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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff-Respondent,) NO. 38755
)
v.)
)
JOSEPH RICHARD CLINTON,) REPLY BRIEF
)
Defendant-Appellant.)
_____)

COPY

REPLY BRIEF OF APPELLANT

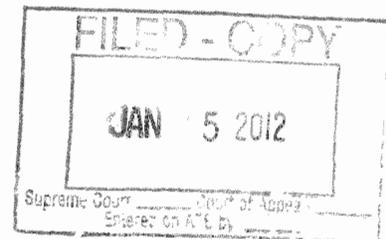
APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Clinton argued that the district court abused its discretion and acted in manifest disregard of the pertinent provisions of I.C.R. 32 and the requirements of I.C. § 19-2522, when it failed to *sua sponte* order a mental health evaluation for Mr. Clinton prior to sentencing. Mr. Clinton alternatively argued that the district court imposed and executed an excessive sentence in light of his mental health issues.

In response, the State argued that the fundamental error standard set forth in *State v. Perry*, 150 Idaho 209 (2010), overruled prior case law which enabled a defendant to claim, for the first time on appeal, that the district court abused its discretion when it acted in manifest disregard of a procedural rule at sentencing. (Respondent's Brief, pp.6-7.) In the alternative, the State argued, in reliance on *State v. Toohill*, 103 Idaho 565 (Ct. App. 1982), that Mr. Clinton cannot claim, for the first time on appeal, that the district court's compliance with a procedural rule was inadequate. (Respondent's Brief, pp.7-8.) The State further argued that I.C. § 19-2522 was not applicable because Mr. Clinton's mental health was not a significant factor at sentencing, and, if it was, the psychological materials before the court at sentencing met the requirements of I.C. § 19-2522. (Respondent's Brief, pp.10-18.)

This Reply Brief is necessary to address the State's claim that the *Perry* fundamental error standard overruled the Idaho Court of Appeals' manifest disregard standard. Mr. Clinton asserts that a defendant need not object to a district court's abuse of discretion at sentencing in order to preserve the issue for appeal. This brief is

also necessary to clarify that Mr. Clinton's claim is not based on the district court's inadequate adherence to I.C.R. 32 and I.C. § 19-2522, but rather a complete failure to adhere to this rule and statute.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Clinton's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the district court abuse its discretion and act in manifest disregard of the pertinent provisions of I.C.R. 32 and the requirements of I.C. § 19-2522, when it failed to *sua sponte* order a mental health evaluation of Mr. Clinton prior to sentencing?¹
2. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with three years fixed, upon Mr. Clinton following his plea of guilty to lewd conduct with a minor under sixteen?

¹ Only Issue 1 will be addressed in this brief.

ARGUMENT

I.

The District Court Abused Its Discretion And Acted In Manifest Disregard Of I.C.R. 32 And I.C. § 19-2522, When It Failed To *Sua Sponte* Order A Mental Health Evaluation Of Mr. Clinton Prior To Sentencing

A. Introduction

The State argues that the *Perry* opinion overruled the Idaho Court of Appeals' manifest disregard standard. (Respondent's Brief, pp.6-7.) However, the *Perry* opinion it did not overrule the manifest disregard standard because that standard is not based on fundamental error. Alternatively, the *Perry* opinion was only dealing with trial issues and not sentencing issues. Additionally, Mr. Clinton need not object to the district court's decision to order a mental health evaluation because that decision is reviewed with an abuse of discretion standard.

The State argues, in the alternative, that even if *Perry* is not applicable, the record before the district court contained enough information to function as a substitute of a full I.C. § 19-2522 evaluation. (Respondent's Brief, pp.7-8.) For that reason, the State asserts, Mr. Clinton's assertion of error merely goes to the adequacy of the district court's compliance with I.C. § 19-2522, which cannot be raised for the first time on appeal. (Respondent's Brief, p.7.) Contrary to the State's assertion, there never was a full diagnosis of Mr. Clinton's dementia, which was the district court's primary focus at sentencing. (PSI, pp.15-36.) Therefore, the district court acted in manifest disregard of I.C.R 32 and I.C. § 19-2522 when it failed to order a mental health evaluation.

