4-7-2010

Gonzales v. State Appellant's Brief Dckt. 36625

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUAN MIGUEL GONZALES,	)	
	)	
Petitioner-Appellant,	)	NO. 36625
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

In an earlier criminal proceeding, Juan Gonzales pled guilty to a single count of lewd conduct with a minor. In that case, Mr. Gonzales' counsel never sought to obtain an independent (confidential) psychosexual evaluation for Mr. Gonzales, and he never advised Mr. Gonzales to exercise his Fifth Amendment right to silence and not participate in the court-ordered (unprivileged) evaluation. Consequently, Mr. Gonzales participated in the court-ordered evaluation, revealing a significant amount of highly prejudicial information. Based largely on this unfavorable evaluation, Mr. Gonzales received a prison sentence of twenty years, with five years fixed.

Subsequently, Mr. Gonzales initiated the present case by filing a petition for post-conviction relief and filing a motion seeking the appointment of post-conviction counsel. In his petition, Mr. Gonzales alleged that he had received ineffective assistance of counsel insofar as his attorney failed to obtain an independent (confidential) psychosexual evaluation or advise him not to participate in the court-ordered evaluation. However, the district court denied Mr. Gonzales' motion for appointment of counsel and summarily dismissed his petition for post-conviction relief.

On appeal, Mr. Gonzales asserts that the district court erred in denying his motion and dismissing his petition because, in fact, he presented *prima facie* evidence of ineffective assistance of counsel or, at the very least, the *possibility* of a valid claim of ineffective assistance of counsel. He asks that this Court vacate the district court's dismissal order and remand his case for an evidentiary hearing or, at a minimum, the appointment of post-conviction counsel.

Statement of the Facts and Course of Proceedings

On August 27, 2007, Juan Gonzales was charged with two counts of lewd conduct and one count of rape based on allegations that he had sexual contact with his teenage daughter. (No. 35211 R., pp.4-5.) Following a preliminary hearing, he was bound over on both counts of lewd conduct, as well as a reduced charged of *attempted* rape. (R., pp.30, 31-32.)

Approximately four months after he was originally charged (on or about January 4, 2008), Mr. Gonzales entered into a plea agreement whereby he pled guilty to a single count of lewd conduct with a minor, for manual-to-genital contact, and, in exchange, the other two charges were dismissed. (No. 35211 Plea Tr., p.3, L.17 – p.4, L.8, p.8, L.22 – p.9, L.15, p.13, L.19 – p.14, L.5.) Upon accepting Mr. Gonzales' plea, the district court ordered a pre-sentence investigation report, as well as a psychosexual evaluation; however, it also advised Mr. Gonzales of his right, based on the Fifth Amendment, not to participate in either. (No. 35211 Plea Tr., p.10, L.16 – p.11, L.8, p.14, L.11 – p.16, L.5; No. 35211 R., pp.40-41.) In response to the district court's order, Mr. Gonzales' counsel requested that the psychosexual evaluation be ordered to be performed by a Dr. Dodgen; however, the district court ordered that a Dr. Smith conduct the evaluation instead. (No. 35211 Plea Tr., p.14, L.18 – p.16, L.5.)

Mr. Gonzales' counsel never sought out a private psychosexual evaluation—whether through Dr. Dodgen or some other provider.[1] (No. 36625 R., p.8.) Nor did

[1] Although the record does not disclose why retained counsel never sought out a private psychosexual evaluation for his client, the failure in this regard appears not to have been based on a lack of funding, as counsel was privately retained (No. 35211 R., pp.13-14) and Mr. Gonzales ended up paying for the court-ordered evaluation (No. 36625 R., p.44).

counsel ever advise Mr. Gonzales to invoke his right to silence in the court-ordered psychosexual evaluation with Dr. Smith. (No. 36625 R., p.8.) Thus, Mr. Gonzales participated in the evaluation with Dr. Smith, as well as a related polygraph examination with Chip Morgan. (*See generally* Psychosexual Evaluation Report (*hereinafter,* PSE); Polygraph Report.)[2]

During the polygraph examination and his interview with Dr. Smith, Mr. Gonzales ultimately disclosed that he had sexual contact with his daughter on numerous occasions, and, further, that this contact included more than the mere manual-to-genital contact that he had admitted in pleading guilty. (PSE, pp.2, 3; Polygraph Report, p.2.) Specifically, Mr. Gonzales admitted to "many" instances of sexual contact, described two instances of completed vaginal intercourse and five additional instances of attempted vaginal intercourse, and disclosed one instance of completed oral sex and one instance of attempted oral sex. (Polygraph Report, p.2.) He also admitted to sexual intercourse with two other underage victims (ages sixteen to seventeen years old) as an adult (age 32). (Polygraph Report, p.2.) Even then the polygrapher opined that Mr. Gonzales had been deceptive (leading to the inference that there are still undisclosed victims or aggravating circumstances about Mr. Gonzales' criminal sexual past). (Polygraph Report, pp.4-5.) Thus, Dr. Smith characterized Mr. Gonzales as a hebephile. (PSE, pp.9, 11.) In addition, in light of Mr. Gonzales' attempts to conceal and minimize his sexual misconduct, the known scope of that misconduct, his alcohol problems, and his apparent lack of empathy for his daughter, Dr. Smith opined that

[2] The PSE is included in the Clerk's Record in Case No. 35211 as a sealed exhibit. The Polygraph Report is attached to the PSE.

Mr. Gonzales presents a moderate risk of re-offense. (PSE, pp.8-9, 10. *Compare* PSE, p.2 (Mr. Gonzales minimizing the number of incidents with his daughter) *and* p.3 (Mr. Gonzales minimizing the type of contact with his daughter) *and* p.5 (Mr. Gonzales claiming that none of sexual partners were underage), *with* Polygraph Report, p.2 (revealing significantly more sexual misconduct) *and* Polygraph Report, pp.4-5 (revealing apparent deception in even the more expansive sexual history provided to the polygrapher).)

Dr. Smith then forwarded his report directly to the prosecution (as well as the district court). (*See* PSE, p.1; No. 35211 Sent. Tr., p.3, L.24 – p.4, L.2.) Thus, his conclusions were then picked up on by the pre-sentence investigator and repeatedly highlighted in the pre-sentence investigation report (*hereinafter*, PSI). (PSI, pp.10-11, 13-14.)

