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Clyne v. State Appellant's Reply Brief Dckt. 42054

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
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| HEATH CLYNE, |) | |
| |) | NO. 42054 |
| Petitioner-Appellant, |) | |
| v. |) | ADA COUNTY NO. CV 2013-17613 |
| |) | |
| STATE OF IDAHO, |) | APPELLANT'S |
| |) | REPLY BRIEF |
| Respondent. |) | |
| _____ |) | |

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

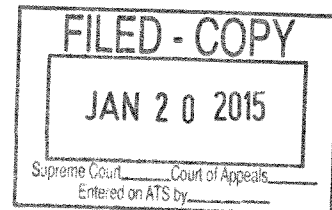
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STATEMENT OF THE CASE

Nature of the Case

Heath Clyne appeals, contending the district court erred when it denied his motion to amend his post conviction petition and when it summarily dismissed the un-amended petition. Mr. Clyne claimed below that defense counsel in his underlying criminal case was ineffective for arguing against his interests at sentencing. Mr. Clyne also sought to supplement that claim in an amended petition. He also sought to add a new claim – that trial counsel was ineffective for not obtaining a mental health evaluation that fulfilled the requirements of I.C. § 19-2522, *et seq.*, prior to sentencing.

On appeal, he contends that he should have been allowed to amend his petition to include the new claim. He also contends that the claim regarding counsel arguing against his interests should not have been summarily dismissed. The State responds, contending that based on the pleadings before the district court, the district court properly summarily dismissed the claim that counsel argued against Mr. Clyne's interests. It also contends that, because the claim Mr. Clyne sought to add to his petition in his motion to amend was not a "winning" claim, the district court properly denied the motion to amend the petition.

The State misunderstands Mr. Clyne's contention regarding the district court's decision to not allow Mr. Clyne to amend his petition to add the new claim for relief. He asserts on appeal, as he argued below, that his proposed amendment sought to add a valid claim that he contends should have included in his petition and evaluated to determine whether it presented a genuine issue of material fact.

With regard to the claim that was actually raised before the district court regarding counsel arguing against Mr. Clyne's interests, the problem with the State's arguments is the incongruity of its assertion that the district court properly denied the motion to amend the petition, which sought to amend and supplement that claim being pursued, and its assertion that the district court also properly summarily dismissed the petition for containing only bare and conclusory allegations which failed to establish a genuine issue of material fact. If the petition was not sufficient to survive summary dismissal, then it needed to be amended and supplemented. However, if the petition was sufficient, such that an amendment was not needed, then summary dismissal was inappropriate. In either case, the district court's actions were erroneous and Mr. Clyne should be afforded relief. Therefore, this Court should vacate the judgment of dismissal, reverse the order denying Mr. Clyne's motion for leave to amend his petition, and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Whether the district court abused its discretion when it denied Mr. Clyne's motion to amend his petition for post conviction relief.
2. Whether the district court erroneously summarily dismissed Mr. Clyne's petition for post conviction relief in the face of at least one genuine issue of material fact.

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Clyne's Motion To Amend His Petition For Post Conviction Relief

Mr. Clyne sought to amend and supplement his *pro se* petition in regard to two claims: (1) that trial counsel was ineffective for failing to seek or secure a statutorily-adequate mental health evaluation prior to his initial sentencing hearing; and (2) that trial counsel was ineffective for arguing against his interests at the sentencing hearing. The rationales the district court gave in denying the motion to amend the petition, as well as the arguments the State makes on appeal against those contentions, are different as to each of those claims. As such, each claim will be addressed in turn.

