. Petitioner has not sought to amend his petition. However, he has requested the Court take judicial notice of numerous documents filed in the underlying criminal case, including the PSI and Dr. Horton's psychosexual evaluation, Judge Bevan's Memorandum Decision denying Rule 35 relief, and affidavits of Dursanov's counsel Brown filed in support of that motion. The State's Answer contesting the petition was filed on March 14, 2011. The Court will take judicial notice of all of these documents, including those attached to the petition. In addition the Court, on its own motion, takes judicial notice of three other items from the underlying criminal file: the Guilty Plea Advisory Form filed June 9, 2008, the Court's Order for Psychosexual Evaluation, and a transcript of the Change of Plea hearing held on June 9, 2008. I.R.E. 201. These latter documents are marked as Court's Exhibits 1, 2, and 3 respectively for purposes of this file. The facts of this case will be discussed as they relate to each of Dursanov's claims.

PETITIONER'S CLAIMS

Dursunov is given notice of the reasons for the proposed dismissal of his petition as follows.

1. **Claimed Estrada Violation.**

Dursunov asserts: "Mr. Brown did not inform me of my right to continued silence under *Estrada v. State*, 143 Idaho 158, 149 P.3d 833 (2006)." This factual assertion is clearly contradicted by the record in this case. At the plea hearing Judge Bevan advised Dursunov that the Court would order a PSI and a Psychosexual Evaluation. The Court specifically asked Dursunov through the interpreter: "And has Mr. Brown talked to you

about you right to remain silent and not speak to an evaluator or to assist in the PSI process." He responded "Yes." His confirmation shows compliance with the *Estrada* rule and forms no basis for post-conviction relief.

2. **Failure to obtain confidential psychosexual evaluation prior to advising to enter a plea of guilty.**

Dursunov asserts that Brown should have obtained a confidential psychosexual evaluation prior to advising him to enter a plea of guilty. Implicit in this assertion is that such an evaluation would have either been very beneficial to Dursunov or conversely that it would have been very detrimental. The plea in this case was not entered pursuant to a sentencing plea bargain. The Court is not aware of any law that requires defense counsel to obtain psychosexual evaluations prior to advising defendants to enter a plea in a sex case. Nor is the Court aware of any standards applicable in these types of cases that recommend that counsel obtain such evaluations. It was clear that this was an "open recommendation" plea bargain. If Dursunov had obtained such an evaluation for use in the plea bargaining process and had it been "detrimental" surely counsel would not have disclosed that to the State. If he had, surely it would not have resulted in a favorable recommendation from the State. If the evaluation had been "favorable" the Court finds that it would have made little difference in this case. The Court ordered evaluation recommended the "rider" program. The "favorable" recommendation of Mr. Ater presented at the Rule 35 hearing recommended "probation." Judge Bevan rejected both recommendations and imposed a penitentiary sentence primarily due to the seriousness of this offense and Dursanov's lack of acceptance of responsibility. The decision to obtain or not obtain such an evaluation prior to advising a defendant to enter a guilty plea is clearly a strategy decision and does not under the facts of this case

constitute ineffective assistance of counsel. Assuming *arguendo* that it does, the Court finds no prejudice to Dursunov. The State had a prosecutable case. Dursunov has made no showing that a "favorable" evaluation would have deterred the State from insisting on a plea of guilty regardless of the recommendations of an evaluator. Similarly, he has made no showing that such an evaluation would have in any way affected the sentence ultimately imposed. Moreover, Dursunov stated at the time of his plea that there was not anything that he asked his attorney to do that was not done. The written guilty plea advisory form (Question 51) confirmed that he was satisfied with his attorney's representation. The Court finds there is no merit to this portion of Dursanov's claim.

3. **Turnover of Report without knowing results thereof**.