Mr. Gonzales was sentenced on March 3, 2008. (*See generally* No. 35211 Sent. Tr.) At that hearing, the district court undoubtedly relied upon Dr. Smith's damning report. (No, 36625 R., p.47 ("The court did rely on the evaluation conducted by Dr. Smith . . . ."); *see, e.g.*, No. 35211 Sent. Tr., p.16, Ls.7-9 ("The court has reviewed in detail the presentence investigation report, as well as the psychosexual evaluation conducted by Dr. Smith."), p.16, Ls.20-21 ("The court has focused a great deal on what Dr. Smith's recommendations are."), p.17, Ls.1-3 ("In cases of this type, given the recommendation by Dr. Smith, the court does not believe that the rider program is appropriate.").) In fact, the PSE appears to have been the single biggest factor underlying the sentence ultimately imposed (and ordered into execution) by the district court (twenty years, with five years fixed):

> The court has focused a great deal on what Dr. Smith's recommendations are. Dr. Smith does note that you are a moderate risk to reoffend. Dr. Smith does note that at the present time you are not a candidate for outpatient treatment and that you're a candidate for residential treatment.
>
> In cases of this type, given that recommendation by Dr. Smith, the court does not believe that the rider program is appropriate. As we all know and this court has been told many times by the Department of Corrections, the rider program is not a treatment program for sex offenders. It is merely an assessment to further evaluate whether the defendant is an appropriate candidate for outpatient treatment.
>
> Dr. Smith has done a complete and thorough examination. The court is concerned over the fact that, Mr. Gonzales, you were deceptive in your polygraph. It's clear that when you were interviewed for the PSI, when you were initially interviewed by Dr. Smith for purposes of his evaluation, that you were minimizing the nature and extent of your behavior with your daughter, and it wasn't until the polygraph that the truth really came out. And I think, in part, that's why Dr. Smith believes that you're not an appropriate candidate for outpatient treatment at this time.
>
> So, for those reasons, the court does not believe that you're an appropriate candidate for probation presently. the court does not believe that you're an appropriate candidate for the rider. Therefore, as to the charge of lewd and lascivious conduct with a minor under sixteen, a felony, the court will impose court costs of $297.50. The court is not going to impose any fine.
>
> The court, however, is going to impose penitentiary time of twenty years, with five years fixed, fifteen years indeterminate, not to exceed twenty. . . .
>
> . . . For the reasons previously stated by the court, [neither] the retained jurisdiction [program] nor probation is appropriate.

(No. 35211 Sent. Tr., p.16, L.20 – p.18, L.10.)

Mr. Gonzales timely appealed. (No. 35211 R., pp.59-61.) On appeal, he argued that the district court abused its discretion by imposing an excessive sentence; however, in a *per curiam* opinion, the Idaho Court of Appeals affirmed Mr. Gonzales' sentence. *State v. Gonzales*, No. 35211, 2009 Unpublished Opinion No. 318 (Ct. App. Jan. 12, 2009). A remittitur was issued on March 31, 2009.

On April 15, 2009, Mr. Gonzales, acting *pro se*, filed a verified petition for post-conviction relief and a supporting affidavit. (No. 36625 R., pp.2-9.) Together, these documents alleged that Mr. Gonzales had received ineffective assistance of counsel in his criminal case insofar as his attorney failed to obtain a private psychosexual evaluation from Dr. Dodgen (which would have remained privileged unless or until the defense decided to disclose it) and failed to counsel him not to participate in the unprivileged evaluation with Dr. Smith. (No. 36625 R., pp.4, 7-8.) Mr. Gonzales, thus, sought an order reopening his criminal case, sealing the existing psychosexual evaluation report in that case, and remanding the case for a new sentencing hearing (wherein Mr. Gonzales might have an opportunity to present a psychosexual evaluation report from an independent expert, such as Dr. Dodgen) before a different district judge.[3] (*See* No. 36625 R., pp.4, 8.)

Along with his petition for post-conviction relief, Mr. Gonzales also filed a motion for appointment of counsel. (*See* Motion and Affidavit in Support for Appointment of Counsel (Conflict Free) (Apr. 15, 2009); *see also* Motion and affidavit for Permission to

[3] Although Mr. Gonzales' verified petition and affidavit spoke specifically of Dr. Dodgen (as opposed to a privately-retained expert more generally), reading those filings liberally, as the district court should have done, and as this Court must do, *cf. Plant v. State*, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2006) ("[W]hen a motion for the appointment of counsel is presented, every inference is to be drawn in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts); *Goff v. State*, 91 Idaho 36, 37, 415 P.2d 679, 680 (1966) (holding that a petition for writ of *habeas corpus* should be liberally construed, especially where it is prepared by a prisoner who is untrained in the law), it is clear that Mr. Gonzales' claim has less to do with anything that Dr. Dodgen might have said, and much more to do with the fact that Dr. Dodgen would have been a privately-retained defense expert and, thus, anything he said would have been privileged. (*See* No. 36625 R., p.8 ("Counsel should have just had me evaluated by Dr. Dodgen, where the results of the evaluation would have been privileged unless favorable and, therefore, voluntarily disclosed by me and Counsel . . . .").)

Proceed on Partial Payment of Court Fees (Prisoner) (Apr. 15, 2009) (providing additional support for Mr. Gonzales' claim of indigency).)[4]

The district court did not hesitate to issue a lengthy notice of its intent to deny Mr. Gonzales' motion for appointment of counsel and summarily dismiss his petition for post-conviction relief in its entirety.[5] (No. 36625 R., pp.10-22.) In its notice, the district court construed Mr. Gonzales' petition as presenting three distinct claims for relief:

> The petitioner asserts that his counsel's ineffectiveness is based on the Idaho Supreme Court decision in *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007), and his claims can be summarized as follows:
>
> (1) His attorney did not advise against participating in the presentence investigation interview;
>
> (2) His attorney did not advised [sic] against participating in the psychosexual evaluation with Dr. Smith; and
>
> (3) His attorney failed to have him evaluated by Dr. Dodgen.

(No. 36625 R., p.16.) It then went on to say that the first claim (concerning the pre-sentence investigation interview) was frivolous because neither the Fifth nor the Sixth Amendment has any application in pre-sentence investigation interviews and, besides, Mr. Gonzales had been apprised of his right to silence at his change of plea hearing anyway.[6] (No. 36625 R., pp.3, 16-17.) The district court then stated that the second

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[4] Both the motion for appointment of counsel, and the motion for permission to proceed on partial payment of fees, are attached to Mr. Gonzales' Motion to Augment Record, which is filed contemporaneously herewith.

[5] That notice was filed on April 20, 2009, five days after Mr. Gonzales' verified petition was filed. (*See* No. 36625 R., p.10.)