A. Mr. Clyne Should Have Been Allowed To Amend His Petition Regarding His Claim That Trial Counsel Was Ineffective For Not Seeking Or Securing A Statutorily-Adequate Mental Health Evaluation

Mr. Clyne sought to amend his petition for post conviction relief to include a new claim – a claim alleging that trial counsel was ineffective for not seeking or securing a statutorily-adequate mental health evaluation. (R., pp.63-66.) The district court gave two reasons for denying the motion to amend the petition to include that claim: (1) that claim “is being raised directly in the appeal from the Court’s decision denying the Rule 35 motion,” (Tr., p.22, Ls.5-7); and (2) that claim is not a “winning” claim (Tr., p.22, Ls.4-5).¹ In his Appellant’s Brief, Mr. Clyne, perhaps inartfully, discussed the

¹ Neither the district court nor the State (which subsequently argued the district court was correct in its conclusion that this claim was not a “winning” claim) clarify how the claim was not “winning”: whether it was that the claim was not properly raised under I.C. § 19-4901, *et seq.*, whether it was that Mr. Clyne had failed to present sufficient evidence to demonstrate a genuine issue of material fact on that claim, or whether it

impropriety of the district court's first rationale in Section I(B)(1) (where he argued against the decision to deny the motion to amend his post conviction petition), and did not address the merits of the district court's second rationale until Section II(C) (where he argued against the decision to summarily dismiss his petition).

However, the State's response does not address the first rationale, or any of Mr. Clyne's arguments therein, at all. (*See generally* Resp. Br.) Therefore, Mr. Clyne will not further discuss the district court's first rationale in this brief. Rather, he simply refers this Court back to pages 11-13 of his Appellant's Brief and requests relief on that basis.

In regard to the district court's second rationale – its belief that Mr. Clyne's claim regarding the mental health evaluation was not a “winning claim” – the State makes several different arguments: (1) this Court is precluded from considering the mental health evaluation claim, since it was not articulated in the *pro se* petition and the district court did not permit Mr. Clyne to amend the petition to include that claim and this Court should affirm on the district court's second rationale because Mr. Clyne did not challenge that rationale in his Appellant's Brief; and (2) the district court was correct in its conclusion that the mental health evaluation claim was not a “winning” claim.

was that Mr. Clyne's allegations were somehow disproved by the record. However, a claim purporting to assert that “trial counsel was ineffective” is properly raised under I.C. § 19-4901, *et seq.* Furthermore, it is inappropriate at the summary dismissal stage of post conviction proceedings to argue that claims should be summarily dismissed in the face of contradictory evidence; the presence of contradictory evidence simply demonstrates the genuine issue of material fact, and thus, the need for an evidentiary hearing. Therefore, based on the context, Mr. Clyne believes that, by asserting that this claim was not a “winning” claim, the district court and the State are contending that, even if all the facts were viewed in the light most favorable to Mr. Clyne, he would not be entitled to relief, and so, failed to articulate a genuine issue of material fact on this claim. Mr. Clyne will focus his arguments in this brief based on that understanding.

However, none of those arguments demonstrate that the decision to deny Mr. Clyne's motion to amend the petition was proper. Therefore, this Court should still reverse the decision to deny Mr. Clyne's motion to amend his petition for post conviction relief.

1. Mr. Clyne Did Challenge The District Court's Conclusion That The Mental Health Evaluation Claim Was Not A "Winning" Claim In His Appellant's Brief

In his Appellant's Brief, Mr. Clyne argued that the proposed amended petition presented a genuine issue of material fact in regard to the mental health evaluation claim, and so, the district court erred by refusing to allow him to file the amended petition to include that claim. However, Mr. Clyne included part of his analysis on that argument in Section II of his Appellant's Brief, where he also argued that the district court erred in summarily dismissing his other claim for relief (that counsel argued against his interests). (See App. Br., pp.15-23.) The reason Mr. Clyne argued those two points in the same section was that he was applying the same standard of review – that he had presented facts establishing a genuine issue of material fact – to both issues.²

The State apparently and understandably construed this to mean that Mr. Clyne was contending that the district court erred by summarily dismissing the mental health evaluation claim that he was seeking to add to his petition. As such, the State contends that, since Mr. Clyne's amended petition was not accepted by the district court, the only