B. The District Court Abused Its Discretion And Acted In Manifest Disregard Of I.C.R. 32 And I.C. § 19-2522, When It Failed To Sua Sponte Order A Mental Health Evaluation Of Mr. Clinton Prior To Sentencing

1. Perry Did Not Overrule The Manifest Disregard Standard Because That Standard Is Not Based On Fundamental Error

Perry did not overrule did not overrule the Idaho Court of Appeals' manifest disregard standard, because the manifest disregard standard is neither based on fundamental error nor does it have any relationship to fundamental error. The manifest disregard standard was set forth in *State v. Toohill*, 103 Idaho 565 (1982). The *Toohill* opinion dealt with the question of whether a district court's failure to order an unrequested mental health evaluation, to aid in the creation of a presentence report, could be challenged for the first time on appeal. *Id.* at 566. The Idaho Court of Appeals began its analysis with the fundamental error doctrine and stated that it "denotes a denial of due process" and "it refers to error which results in failure to afford the accused a fair trial." *Id.* The opinion went on to state that the Idaho Supreme Court has never extended "'fundamental error' doctrine beyond the adjudication of guilt, to the sentencing process." ² *Id.* After these statements were made, the Idaho Court of Appeals held:

We recognize that pre-sentence reports have a significant bearing upon sentencing decisions and upon appellate review of sentencing discretion. Our Supreme Court has established, by rule, the minimum requirements for pre-sentence reports. See I.C.R. 32(b) and its predecessor, I.C.R. 37, which applies to this case. The rule is there to be followed. Manifest disregard of the rule could not be countenanced on appeal without diminishing the reputation of the judicial process. Therefore, we believe

² The Idaho Supreme Court has since applied fundamental error to sentencing issues. See *State v. Longest*, 149 Idaho 782 (2010) (see also *State v. Jafek*, 141 Idaho 71 (2005)) (*State v. Robbins*, 123 Idaho 527 (1993)).

that a case characterized by such disregard of the rule may be reviewed, despite lack of objection below, in order to protect the integrity of the courts.

Id. The Idaho Court of Appeals did not base its manifest disregard standard on fundamental error or due process, as it was described by the Idaho Supreme Court at that time. *Id.* Instead, the Court of Appeals based this standard on the importance of trial courts' adherence to procedural rules when exercising their sentencing discretion. *Id.* In other words, the manifest disregard standard is distinct and independent from the fundamental error doctrine. So, even if *Perry* altered the fundamental error standard outside of a trial, it did not alter the manifest disregard standard because that doctrine is based on appellate review of abuse of discretion at sentencing and the requirements that trial courts adhere to procedural rules.

The manifest disregard standard is not derived from fundamental error because Idaho trial courts have an independent and statutorily directed duty to order mental health evaluations pursuant to I.C. § 19-2522. In *State v. Hanson*, Opinion 42 (Idaho January 06, 2012), (Court opinion is not yet final pursuant to I.A.R. 38(b)),³ the Idaho Supreme Court reaffirmed the mandatory and independent duty of trial courts to order mental health evaluations pursuant to I.C. § 19-2522.⁴ The Idaho Supreme Court noted that the decision to order a mental health evaluation is generally discretionary. *Id.* at 4. However, that discretion is statutorily curtailed because the language of I.C. § 19-2522

³ Mr. Clinton recognizes that this case was released after the State filed its Respondent's Brief.

⁴ *Hanson* is distinguishable from this matter because the defendant in *Hanson* did request a mental health evaluation. Despite that difference, the *Hanson* opinion provides helpful guidance in determining the nature of a district court's duty pursuant to I.C. § 19-2522.

“clearly indicates that a psychological evaluation is mandatory . . . when ‘there is a reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown the court **shall** appoint at least (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant.” *Id.* at 4-5. (quoting I.C. § 19-2522) (original emphasis). The court recognizes that I.C. § 19-2522 requires the trial court to order a mental health evaluation, regardless of whether defense counsel requests one.⁵

In sum, the manifest disregard standard, which is derived from statutory duty, bears no relationship to fundamental error, which is derived from constitutional guarantees of due process.