[6] The district court cited *Stuart v. State*, 145 Idaho 467, 180 P.3d 506 (Ct. App. 2007), for the proposition that the neither the Fifth Amendment right to silence, nor the Sixth Amendment right to counsel, has any application in a pre-sentence investigation interview. (No. 36625 R., pp.16-17.) While the district court's citation to *Stuart* was appropriate for its contention regarding the Sixth Amendment, *Stuart* does not support the district court's claim that the Fifth Amendment right to silence has no application in a pre-sentence investigation interview. *See generally Stuart*, 145 Idaho 467, 180 P.3d

claim (concerning Dr. Smith's psychosexual evaluation) was frivolous because the *only* relevant inquiry is whether Mr. Gonzales was advised of the existence of his right to silence (as opposed to being counseled as to whether he should invoke or, instead, waive that right), and the transcript of Mr. Gonzales' change of plea hearing unequivocally showed that he was so advised (by the district court). (No. 36625 R., pp.13, 17-19.) Finally, with regard to the third claim (concerning the lack of an evaluation by Dr. Dodgen), the district court observed that Mr. Gonzales could not demonstrate that Dr. Smith's evaluation was flawed such that it could have been rebutted, or that Dr. Dodgen's evaluation (had he conducted one) would have been favorable, and it ruled that any claim of ineffective assistance of counsel is frivolous until such a showing is made, and, besides, the district court reasoned, Mr. Gonzales failed to show that the failure to contract with Dr. Dodgen was not a strategic decision on the part of counsel. (No. 36625 R., pp.13, 19-21.)

On April 30, 2009, Mr. Gonzales filed a response to the district court's notice (No. 36625 R., pp.26-27), as well as a second affidavit, which included a 2008 letter from the attorney who had handled Mr. Gonzales' direct appeal[7] (No. 36625 R., pp.29-33). The letter from appellate counsel is notable because, as a letter alerting Mr. Gonzales to a possible claim of ineffective assistance of counsel, and explaining that claim, it should have put Mr. Gonzales' original petition and affidavit in context. (*See* No. 36625 R., pp.32-33.) It also should have made it exceptionally clear to the district court that

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506. In fact, the *Stuart* Court specifically declined to address this very issue. *Id.* at 469 n.1, 180 P.3d at 508 n.1. Furthermore, although it is not relevant to any claims raised in this appeal (*see* note 8, *infra*), Mr. Gonzales contends that, unless the right is waived, or unless immunity is granted, he *always* has a Fifth Amendment right to silence.

[7] That appellate attorney in question was undersigned counsel, Erik Lehtinen.

Mr. Gonzales' claim was that he had received ineffective assistance of counsel in his criminal case insofar as his attorney failed to obtain a private psychosexual evaluation from Dr. Dodgen (which would have remained privileged unless or until the defense decided to disclose it) and failed to counsel him not to participate in the unprivileged evaluation with Dr. Smith. (*See* No. 36625 R., pp.32-33.) Specifically, the letter from appellate counsel stated as follows:

> My concern is that Mr. Brown [defense counsel] may have rendered deficient performance by failing to advise you not to participate in the presentence investigation or the evaluation with Dr. Smith. He could have simply had you evaluated by Dr. Dodgen, where the results of the evaluation would have been privileged unless favorable and, therefore, voluntarily disclosed by you and Mr. Brown. I simply cannot see any strategic value to him advising you to waive your rights and disclose a lot of potentially harmful information in a non-privileged setting to Dr. Smith. This seems to have been a tremendous and unnecessary risk, and one that ended up hurting you in the end.

(No. 36625 R., pp.32-33.)

Again, the district court responded promptly. On May 11, 2009, the district court entered a 15-page order dismissing Mr. Gonzales' petition and formally denying his motion for appointment of counsel. (No. 36625 R., pp.34-48.) In this order, the district court continued to characterize Mr. Gonzales' petition as presenting the following three claims for relief: (1) his attorney did not advise him against participating in the presentence investigation interview; (2) his attorney did not advise him against participating in the psychosexual evaluation with Dr. Smith; and (3) his attorney failed to have him evaluated by Dr. Dodgen. (*See, e.g.*, No. 36625 R., p.35.) It then analyzed each claim in turn, describing them all as frivolous.

With regard to what the district court characterized as Mr. Gonzales' first claim (concerning the pre-sentence investigation interview), the district court concluded that

that claim was frivolous because "the right to remain silent does not apply to the presentence investigation interview," and because the pre-sentence investigation interview was not a critical stage of the proceeding where Mr. Gonzales would have been entitled to the effective assistance of counsel. (No. 36625 R., pp.38, 41.)

With regard to what the district court characterized as Mr. Gonzales' second claim (concerning participation in Dr. Smith's psychosexual evaluation), the district court concluded that that claim was frivolous because: Mr. Gonzales had been informed of his right to silence by the district court; counsel could not have known that Dr. Smith's evaluation would be unfavorable (or favorable, for that matter) so Mr. Gonzales' claim must necessarily be the product of hindsight; the failure to advise Mr. Gonzales to exercise his right to silence must be presumed to have been a tactical decision on the part of counsel, and Mr. Gonzales cannot disprove that possibility; and the district court would have treated the absence of a psychosexual report in the same manner as a highly unfavorable report, such that it would have imposed a prison sentence even without the damning report from Dr. Smith. (No. 36625 R., pp.38, 41-44, 47.)

Finally, with regard to what the district court characterized as Mr. Gonzales' third claim (concerning the failure to obtain an evaluation from Dr. Dodgen), the district court concluded that that claim was frivolous because Mr. Gonzales failed to identify any flaws in Dr. Smith evaluation or say what sort of favorable statements Dr. Dodgen might have made and, besides, Mr. Gonzales failed to disprove the district court's presumption that Mr. Gonzales' counsel had a strategic or tactical reason for failing to obtain an independent psychosexual evaluation. (No. 36625 R., pp.38, 44-45, 46, 47.)

On June 5, 2009, Mr. Gonzales, still acting *pro se*, filed a timely notice of appeal, thereby initiating the present appeal. (No. 36625 R., pp.50-52.) On appeal, Mr. Gonzales contends that the district court erred in summarily dismissing his petition and in denying his motion for appointment of counsel. Specifically, Mr. Gonzales asserts that, not only has he raised the possibility of a valid claim such that counsel should have been appointed to assist him, but he has presented *prima facie* evidence of ineffective assistance of counsel such that he is entitled to an evidentiary hearing on his claims.