² Idaho case law does not provide a clear standard for assessing whether the district court erred in denying a motion to amend – whether, for example, the petitioner need only show that the proposed amendment would present a viable claim for relief, or if he must meet a higher standard and present sufficient facts to set forth a genuine issue of material fact in the proposed amendment. In his Appellant's Brief, Mr. Clyne was simply arguing under the higher standard that might apply, since, if he meets the higher standard, he has certainly met a lower standard.

claims that are viable on appeal are those that were raised in the *pro se* petition. (Resp. Br., pp.15-16.) Based on that understanding of Mr. Clyne's claims, the State argues that this Court should deny relief in regard to Mr. Clyne's mental health evaluation claim because Mr. Clyne did not challenge the district court's second rationale for denying his motion to amend the petition – "I think [it] is not a winning claim." (Resp. Br., p.9 (quoting Tr., p.22, Ls.2-4).)

However, the State's argument misses the point Mr. Clyne was trying to argue, and he apologizes for the confusion created by his Appellant's Brief in this regard. He was arguing that, in considering whether the district court erred in refusing to allow Mr. Clyne to amend his petition based on the fact that it sought to add a valid claim for relief. This Court can, and indeed should, consider the merits of the proposed claim in determining whether the district court improperly denied a motion to amend a petition.³ However, in determining whether the district court properly summarily dismissed the petition for post conviction relief, Mr. Clyne agrees that this Court would properly only consider the claims actually included in the petition for relief that was before the district court. However, based on a proper understanding of Mr. Clyne's arguments, he did challenge the district court's second rationale – that the mental health evaluation claim was not a "winning" claim – in his Appellant's Brief.

Properly considering Mr. Clyne's claim on appeal, the record demonstrates that the district court erred by refusing to allow Mr. Clyne to amend his petition. The fact that Mr. Clyne was prevented from having a valid claim for relief considered on its merits

³ The State recognized as much, as it cross-applied its own arguments about whether there was a genuine issue of material fact on this issue to its analysis of whether the district court properly denied the motion to amend the petition because the claim was not "winning." (See Resp. Br., p.9 n.2.)

because the district court refused to allow him to amend his petition to include that viable claim demonstrates the error of the district court's decision. After all, one of the reasons counsel is appointed in post conviction cases is to assist the petitioner in properly presenting all viable issue for relief. *Charboneau v. State*, 140 Idaho 789, 793 (2004). This is particularly true in light of the fact that a petitioner's failure to articulate all viable claims for relief in his initial petition will most likely preclude him from ever seeking relief on that basis in the future. See, e.g., *Stuart v. State*, 149 Idaho 35, 41 (2010) (holding that claims which could have, but were not, raised in the timely initial petition for relief are deemed waived). Therefore, this Court should reverse the decision to deny Mr. Clyne's motion to amend his petition.

2. The Conclusion That The Mental Health Evaluation Claim Is Not A "Winning" Claim Is Erroneous

As to the merits of the assertion that the claim was not "winning," the facts, when viewed in the light most favorable to Mr. Clyne, demonstrate that he would be entitled to relief on this claim of ineffective assistance of counsel.⁴ See, e.g., *Charboneau*, 140 Idaho at 793 (explaining that, at the summary dismissal stage of the proceedings, the facts are to be viewed in the light most favorable to the petitioner). As a result, the State's argument – that the district court properly denied the motion to amend the

⁴ As discussed in Section I(A)(1), *supra*, even though this Court cannot independently rule on whether Mr. Clyne is entitled to an evidentiary hearing on this claim without the district court actually considering the claim first, this Court should still review the merits of the claim – that there is a genuine issue of material fact as to whether trial counsel was ineffective for not seeking or securing a statutorily-adequate mental health evaluation – as that issue is relevant to the analysis of whether the district court abused its discretion by denying Mr. Clyne's motion to amend the petition. It is directly relevant to the district court's determination that this was not a "winning" claim. At any rate, as will be discussed in detail in Section I(B), *infra*, the courts should seek to resolve claims on their merits, rather than on procedural defaults.