2. The Perry Standard Is Applicable To Trials And Did Not Supplant The Idaho Court Of Appeals’ Manifest Disregard Standard Which Is Applicable At Sentencing

The State asserts that the Idaho Supreme Court overruled the Idaho Court of Appeals’ manifest disregard standard in *State v. Perry*, 150 Idaho 209 (2010). (Respondent’s Brief, pp.6-7.) The State’s position is without merit because *Perry* only addressed trial error. In *Perry*, the Idaho Supreme Court set forth a single standard to govern prosecutorial misconduct and the harmless error, which are rules that are only

⁵ This point is repeated in the *Hanson* opinion. (“[We] hold that when the record shows a defendant has a substantial history of serious mental illness, the defendant’s mental condition will be a significant factor in determining an appropriate sentence and I.C. § 19-2522 requires the sentencing court to obtain a psychological evaluation prior to sentencing.” *Hanson*, at 6.)(“[T]he district court did not order an evaluation prior to sentencing, but did order one after sentencing” *Id.* (citing to *State v. Banbury*, 145 Idaho 265 (Ct. App. 2007) (emphasis added)) (“[T]he sentencing court should have ordered an evaluation before imposing sentence” *Id.* at 6-7. (citing to *State v. McFarland*, 125 Idaho 876 (Ct. App. 1994)).

applicable at trial. *Perry*, 150 Idaho at 219.⁶ This point is consistent with the fact that the language in the *Perry* opinion only references trial error and does not address sentencing error. Even the State's citation to *Perry* refers to error, which occurs at trial. (Respondent's Brief, p.6. ("[W]here an error has occurred at trial and was not followed by a contemporaneous objection . . ." *Perry*, 150 Idaho at 226) (emphasis added.))

The *Perry* opinion addressed a policy against tactically omitting an objection or "sandbagging," which is not a concern at sentencing in the specific context of the district court's failure to order a mental health examination because participation in that exam is not mandatory. The *Perry* opinion stated that "requiring a contemporaneous objection prevents the litigant from sandbagging the court, *i.e.*, 'remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.'" *Perry*, 150 Idaho at 224. (citations omitted). In *Estrada v. State*, 143 Idaho 558 (2006), the Idaho Supreme Court noted that a defendant's participation with the presentence report ordered pursuant to I.C.R. 32 is not mandatory and the defendant can refuse to participate in the report. *Estrada*, 143 Idaho at 562. While the district court has a duty pursuant to I.C.R. 32 and I.C. § 19-2522 to order a mental health evaluation at sentencing when mental health is a significant sentencing factor, the defendant can refuse to participate with that evaluation as per *Estrada*. In the event the district court fulfills its duty to order a mental health evaluation, and a defendant refuses to participate in that evaluation, the doctrines of waiver and invited error will presumably preclude the defendant from obtaining appellate relief on that issue.

⁶ The Idaho Supreme Court also disavowed its prior definition of fundamental error which was set forth in *Smith v. State*, 94 Idaho 469 (1971), for reasons which are unrelated to the matter at hand. *Id.* at 226-227.

In sum, the *Perry* opinion was only altered fundamental error as it applies to trials because it was addressing trial issues.

3. The District Court's Failure To Order A Mental Health Evaluation Can Be Raised For The First Time On Appeal Because That Decision Is Reviewed Under An Abuse Of Discretion Standard

It is well-established that the standard that this Court applies to review a sentence on appeal is an abuse of discretion. See, e.g., *State v. Mitchell*, 146 Idaho 378, 384 (Ct. App. 2008); *State v. Jafek*, 141 Idaho 71, 74-75 (Ct. App. 2005). The three-part test for an abuse of discretion is equally well-established—this Court will review the district court's sentencing determination for: (1) whether the district court correctly recognized the issue as one of discretion; (2) whether the court acted within the proper boundaries of that discretion and consistently with the legal standards that are applicable to the district court's discretionary determination; and (3) whether the district court reached its decision through the exercise of reason. *Id.* In this case, the district court acted in violation of the applicable legal standards attendant to its discretion at sentencing when the court failed to order a mental health evaluation pursuant to I.C. § 19-2522. There are many discretionary decisions made by Idaho trial courts, which are routinely reviewed by Idaho appellate courts under an abuse of discretion standard that does not require objections. For example, defense counsel is not required to immediately object after the imposition of a sentence to preserve an excessive sentencing claim for appellate review.

Further, from a perspective of judicial economy, allowing unobjected to error to be raised for the first time on appeal is less expensive and time consuming than allowing unobjected error at trial to be raised in the same manner. “[U]nobjected to

errors that occur at trial precipitates an entire new trial that could have been avoided by a timely objection, whereas correcting a sentencing error results in, at most, only a remand for resentencing, or, as in this case, for a modification of the allegedly erroneous condition of supervised release.” *U.S. v. Sofsky*, 287 F.3d 122, 125 (2nd Cir. 2002). Had Mr. Clinton requested a psychological evaluation at sentencing, the district court would have had to continue the hearing, which would have caused the expenditure of a substantially similar amount of judicial resources as the remedy requested pursuant to this appeal: to wit, a psychological evaluation performed by the licensed psychologist or psychiatrist and another sentencing hearing.