ISSUES

1. Did the district court err in summarily dismissing Mr. Gonzales' petition for post-conviction relief?

2. Did the district court err in denying Mr. Gonzales' motion for appointment of post-conviction counsel?

ARGUMENT

I.

The District Court Erred In Summarily Dismissing Mr. Gonzales' Petition For Post-Conviction Relief Because The Petition Presented *Prima Facie* Evidence Of Ineffective Assistance Of Counsel

A. Introduction

In his petition for post-conviction relief, Mr. Gonzales presented two closely connected claims for relief: (1) his attorney rendered ineffective assistance of counsel for failing to seek out a private (privileged) psychosexual evaluation; and (2) his attorney rendered ineffective assistance of counsel for failing to advise him not to participate in the court-ordered (unprivileged) psychosexual evaluation.[8] The district court, however, summarily dismissed both claims. For the reasons set forth in detail below, Mr. Gonzales contends that the district court erred in summarily dismissing his claims, as he has presented *prima facie* evidence of ineffectiveness with regard to both claims.

B. Applicable Legal Standards

The United States Constitution "guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). One such provision is the right to the assistance of counsel, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."), which has been interpreted as the right to the *effective* assistance of counsel. *Strickland*, 466 U.S. at 685-86.

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[8] Mr. Gonzales' petition also asserted a claim concerning his counsel's failure to advise him not to participate in the pre-sentence investigation interview; however, Mr. Gonzales is not appealing the summary dismissal of that particular claim.

There is a two-pronged test for determining whether an attorney has rendered ineffective assistance in contravention of a criminal defendant's right to counsel. The threshold inquiry is whether counsel's performance was "deficient," *i.e.*, whether it "fell below an objective standard of reasonableness," as judged "under prevailing professional norms." *Id.* at 687-91. Assuming there has been deficient performance, the next inquiry is whether that deficient performance prejudiced the defendant. *Id.* at 687, 691-96. In order to establish "prejudice," it need not be shown "that counsel's deficient conduct more likely than not altered the outcome in the case" since the "result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 693-94. Instead, it need only be shown "that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Under Idaho law, a claim of ineffective assistance of counsel may be raised by the defendant in his direct appeal; however, such a claim is more appropriately asserted through a petition for post-conviction relief. *Sparks v. State*, 140 Idaho 292, 295-96, 92 P.3d 542, 545-46 (Ct. App. 2004).

A petition for post-conviction relief initiates a proceeding which is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter,* UPCPA) (I.C. §§ 19-4901 to -4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456, 808 P.2d at 375. Because it is a civil proceeding, the petitioner must prove his

allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). However, the petition initiating a post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim"; it "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 attached." *Id.*; 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." *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of post-conviction petitions where there are no genuine issues as to any material facts and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c).[9] In analyzing a post-conviction petition under this standard, the district court need not "accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Martinez*, 126 Idaho at 816-17, 892 P.2d at 491-92. However, if the petitioner presents any evidentiary support for his allegations, the district court must take the petitioner's allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646, 448 P.2d 649, 652 (1968). This is so even if the

[9] Although this standard is set forth in section 19-4906(b), which deals with motions for summary disposition, it appears to apply to *sua sponte* dismissals as well. *See, e.g., Small*, 132 Idaho at 331, 971 P.2d at 1155 (discussing the standard for summary disposition under section 19-4906 *generally* as being whether a genuine issue of material fact has been presented).

allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982). But in doing so, it must still liberally construe the facts and draw reasonable inferences in favor of the petitioner, *Small*, 132 Idaho at 331, 971 P.2d at 1155.[10]

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331, 971 P.2d at 1155. If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

If the district court orders dismissal *sua sponte*, it must first give the petitioner twenty days' notice and allow the petitioner to respond to the notice. I.C. § 19-4906(b). The purpose of this requirement is to give the petitioner an opportunity to challenge the decision before it is finalized. *Baruth v. Gardner*, 110 Idaho 156, 159-60, 715 P.2d 369, 371-72 (Ct. App. 1986). Thus, this requirement is strict; it makes no difference whether the petitioner's claims are meritorious or not. *Cherniwchan v. State*, 99 Idaho 128, 129-30, 578 P.2d 244, 245-46 (1978). Moreover, vague notice of the district court's intent to dismiss is insufficient. The district court must be specific as to the bases for the intended dismissal so as to provide the petitioner with a *meaningful* opportunity to respond. *Banks v. State*, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993). It is not sufficient to merely recite the language from section 19-4906 and state a conclusion.

[10] The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996).

Id. If the district court fails to give the petitioner the required notice and opportunity to respond, or if the district court's notice is impermissibly vague, the petition must be reinstated. *Peltier*, 119 Idaho at 456-57, 458, 808 P.2d at 375-76, 377 (failure to give any notice); *Banks*, 123 Idaho at 954, 855 P.2d at 39 (notice was impermissibly vague).

Because evaluation of a motion for summary disposition will never involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court will review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03, 128 P.3d 938, 939-40 (2006).

Applying these standards to Mr. Gonzales' case, it ought to be apparent (for the reasons stated in detail below) that the district court erred in summarily dismissing Mr. Gonzales' petition in its entirety.

C. Mr. Gonzales Has Presented *Prima Facie* Evidence Of Ineffective Assistance Of Counsel And, Thus, Is Entitled To An Evidentiary Hearing On His Claims

Mr. Gonzales raised the following two claims of ineffective assistance of counsel in his petition for post-conviction relief: (1) his attorney was ineffective for failing to seek out a private (privileged) psychosexual evaluation; and (2) his attorney was ineffective for failing to advise him not to participate in the court-ordered (unprivileged) psychosexual evaluation with Dr. Smith.[11] (No. 36625 R., pp.4, 7-8; *see also* R., pp.32-33 (letter of appellate counsel).) These two interrelated claims are based on certain fundamental principles: first, once a defendant has been found guilty of a sex offense, competent defense counsel must not only apprise his client of his Fifth Amendment right to silence during the pre-sentence investigation interview and psychosexual evaluation,

but also *advise his client as to whether the client should invoke/waive that right*; second, to the extent that it *ever* may be reasonable to advise a client to waive his Fifth Amendment rights, competent defense counsel cannot so advise his client unless or until he knows what information is likely to be revealed in the interview and/or evaluation, and what kind of conclusions might result; and third, the only way for competent counsel to gather the evidence necessary to advise his client as to whether the client should waive his Fifth Amendment rights and participate in the pre-sentence investigation interview and psychosexual evaluation, or to properly prepare for sentencing generally, is to obtain an independent (privileged) evaluation prior to sentencing. Mr. Gonzales' point, quite clearly, was that had counsel acted competently in this regard, at a minimum, Dr. Smith's extraordinarily prejudicial report would not have been before the district court at the time of Mr. Gonzales' sentencing hearing.[12]

For the reasons set forth in detail below, Mr. Gonzales contends that he has asserted cognizable claims of ineffective assistance of counsel, and presented a *prima facie* case as to each.