petition on this issue – is meritless. The record clearly indicates that Mr. Clyne’s mental health was going to be a substantial issue at sentencing, as the district court stated, “I need [a mental health evaluation] to sentence this defendant.” (R., p.83 (emphasis added).) Therefore, the district court was required to have a statutorily-adequate evaluation of Mr. Clyne’s mental condition. See, e.g., I.C. § 19-2522(1). As the Court of Appeals has previously held, a defendant who is sentenced without this statutorily-required evaluation is entitled to a new sentencing hearing. *State v. Durham*, 146 Idaho 364, 367 (Ct. App. 2008).⁵ Thus, the relevant facts – that the district court needed the evaluation and sentenced Mr. Clyne without one – which appear to be unrefuted, but certainly, if viewed in the light most favorable to Mr. Clyne, demonstrate that he would be entitled to relief. See *id.* Therefore, Mr. Clyne’s allegation that his attorney was ineffective for not ensuring the district court had this necessary information at sentencing is a “winning” claim provided he is able to present sufficient evidence to prove his allegations on that issue at an evidentiary hearing.

The proposed amended petition sought to assert that new claim and present information in support thereof. For example, it sought to present evidence that Mr. Clyne’s actions in the underlying criminal case could potentially have been attributed to particular diagnoses, and that his condition could be managed with medication. (R., p.65.) That evidence would demonstrate why a new evaluation was necessary, and thus, would demonstrate why counsel needed to seek the adequate evaluation. Compare *Durham*, 146 Idaho at 367 (recognizing that one reason such

⁵ The State asserts that *Durham* is not relevant to this case. (Resp. Br., p.17.) As will be demonstrated at various points herein, the analysis from that decision is relevant and on point in several respects. Therefore, the State’s disregard of *Durham* is unwarranted.

evaluations are required is that they can provide information about factors relevant to sentencing, such as whether the crime was uncharacteristic for the defendant or factually irrational). Therefore, the district court abused its discretion by refusing to accept and consider this evidence relevant to a legitimate claim for post conviction relief.

The State makes two basic arguments against this conclusion – that Mr. Clyne’s own statements at sentencing disprove his claim of ineffective assistance and that he did not allege prejudice on this claim. (Resp. Br., pp.15-18.) Those arguments are both erroneous.

a. Mr. Clyne’s Statements At The Sentencing Hearing Do Not Demonstrate That His Mental Health Evaluation Claim Was Not A “Winning” Claim

The State contends that because, at sentencing, Mr. Clyne said he did not believe he needed mental health treatment, there is no genuine issue of material fact on his mental health evaluation claim. (Resp. Br., pp.17-18 (quoting R., p.87).) The State also relies on Mr. Clyne’s statement at the rider review hearing regarding his unwillingness to participate in a mental health evaluation at that time to further its argument in this regard. (Resp. Br., p.18 (quoting Tr., p.5, Ls.9-14).) It is strange that, in these particular instances, the State is willing to take Mr. Clyne at his word and argue that those statements constitute sufficient evidence to disprove his allegations, and yet, it is unwilling to accept the statements he made in his verified pleadings and affidavits as contrary evidence which establishes a genuine issue of material fact on this claim. (See Resp. Br., pp.10-18.) Nevertheless, the State’s arguments are misplaced; the potentially-contradictory statements certainly do not demonstrate that there is no

genuine issue of material fact, since all a potentially-contradictory statement can do is *create* genuine issues of material fact.

However, these statements do not actually contradict or disprove Mr. Clyne's allegations. For example, Mr. Clyne was seeking to challenge the failure to have a mental health evaluation conducted before the *original sentencing hearing*, not the rider review hearing, in his petition for post conviction relief. While he may have been unwilling to participate in an evaluation at the end of a period of retained jurisdiction, that does not necessarily mean that he was unwilling to participate in an evaluation prior to sentencing. Therefore, his statement – that he did not want to participate in a mental health evaluation at the end of his period of retained jurisdiction – is irrelevant to the issue intended to be presented in his petition for post conviction relief and pursued on this appeal.