Dursunov asserts that "Mr. Brown agreed to turn over the results of the court-ordered psychosexual evaluation without knowing what the results would be" citing *State v. Wood*, 132 Idaho 88 (1998). In *Wood* the defendant requested Court appointment of a psychiatrist. Upon pleading guilty, the Court, without objection from Wood's counsel, ordered that the psychiatrist's report, the contents of which were unknown to the defendant, be included in the PSI. The psychiatrist testified at sentencing at the request of the State unfavorably to Wood. The Supreme Court found Wood's counsel's actions in failing to object to the Court's order to include the psychiatric exam in the PSI to constitute ineffective assistance which was prejudicial to Wood. *Wood* does not provide authority for what occurred in this case. The sentencing court is vested with the discretion to order a psychosexual evaluation in cases involving lewd conduct with a minor. I.C. §18-8316. If ordered the defendant shall submit to such

an evaluation, subject of course to the protections articulated in *Estrada*. Once ordered, the evaluation must be submitted to the Court. Had Mr. Brown objected to "turning over" the results of the evaluation, his objection would have been futile. Certainly he could have objected to the contents of the evaluation. To the extent he did based upon the "language" issue, which has been addressed on appeal and does not afford Dursunov a basis for post-conviction relief. The Court finds no merit to this claim.

4. **Failure to inform defendant that he could have his own confidential psychosexual evaluation.**

Dursunov asserts: "Mr. Brown did not inform me that I could have my own confidential psychosexual evaluation." This is an undisputed factual assertion in the record. For many of the reasons set forth above, again assuming *arguendo* that this constitutes ineffective assistance of counsel, Dursunov has failed to establish how this prejudiced him in this case. He does state that had he been so informed he would have obtained such an evaluation. He does not state that he would not have plead guilty. Nor does he offer any evidence of what such an evaluation would have established. It appears that the "confidential evaluation" that he would have sought would have come from Gail Ater. To that extent, the results of Mr. Ater's limited evaluation were presented at the Rule 35 hearing. The only significant distinction between the two evaluations was the evaluator's conclusion as to the degree of risk of re-offense: moderate to high from Dr. Horton; moderate to low from Mr. Ater. It is clear from the sentencing record that Judge Bevan, while recognizing that Dr. Horton's evaluation was somewhat unfavorable, sentenced Dursunov to the penitentiary for reasons beyond consideration of his amenability for treatment. Dursunov has failed to establish entitlement to post-conviction relief for this claim.

5. **Confidentiality of Dr. Horton's report**.

Dursunov seems to claim that he was entitled to have a confidential evaluation from Dr. Horton. If that is his claim, it is without merit. The Court ordered the evaluation. As such, it is not confidential. Dursunov had no right to claim confidentiality of a court ordered evaluation. Nor did he have the right to preclude the Court from considering its own court ordered evaluation. Mr. Brown would not have prevailed on such an objection even if he had made it. This claim does not entitle Dursunov to post conviction relief.

6. **Failure to object to Dr. Horton's evaluation**.

The record before this Court does support Dursanov's assertion that Mr. Brown did not object to Dr. Horton's evaluation. Judge Bevan addressed all of the issues concerning the "language" issue in his Memorandum Opinion Denying Rule 35 relief and as stated this decision was affirmed on appeal. In that opinion the Court stated: "Nevertheless, even if the court were to consider Dursanov's changed position now, after sentence was pronounced, there is nothing in in Dr. Horton's evaluation or the polygraph which, if disregarded would change this court's view. This Court did reference Horton's evaluation, and perhaps the polygraph, during its sentencing colloquy. However, the court's primary focus was that Dursunov lacked remorse for his crime and was otherwise deflecting blame for his own conduct onto the child victim. While Horton's report references this fact, the report is not the sole source of such information." *Memorandum Decision and Order Denying I.C.R. 35 Motion, pgs. 6-7.* Had Mr. Brown made more specific objections to the "language" issue as it concerned the report and the polygraph, given Judge Bevan's statement quoted above, it is clear to this Court that there is not "a reasonable probability that the Court would have imposed a lesser

sentence if Mr. Brown had objected to Dr. Horton's report and the polygraph results at the sentencing hearing" as Dursunov alleges. Dursunov has not established the prejudice prong of *Strickland* that would entitle him to post-conviction relief.

CONCLUSION

The Court believes that it has addressed all of Dursanov's claims in this Notice. If it has not, then Dursunov is notified that he must more fully articulate his claims or his petition will be dismissed. The Court hereby gives notice of intent to dismiss this petition for the reasons set forth above with prejudice 20 days from the date hereof unless Dursunov presents materials to the Court which would cause reconsideration of the Court's intent to dismiss.

DATED this 31 day of March, 2010.

Randy J. Stoker
District Judge