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[11] As noted, Mr. Gonzales present no claim on appeal related to the summary dismissal of his claim that his counsel was ineffective for failing to advise him not to participate in the pre-sentence investigation interview. (*See* note 8, *supra*.)

[12] Contrary to the district court's belief, Mr. Gonzales' claim is not based on any speculation as to what may have been wrong with Dr. Smith's evaluation, or what any other expert (such as Dr. Dodgen) would have said. Rather, as noted, Mr. Gonzales simply asserts that, but for counsel's deficient performance, Dr. Smith's damning report would not have been before the district court at sentencing.

1. Mr. Gonzales Has Presented *Prima Facie* Evidence Of Ineffectiveness Based On Counsel's Failure To Seek Out An Independent (Privileged) Psychosexual Evaluation

As noted above, in order to establish a claim of ineffective assistance of counsel, the petitioner must prove both prongs of the *Strickland* standard—deficient performance on the part of counsel, as well as some prejudice owing to that deficient performance. At the summary dismissal stage, however, the petitioner need only present *prima facie* evidence of both prongs. *McKay v. State*, __ Idaho __, __ P.3d __, 2010 WL 323546, *3-4 (Jan. 29, 2010). In this case, Mr. Gonzales has easily satisfied that standard.

a) Mr. Gonzales Presented *Prima Facie* Evidence Of Deficient Performance

It is well-settled in Idaho that the existence and identity of defense experts, as well as the statements, reports, and opinions of those experts, are protected unless or until the defense decides to utilize those experts in open court. *See* I.C.R. 16(c) & (g); I.R.E. 502. Accordingly, in a case in which the defendant has been found guilty of a sex offense, there is little or no risk that a psychosexual evaluation of the defendant performed by an independent expert retained for that purpose by the defense need end up in the district court's hands for the defendant's sentencing hearing. If the evaluation turns out to be favorable to the defendant, defense counsel could, and indeed should, offer the independent expert's testimony (or a report in lieu of live testimony), in mitigation at his client's sentencing hearing. *See Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (trial counsel's failure to investigate and present substantial mitigating evidence deemed to be deficient performance); *see also* ABA STANDARDS FOR CRIMINAL

JUSTICE, The Defense Function §§ 4-4.1(a)[13] & 4-8.1(b)[14]; ABA STANDARDS FOR CRIMINAL JUSTICE, Providing Defense Services § 5-1.4[15]; NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guidelines 4.1,[16] 8.1(a),[17] 8.3(a),[18]

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[13] "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function § 4-4.1(a).

[14] "Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case. . . ." ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function § 4-8.1(b).

[15] "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process." ABA STANDARDS FOR CRIMINAL JUSTICE, Providing Defense Services § 5-1.4.

[16] "Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. . . . Counsel should secure the assistance of experts where it is necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1.

[17] "Among counsel's obligations in the sentencing process are: . . . to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court," and "to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1(a).

[18] "In preparing for sentencing, counsel should consider the need to . . . collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing . . . ." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.3(a).

8.4(a),[19] 8.6(a),[20] & 8.7[21]; IDAHO RULE OF PROFESSIONAL CONDUCT 1.1.[22] However, if the evaluation turns out to be unfavorable, such that it would be unhelpful (or even harmful) to the defendant if disclosed, defense counsel could simply keep the evaluation confidential. *See State v. Wood*, 132 Idaho 88, 97, 100-01, 967 P.2d 702, 711, 714-15 (1998) (noting that privileged expert reports need not be disclosed if unfavorable to the defendant). In light of the tremendous potential upside to obtaining a favorable psychosexual evaluation that can be offered in mitigation, especially where there is virtually no downside risk of an unfavorable evaluation coming back to haunt the defendant, there is simply no tactical reason for defense counsel not to obtain independent psychosexual evaluations in virtually every case in which a client is awaiting sentencing for a sex crime.[23]

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[19] "Counsel should . . . provide to the official preparing the [presentence] report relevant information favorable to the client . . . ." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.4(a).

[20] "Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are: . . . information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background," and "information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation . . . ." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.6(a).

[21] "Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest. . . . Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defense." NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guidelines 8.7(a) & (d).

[22] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." I.R.P.C. 1.1.

[23] In the average sex crime case, the only reason to forego an independent psychosexual evaluation might be the cost of that evaluation. Whether this reason is a

Moreover, without a confidential psychosexual evaluation in hand, defense counsel can have absolutely no idea what may come out of any such evaluation,[24] and he can have no basis to intelligently advise his client to either invoke his Fifth

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"strategic" reason, however, is a question that this Court need not answer in this case, as the Record on Appeal seems to indicate that the cost of any psychosexual evaluation was not an issue in this case, as Mr. Gonzales did, in fact, pay for a psychosexual evaluation out of his own pocket—the extraordinarily prejudicial court-ordered evaluation performed by Dr. Smith. (No. 36625 R., p.44.)

Because this is a case with privately-retained defense counsel and a psychosexual evaluation paid for by the defendant, this Court need not concern itself with the conflict of interest that undeniably exists between those criminal defendants who are represented by defenders in law firms with flat-fee public defender contracts or in dedicated public defender offices with fixed budgets, in which cases the attorneys have every financial incentive to push their clients to participate in the court-ordered evaluations simply because the cost of such evaluations would be borne directly by the government, instead of coming out of the defenders' own operating budgets (or profit margins).

[24] While it may be tempting to hold that defense counsel has a near-absolute right to rely on the representations of his client and, therefore, cannot be found to have rendered deficient performance by advising his client based upon those representations, the fact is that is not necessarily true when it comes to advising sex offenders about the risks of participating in a non-privileged psychosexual evaluation.

First, with regard to the concern that a psychosexual evaluation (especially one that is coupled with a polygraph examination) may disclose additional sex crimes which may be extremely prejudicial at sentencing, it is no solution to say that counsel can simply ask his client if he has committed other acts of sexual misconduct which may come to light during the evaluation process. Given the stigma attached to sex offenses, most sex offenders tend to live in a world of denial, where they cannot admit their actions (or their desires) even to themselves, much less to some lawyer who they hardly know. This is especially true in cases where they are represented by lawyers appointed by, and sometimes even employed directly by, the State.