In sum, *Perry* did not overrule the manifest disregard standard because it is based on the district court's independent duty to order a mental health evaluation pursuant to I.C.R. 32 and I.C § 19-2522, and is not based on due process and the fundamental error standard. Alternatively, the *Perry* opinion was limited to trial proceedings and not sentencing. Additionally, because the failure to order a mental health evaluation is reviewed on an abuse of discretion standard, defendants do not have to object to allege that discretion was abused.

4. Mr. Clinton Can Demonstrate Fundamental Error

If it is determined that *Perry* overruled the manifest disregard standard, Mr. Clinton argues, in the alternative, that he can demonstrate fundamental error. In order to make a showing of fundamental error, the defendant must demonstrate: (1) that the error was of constitutional magnitude – i.e. that one or more of the defendant's un-waived constitutional rights were violated; (2) that the error was plain on the face of the record and that the failure to object was not the product of a tactical decision; and

(3) that the error was prejudicial, which requires the defendant to show a reasonable possibility that the error contributed to the outcome of the proceedings. *Perry*, 150 Idaho at 226.

Mr. Clinton submits that he met this standard. Even though Mr. Clinton argues that manifest disregard standard was not based on due process, an independent due process violation can be found when a district court fails to adhere to the procedural rules and statutory mandates. The district court violated Mr. Clinton's constitutionally protected due process rights did not adhere to its statutorily mandated duty to order a mental health evaluation. See section I(B)(1), *supra*. In light of *Hanson and Estrada, supra*, this error was clear and there is not risk of sandbagging. See section I(B)(1) and 1(B)(3), *supra*. Additionally, Mr. Clinton was prejudiced because he lost the benefit of his plea bargain, *i.e.*, an order placing him on probation. (Appellant's Brief, pp.11-12.) Further, the district court increased the length of the indeterminate portion of Mr. Clinton's sentence because it did not have enough information about Mr. Clinton's treatment options. See Section I(D) *infra*.

C. The District Court Did Not Substantially Comply With I.C. § 19-2522 When It Relied On Mr. Clinton's Competency Evaluations, Psychosexual Evaluation, And The Presentence Report

The State asserts that the district court had an adequate record of Mr. Clinton's mental health prior to sentencing, and for that reason the manifest disregard standard is not applicable because a claim that adequacy of compliance with I.C.R. 32 cannot be raised for the first time on appeal. (Respondent's Brief, p.7.) In support of this position the State cited to *Toohill, supra*. The portion of the *Toohill* opinion relied on by the State is as follows:

However, we will not review a contention, made for the first time on appeal, that compliance with the rule was simply inadequate-e.g., that the report should have developed a particular point further, or that certain information was incomplete or inaccurate. Those are matters to be raised at the sentencing hearing.

Toohill, 103, Idaho at 566-567.

Contrary to the State's assertion, the fact that the PSI addressed Mr. Clinton's mental health, does not overcome the district court's failure to order a mental health evaluation. (Respondent's Brief, p.10-11.) The Idaho Supreme Court recently addressed this issue in *Hanson, supra*. In that case, the defendant refused to participate in the presentence report but requested a mental health evaluation. *Hanson* at 8. The State argued that the general waiver rule precluded the defendant from selectively invoking his 5th Amendment privilege against self incrimination in regards to the same subject matter. *Id.* at 8-9. In rejecting this argument, the Idaho Supreme Court first noted that there are "topics in common to both a PSI and psychological evaluation." *Id.* at 9. The Supreme Court then stated that the Presentence Investigation Report (*hereinafter*, PSI) provides a general and "cursory" background of the defendant from information available in the public records, while a psychological evaluation provides "in-depth analysis" performed by a psychiatrist or a licensed psychologist and has specific requirements that are "focused directly and exclusively on the defendant's [psychological] background." *Id.* at 9-10. In light of the foregoing, the State's argument that the PSI adequately addressed Mr. Clinton's mental health is without merit because the PSI does not satisfy the "focused" requirements of an I.C. § 19-2522 mental health evaluation. (Respondent's Brief, pp.10-11.)