Second, there are other risks associated with a defendant's participation in a psychosexual evaluation besides the concern that additional crimes will be disclosed. One such risk is that other highly prejudicial "deviant," albeit not illegal, sexual conduct will be disclosed. Thus, even if counsel could rely on his client's representations regarding his past criminal conduct, counsel may not know to ask the questions necessary to gain a full understanding of what might actually come out in the psychosexual evaluation. Another risk is that counsel does not have access to, or the ability to interpret, the diagnostic tests utilized in a psychosexual evaluation, many of which may give rise to expert opinions that are highly prejudicial, the most obvious of which would be a conclusion that the client presents a high risk of re-offense and/or is untreatable.

Amendment rights or, instead, to participate in a court-ordered (non-privileged) evaluation. Under these circumstances, if counsel advises his client to waive his rights and participate in the evaluation, he turns his client's fate over to chance. This is not effective assistance of counsel.

It is now well-recognized that counsel's decisions (even those that one might try to characterize as "strategic decisions") are unreasonable insofar as they are based on inadequate information, *see, e.g., Wiggins v. Smith*, 539 U.S. 510, 524-29 (2003) (trial counsel's "tactical" decision not to pursue a mitigation investigation and, instead, to pursue an alternate strategy at sentencing, deemed to be deficient performance where the decision to abandon the mitigation investigation was based on insufficient information about the state of the mitigation evidence); *Strickland*, 466 U.S. at 691 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, it ought not to be surprising that the Idaho Supreme Court has already implicitly recognized that an attorney renders deficient performance when he allows a psychological evaluation to be turned over to the district court and the State before the attorney even knows what that evaluation might say. In *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), the Supreme Court held that trial counsel was ineffective for failing to object when: (1) the district court ordered the defense expert's psychiatric evaluation report concerning the defendant be appended to the pre-sentence investigation report, and (2) the State called the defense's psychiatric expert to offer

testimony in aggravation at the defendant's sentencing hearing. Critically, in discussing the defense expert's report, the Idaho Supreme Court held that counsel rendered deficient performance in failing to object to its inclusion in the pre-sentence investigation report because "the [psychiatric] report had not been completed and its contents could not be known" to counsel, *id.* at 97, 967 P.2d at 711, and, "[a]lthough there are instances in which defense counsel properly would not object, knowing that contents of the report are favorable to the defendant, in this case the report had not been written and [counsel] did not know whether it would be favorable or unfavorable," *id.* at 101, 967 P.3d at 715. Thus, in *Wood*, the Idaho Supreme Court recognized that defense counsel cannot make an informed decision as to whether the contents of a psychological evaluation (of which a psychosexual evaluation is undoubtedly a specialized form) should be disclosed to the State or the sentencing court without first ascertaining the contents of that evaluation.

Since an independent (confidential) psychosexual evaluation could have been potentially beneficial to Mr. Gonzales, and because there is no valid strategic or tactical reason for defense counsel to forego such an evaluation, by presenting evidence that his counsel failed to obtain such an evaluation, Mr. Gonzales has presented *prima facie* evidence that his counsel rendered deficient performance in this case.

b) Mr. Gonzales Presented *Prima Facie* Evidence Of Prejudice

Although Mr. Gonzales certainly cannot speculate that an independent psychosexual evaluation would have drawn Dr. Smith's report into question or provided significant mitigating evidence, it is nevertheless clear that counsel's approach of foregoing an independent (privileged) evaluation in favor of the court-ordered (non-

privileged) evaluation was extremely prejudicial under the facts of this case. Based on the existing record, it is reasonable to infer that, had counsel obtained an independent evaluation, any resulting report would have turned out to be just as unflattering as the report prepared by Dr. Smith and, therefore, competent counsel would have kept that report confidential and advised his client to invoke his Fifth Amendment rights during the court-ordered evaluation. Thus, neither Dr. Smith's extremely prejudicial report (*see generally* PSE (revealing additional crimes and victims, a pattern of abuse, minimization and a lack of empathy on Mr. Gonzales' part and a moderate risk of re-offense); Polygraph Report), nor any similar report, would have been considered by the district court at sentencing. And, as noted above, the district court clearly relied quite heavily on Dr. Smith's very damaging report. (*See* No, 36625 R., p.47; *see, e.g.*, No. 35211 Sent. Tr., p.16, Ls.7-9, p.16, L.20 – p.18, L.10.)

The fact that the district court has stated, after the fact, that it would have imposed the same sentence upon Mr. Gonzales, even absent the damning PSE by Dr. Smith, is of no consequence to the prejudice analysis in the present case. The United States Supreme Court made it clear in *Strickland* that, in order to establish[25] "prejudice," it need not be shown "that counsel's deficient conduct more likely than not altered the outcome in the case" since the "result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland,* 466 U.S. at 693-94. Instead, it need only be shown "that there is a

[25] This Court must keep in mind that, at the summary dismissal stage, Mr. Gonzales was not required to *establish*, *i.e.*, prove, anything; his only responsibility was to present *prima facie* evidence.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Clearly, this standard leaves no room for the subjective, *post hoc* rationalizations of the sentencing judge. Indeed, as Eleventh Circuit Court of Appeals ably explained:

> *A trial judge's post-hoc statements concerning how additional evidence might have affected its ruling are not determinative for purposes of assessing prejudice.* Indeed, in *Strickland*, the trial judge who sentenced the petitioner to death testified during federal *habeas* proceedings that the additional evidence would not have caused him to rule differently. *See* [*Strickland v. Washington*, 466 U.S.] at 678-79, 104 S.Ct. at 2060; *Washington v. Strickland*, 693 F.2d 1243, 1249 (11th Cir.1982). The Supreme Court held that this testimony was "irrelevant to the prejudice inquiry." *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071. The Court made clear that the assessment should be based on an objective standard that presumes a reasonable decisionmaker. *Id.* at 695, 104 S.Ct. at 2068.

Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008).[26]

In light of the *Strickland* standard, it ought not to be surprising that, in *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007), the Idaho Supreme Court explained that a showing that a damaging psychosexual evaluation (placed before the court due to the deficient performance of counsel) "play[ed] an important role in the sentencing," is sufficient to satisfy the prejudice prong of the *Strickland* standard. Assuming then that *Strickland* and *Estrada* still control,[27] it is readily apparent that Mr. Gonzales has at least

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[26] Furthermore, to the extent that the sentencing judge's subjective, after-the-fact explanation of what sentence he would have handed down under an alternate set of facts might be relevant, his explanation is not a question of law which could be resolved through summary disposition proceedings; his testimony creates a question of fact, which could only be resolved at a contested evidentiary hearing.

[27] Mr. Gonzales is not unmindful of the Idaho Court of Appeals' opinion in *Hughes v. State*, 138 Idaho 448, 224 P.3d 515 (Ct. App. 2010). In that case, despite the plain language of *Estrada*, the Court of Appeals rejected the notion "that the *Estrada* Court . . . [held] that the level of the sentencing court's reliance on the PSE was the only factor in analyzing prejudice," *Hughes*, 148 Idaho at 464, 224 P.3d at 531, and it went on to create a new three-part test, which took into account: (1) the degree to which the psychosexual evaluation was materially unfavorable, (2) the degree to which the

made out a *prima facie* case of prejudice since: the district court specifically acknowledged its heavy reliance on the PSE (both at the time of sentencing (*see, e.g.*, No. 35211 Sent. Tr., p.16, Ls.20-21, p.17, Ls.1-3) and in dismissing Mr. Gonzales' post-conviction petition (*see* No. 36625 R., p.47)); it made specific, repeated references to Dr. Smith's report in imposing sentence (*see, e.g.*, No. 35211 Sent. Tr., p.16, Ls.21-25, p.10, Ls.10-19); and, viewing the district court's sentencing comments as a whole, it

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sentencing court relied upon the evaluation, and (3) the totality of the evidence before the sentencing court, *id.* at 464-65, 531-32. Despite the Court of Appeals' claim that the third factor in its new test "does not shift [its] analysis to a determination of whether the sentence imposed is supported by the evidence," and, instead, merely calls for a determination of "whether it can be said, considering all of the evidence before the sentencing court, that there is a reasonable probability that the PSE resulted in a greater sentence," *id.* at 465, 224 P.3d 532, the Court of Appeals appears to have gone on to do precisely that, *see id.* at 465-69, 224 P.3d at 532-36. Although the Court of Appeals recognized that the psychosexual evaluation was very unfavorable to the petitioner, and that it had been relied upon by the sentencing court, it highlighted the fact that the sentencing judge had discussed the petitioner's crimes and had opined that those crimes showed that the petitioner was "evil," and it offered the following conclusory statement related to its weighing of the evidence:

> We have considered the extent and character of any admissions by Hughes and conclusions based thereon in the PSE, the extent of the sentencing court's reliance on the PSE which can be demonstrated from the record, and the totality of the evidence before the sentencing court. From this review, we cannot say that there is a reasonable probability that, absent the PSE, Hughes would have received a more favorable sentence. Hughes has failed to demonstrate prejudice in satisfaction of the second prong of the Strickland standard. Therefore, the district court's dismissal of Hughes' claim of ineffective assistance of counsel for counsel's failure to advise Hughes regarding his rights prior to the PSE is affirmed.

Hughes, 148 Idaho at 468-69, 224 P.2d at 535-36.

To the extent that *Hughes* created a prejudice standard that is inconsistent with *Strickland* and *Estrada* (and Mr. Gonzales contends that it does because, the Court of Appeals' claims notwithstanding, it really just calls for the Court of Appeals to render a decision based on its own subjective belief as to what the petitioner's sentence should have been), it has no precedential value and ought not to be followed in this case. However, to the extent that the new *Hughes* standard has any ongoing vitality, Mr. Gonzales has satisfied that standard since, as noted above, the PSE in his case was extremely unfavorable, the district court relied almost exclusively on that PSE, and

appears that Dr. Smith's report was the single biggest factor underlying the prison sentence ultimately imposed (*see* No. 35211 Sent. Tr., p.15, L.19 – p.19, L.4).

Thus, on the record that exists in this case, it is apparent that Mr. Gonzales has presented, at the very least, a *prima facie* case of prejudice in support of his claim that he received ineffective assistance of counsel for his attorney's failure to obtain an independent psychosexual evaluation.

2. Mr. Gonzales Has Presented *Prima Facie* Of Ineffectiveness Based On Counsel's Failure To Advise Him Not To Participate In The Pre-Sentence Investigation Interview Or The Court-Ordered (Unprivileged) Psychosexual Evaluation With Dr. Smith

As noted, in order to survive summary dismissal, a post-conviction petitioner alleging ineffective assistance of counsel must present *prima facie* evidence of the deficient performance of defense counsel, as well as some prejudice owing to that deficient performance. *McKay v. State*, __ Idaho __, __ P.3d __, 2010 WL 323546, *3-4 (Jan. 29, 2010). Just as he satisfied this standard with regard to his claim that counsel was ineffective for failing to obtain an independent (confidential) psychosexual evaluation, so too has he satisfied this standard with regard to his claim that counsel was ineffective for failing to advise him to invoke his Fifth Amendment rights and not participate in the court-ordered psychosexual evaluation with Dr. Smith.

a) Mr. Gonzales Presented *Prima Facie* Evidence Of Deficient Performance

In *Estrada*, *supra*, the Idaho Supreme Court held that: a psychosexual evaluation is a critical stage of a criminal proceeding, such that the defendant has a

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there can be little doubt that Dr. Smith's observations and opinions led to a longer sentence than would otherwise have been imposed.

Sixth Amendment right to the effective assistance of counsel during that stage of the proceeding, *Estrada*, 143 Idaho at 561-63, 149 P.3d at 836-38; the defendant has a Fifth Amendment right to silence during a psychosexual evaluation, *id.* at 563-64, 140 P.3d at 838-39; and the failure of counsel to advise the defendant of his Fifth Amendment right to silence and *advise him as to whether he should waive that right and submit to the psychosexual evaluation* may constitute deficient performance and ineffective assistance of counsel, *id.* at 562-63, 564, 149 P.3d at 837-38, 839. On the latter point, the Idaho Supreme Court specifically held that "a defendant has a Sixth Amendment right to counsel regarding . . . the decision of whether to submit to a psychosexual exam. . . . Estrada does have a right to at least the advice of counsel regarding his participation in the psychosexual evaluation . . . ." *Id.* at 562-63, 837-38. Thus, it is clear that effective assistance of counsel not only includes informing the defendant of his Fifth Amendment right to silence during his psychosexual evaluation, but also competent advice as to whether he should invoke that right. *Id. Cf., e.g., Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966) (recognizing that even after one has been advised of his right to silence, he still may benefit from the guiding hand of counsel); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (holding that a criminal defendant is not only entitled to know what her plea choices are, but also *advice* from her counsel concerning what plea should actually be entered).