The State also argued that the two competency evaluations were a sufficient substitute for an I.C. § 19-2522 psychological evaluation. (Respondent's Brief, pp.11-13.) Contrary to the State's assertion, Mr. Clinton's competency evaluations were not a sufficient substitute for a full psychological examination because they did not address potential treatment options. One of the primary purposes of an I.C. § 19-2522 mental health evaluation is to "assist" the district court when deciding whether to recommend psychological treatment while the defendant is incarcerated, and competency evaluations generally do not consider the factors set forth in I.C. § 19-2522. *Hanson*, at 10-11; (See also *State v. Banbury*, 145 Idaho 265, (Ct. App. 2007) "[P]sychological evaluations to determine a defendant's competence to stand trial or aid in his defense conducted pursuant to I.C. § 18-211 often will be insufficient to inform the court's sentencing decision because they will not address the factors delineated in I.C. § 19-2522(3)."). As argued in the Appellant's Brief, the first competency evaluation stated that Mr. Clinton needed a comprehensive neurological evaluation, which may assist in treatment options to improve his cognitive functioning, and the second evaluation never ruled out dementia. (Appellant's Brief, pp.8-11.) Therefore, the competency evaluations are not an adequate substitute for an I.C. § 19-2522 evaluation because they did not address treatment related issues and never fully diagnosed Mr. Clinton's possible dementia.

The psychosexual evaluation cannot function as a substitute for an I.C. § 19-2522 evaluation because it never provided further insight into Mr. Clinton's possible dementia. (PSI, pp.15-36.) The psychosexual evaluation suffered from the same deficiency as the competency evaluations because it relied on those evaluations and

never indicated that it performed the comprehensive neurological examination deemed necessary in the competency evaluations. (PSI, pp.19-20.) While the psychosexual evaluator did perform his own mental health examination, which focused on Mr. Clinton's clinical mood issues, substance addiction, and his personality disorders, the evaluator did not indicate that any comprehensive testing for neurological disorders were performed. (PSI, p.25.) According to the State, "[d]uring the psychosexual evaluation, Dr. Johnson administered three psychological tests in addition to the 16 previous psychological test performed by Dr. Beaver, but the new tests did not produce valid results due to 'what appeared to be low intellectual functioning.'" (Respondent's Brief, pp.13-14 (citing to PSI, p.24.)) The psychosexual evaluation did not shed any new light on Mr. Clinton's mental health. In fact, it only raised more questions about Mr. Clinton's cognitive functioning.

In sum, the record before the district court did not function as an adequate substitute for a full I.C. § 19-2522 mental health evaluation. For that reason, the district court acted in manifest disregard of I.C.R. 32 and I.C. §19-2522 when it failed to order a mental health evaluation prior to sentencing.

D. Mr. Clinton's Mental Health Was A Significant Factor At Sentencing

The State argues that Mr. Clinton must establish a nexus between his mental health and the commission of the underlying offense, in order for his mental health to be considered as a significant factor at sentencing. Specifically, the State argued:

The specific extent of [Mr. Clinton's] dementia was not a 'significant factor at sentencing' because it was not a 'key underlying factor in the defendant's commission of the crime.'" *State v. Shultz*, 149 Idaho 285, 288 (Ct. App. 2010) (Stating that "[a]lthough not exclusive, a defendant's mental condition can be a significant factor at sentencing when that

condition may be a key factor in the defendant's commission of the crime, especially when the actions are a serious departure from the defendant's history and character.""). The crime at issue here is not a departure from [Mr. Clinton's] history or character in any way.

(Respondent's Brief, p.15.) While Mr. Clinton does not contest the standard proffered by the State, this is not an exclusive standard.

Hanson, supra, clarified what is necessary to establish that mental health is a significant factor at sentencing. In that case, the Idaho Supreme Court held that "when the record shows a defendant has a substantial history of serious mental illness, the defendant's mental condition will be a significant factor in determining an appropriate sentence and I.C. § 19-2522 requires the sentencing court to obtain a psychological evaluation prior to sentencing." *Hanson*, at 6. The Idaho Supreme Court went on to hold that the district court's comments about a defendant's need for psychological treatment can be considered in this analysis. *Id.* 6-7. In this case, the district court made the following statements pertaining to Mr. Clinton's mental health and potential treatment:

It is not clear if treatment can be successful, based on his deteriorating condition.

...

Historically, what happened to elderly defendants in a situation like this is that they were sent to Orofino, where there is some treatment available, and where they are kept away from younger inmates who might present a risk to them, but they are also kept away from any access to children, and it's probably something like that that would be beneficial in this case.

There is limited sexual offender treatment in the institution. It's really . . . up in the air about whether that would be successful, I think the court does need to consider the State's recommendation for a longer tail.

(Tr., p.51, L.25 – p.53, L.3.) Even the length of Mr. Clinton’s sentence was partially based on the district court’s assertions about the nexus between Mr. Clinton’s mental health and the affect it has on his amenability to treatment. The district court went on to state:

[H]e already had treatment, so I do not think in the sense of a willingness to participate in treatment [sic], he has demonstrated that in the past, but with the processes that are going on inside him now, it’s not clear if he can benefit from it in the future.

(Tr., p.53, Ls.11-17.) The district court stated that it was unsure about the type of treatment Mr. Clinton needed and that this lack of clarity was caused by Mr. Clinton’s deteriorating mental health. The district court lengthened the indeterminate portion of Mr. Clinton’s sentence based on this confusion, which could have been reduced had it ordered a full I.C. § 19-2522 evaluation.

Additionally, the State argues that there is no nexus between Mr. Clinton’s mental health and the commission of the offense because “[t]he crime at issue here is not a departure from [Mr. Clinton’s] history or character in any way.” (Respondent’s Brief, p.15.) Contrary to this assertion, Mr. Clinton’s mental health issues did contribute to his commission of the offense. The State accurately pointed out that Mr. Clinton had previously been convicted for a similar offense. (Respondent’s Brief, p.15.) However, the State failed to mention that this conviction occurred, approximately 25 years ago, in 1986 and is the only other criminal conviction on Mr. Clinton’s record. (PSI, pp.4-5.) Concerning this point, the district court stated that Mr. Clinton’s prior treatment, “was successful for awhile.” (Tr., p.47, L.22 – p.50, L.50.) The Court went on to state that:

[W]hat we have right now is a very serious issue that the defendant is suffering from dementia, which will probably worsen his ability to

understand and internalize additional counseling. If the prior counseling was successful . . . that success appears to be dimming now.

(Tr., p.51, Ls.11-17.)

I'm afraid that what's going on for whatever reason appears to be lessening his ability to control his impulses.

(Tr., p.52, L.13-16.)

Unfortunately, sexual impulses tend to survive dementia. They tend to be whatever they were before the dementia process began, so I think, unfortunately, the risk in this case is quite high, and the practical solutions are non-existent.

(Tr., p.53, Ls.18-23.)⁷ According to the district court, Mr. Clinton was willing to participate in treatment in the past and this treatment was successful. The district court went on to state that Mr. Clinton's lack of compliance with his prior treatment was out of his control and caused by his dementia. Therefore, the district court concluded that Mr. Clinton's dementia was causally related to the commission of the underlying offense.

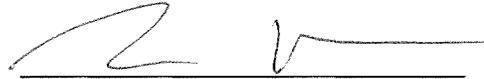
In sum, Mr. Clinton mental illness is so severe it was the district court's major focus at sentencing and the reason he was not placed on probation, which was the benefit his attorney negotiated for him during the plea process. Therefore, and under the standards set forth in *Hanson* and *Shultz*, Mr. Clinton's mental health was a significant factor at sentencing.

⁷ In his Appellant's Brief, Mr. Clinton does challenge some of the district court's statements as being clearly erroneous because they are the type which require an expert opinion. (Appellant's Brief, pp.11-15.)

CONCLUSION

Mr. Clinton respectfully requests that his sentence be vacated and that this case be remanded to the district court with instructions to order a mental health evaluation pursuant to I.C. § 19-2522. Alternatively, Mr. Clinton respectfully requests that this Court remand this case with instructions for the district court to either place Mr. Clinton on probation with terms it deems appropriate or place him on a period of retained jurisdiction.

DATED this 25th day of January, 2012.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSEPH RICHARD CLINTON
INMATE #25517
ISCI
PO BOX 14
BOISE ID 83707

DEBORAH A BAIL
DISTRICT COURT JUDGE
E-MAILED BRIEF

ED ODESSEY
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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SFW/eas