As discussed above, the uncontroverted evidence in this case is that Mr. Gonzales' counsel never obtained an independent psychosexual evaluation for his client (No. 36625 R., p.8) and, thus, the most reasonable inference is that he could not have known what kind of damaging evidence might come out of his client's participation

in the court-ordered (unprivileged) evaluation with Dr. Smith. Nevertheless, counsel failed to advise his client not to participate in the court-ordered evaluation. (No. 36625 R., p.8.)

While it is difficult to imagine *any* situation in which it would be reasonable for a defense attorney, ignorant of the likely outcome of a court-ordered (unprivileged) psychosexual evaluation, to fail to advise his client to invoke his Fifth Amendment rights, such a failure is particularly egregious in a case such as this one—where defense counsel had reason to believe that the court-ordered evaluation would disclose aggravating evidence. In this case, although Mr. Gonzales had only originally been charged with two counts of lewd conduct (for manual-to-genital contact and oral-to-genital contact) over a relatively brief period of time (four months) (No. 35211 R., pp.4-5), and had pled guilty to only one of those two counts—the one that was arguably less egregious (the instance of manual-to-genital contact) (No. 35211 Plea Tr., p.13, L.15 – p.14, L.5), and although, on the single count of rape, Mr. Gonzales had been bound over on the lesser offense of attempted rape (*see* No. 35211 R., p.30), the fact is that there was some reason to believe that Mr. Gonzales had engaged in a pattern of sexual abuse of his daughter, and that the sexual contact was more egregious than Mr. Gonzales had pled guilty to. Specifically, counsel had information indicating that Mr. Gonzales' daughter had said that she had been sexually abused virtually every night for a period of time, this sexual abuse included multiple instances of vaginal intercourse, and she perceived a threat of physical abuse if she attempted to resist her father's advances. (*See* No. 35211 R., p.7 (affidavit in support of complaint, summarizing CARES interview with victim).) Counsel should have known that, if the

daughter's claims were true, there was a good chance that fact would come out in the court-ordered psychosexual evaluation (especially if it included a polygraph examination, as most psychosexual evaluations do) and that Mr. Gonzales might be made to appear as if he was wrongfully denying or minimizing his conduct, or was failing to show remorse for his actions. In light of all of this, and in light of the fact that counsel did not have an independent (confidential) evaluation to work from, counsel never should have "rolled the dice" by failing to advise his client to invoke his right to silence during the court-ordered evaluation. In short, counsel rendered deficient performance when he failed to advise Mr. Gonzales not to participate in the court-ordered evaluation with Dr. Smith.

b) Mr. Gonzales Presented *Prima Facie* Evidence Of Prejudice

Had counsel correctly advised Mr. Gonzales to invoke his Fifth Amendment rights and not participate in the court-ordered (non-privileged) evaluation, Mr. Gonzales presumably would have followed that advice (*see* No. 36625 R., pp.7-8) and Dr. Smith's extremely prejudicial evaluation would not have been considered by the district court at sentencing.

As discussed in Part I(C)(1)(b) above (and, therefore, not repeated in full herein), because the district court specifically acknowledged its heavy reliance on the PSE; it made specific, repeated references to Dr. Smith's report in imposing sentence; and, viewing the district court's sentencing comments as a whole, it appears that Dr. Smith's report was the single biggest factor underlying the prison sentence ultimately imposed, it is clear that Dr. Smith's report played a role in Mr. Gonzales' sentence. Therefore,

Mr. Gonzales has met his burden of presenting *prima facie* evidence of prejudice owing to his counsel's failure to advise him not to participate in the court-ordered evaluation.

II.

The District Court Erred In Denying Mr. Gonzales' Motion For Appointment Of Counsel Because, At a Minimum, Mr. Gonzales Raised The Possibility Of A Valid Claim

"A request for appointment of counsel in a post conviction proceeding is governed by Idaho Code § 19-4904, which provides that in proceedings under the UPCPA [Uniform Post-Conviction Procedures Act], a court-appointed attorney 'may be made available' to an applicant who is unable to pay the costs of representation. 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).

In *Charboneau*, the Supreme Court held that a post-conviction petitioner is entitled to the appointment of counsel "unless the trial court determines that the post-conviction proceeding is frivolous." *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111 (quoting *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001)). It further held that the proceeding is not frivolous and, thus, counsel must be appointed, if the petitioner "alleges facts to raise the *possibility* of a valid claim . . . ." *Id.* at 793, 102 P.3d at 1112 (emphasis added).

Subsequently, in *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007), the Supreme Court had occasion to revisit the standard for appointment of counsel in post-conviction cases. In that case, the Court reaffirmed the *Charboneau* standard:

> In deciding whether the *pro se* petition raises the possibility of a valid claim, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain

> counsel to conduct a further investigation into the claims. Although "the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims," *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001), the court should appoint counsel if the facts alleged raise the possibility of a valid claim.

Swader, 143 Idaho at 654, 152 P.3d at 15. The *Swader* Court also made it clear that this standard is much lower than the standard for deciding petitions for post-conviction relief on their merits because, as had also been recognized in *Charboneau*, *pro se* petitioners generally cannot investigate or properly present their claims (regardless of whether those claims will ultimately be successful) without the assistance of counsel. *Id.* at 654-55, 152 P.3d 15-16.

In light of the foregoing standards, Mr. Gonzales contends that, even if his verified petition for post-conviction relief, when considered along with his supporting affidavit and his supplemental filing, failed to present *prima facie* evidence of ineffective assistance of counsel so as to survive summary dismissal, based on the reasoning set forth in Part I, above (which is incorporated herein by this reference), they are sufficient to meet the standard for appointment of counsel, *i.e.*, they raise the possibility of a valid claim.

CONCLUSION

For the foregoing reasons, Mr. Gonzales respectfully requests that the district court's summary dismissal order be vacated, and that his case be remanded to the district court for an evidentiary hearing or, at the very least, for appointment of counsel.

DATED this 7th day of April, 2010.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of April, 2010, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JUAN MIGUEL GONZALES
INMATE # 17880
ICC
PO BOX 70010
BOISE ID 83707

JOHN K. BUTLER
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

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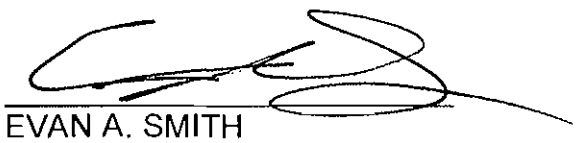

EVAN A. SMITH
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ERL/eas