Similarly, Mr. Clyne's statement at the sentencing hearing – that he believed he did not need mental health treatment – even if true, does not contradict the claim he sought to make in post conviction. As the Court of Appeals pointed out in *Durham*, part of the reason the district court is required to obtain a mental health evaluation when it determines that a defendant's mental health will be a significant factor at sentencing is that such an evaluation "can assist the sentencing court in assessing the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law *at the time of the offense charged.*" *Durham*, 146 Idaho at 366 (emphasis added). It is perfectly possible that Mr. Clyne was suffering from symptoms of a mental health condition at the time he committed the crime, but thereafter, received treatment and medication while in jail, and so, at sentencing, no

longer felt the impact of those symptoms. (See, e.g., R., pp.64-65 (noting that Mr. Clyne had been receiving medication for schizophrenia while in jail).) In that case, his statement would not be inaccurate, but still, would not disprove his post conviction claim. That is certainly the case if these facts are viewed in the light most favorable to Mr. Clyne.

Furthermore, as one author noted while examining mental health treatment in penal facilities, “[t]here is a caveat that self-reports do not always produce an accurate number [of people needing treatment], especially when dealing with mental illnesses. Inmates *may not even know they are suffering from an illness or they may be embarrassed of admitting that they suffer from a mental illness.* This emphasizes the need for implementing uniform assessment and screening tools.” Ralph M. Rivera, *The Mentally Ill Offender: A Brighter Tomorrow through the Eyes of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004*, 19 J.L. & Health 107, 126 (2005) (emphasis added). If Mr. Clyne were one such person, his statement – that he did not believe he needed treatment – would not reflect the actual state of his mental condition. He might not have recognized that he was suffering from such a condition, or he might have been embarrassed to admit it, and so, said that he did not have such a condition. Neither scenario justifies trial counsel’s decision to proceed to sentencing without a statutorily-adequate evaluation.

Therefore, the State’s contention that Mr. Clyne’s other statements disprove his allegation should be rejected.

b. Mr. Clyne Sufficiently Alleged Prejudice In Regard To His Mental Health Evaluation Claim

The State also contends that Mr. Clyne did not allege prejudice on the proposed mental health evaluation claim, and so, failed to state a claim upon which relief could be granted. (Resp. Br., pp.15-16.) That assertion is not accurate. In his proposed amended petition, Mr. Clyne contended that, had counsel sought the necessary mental health evaluation, he would have been able to argue that Mr. Clyne could be treated in the community, and therefore (echoing Mr. Clyne's second claim for post conviction relief), trial counsel would not have disavowed probation as a sentencing alternative. (R., pp.65-66.) Thus, he alleged a reasonable probability that the sentencing decision would have been different but for trial counsel's deficient performance, and so, alleged prejudice. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). To that point, the State argues that, because Mr. Clyne did not provide specific information about that treatment plan for which trial counsel would have advocated, Mr. Clyne failed to allege sufficient evidence to create a genuine issue of material fact on the prejudice prong of the *Strickland* test. (Resp. Br., pp.14-15.) That argument is also mistaken.

While it is generally expected that a petitioner will plead his case with specificity, he cannot properly allege those things that are not within his personal knowledge as fact. *Kelly v. State*, 149 Idaho 517, 521 (2010); *Hall v. State*, 156 Idaho 125, 130-31 (Ct. App. 2014). Mr. Clyne has no way of knowing what sort of treatment program the mental health evaluator would have recommended. That deficiency is a direct result of his trial attorney's failure to have an adequate evaluation performed. Therefore, it would have been inappropriate for him to allege facts about the particular treatment plan for which trial counsel could have argued in his verified pleadings or affidavits. As such,

the perceived shortcoming that the State highlights actually proves that trial counsel's deficient performance prejudiced Mr. Clyne.

The State's argument also demonstrates the prejudice caused by not allowing Mr. Clyne to amend his petition and allow his trial attorney to seek and/or provide the necessary evidence to flesh out the claim. After all, as the State noted, this claim was not articulated in the *pro se* petition. Thus, assuming post conviction counsel were providing effective assistance in pursuing this claim of ineffective assistance of counsel, upon being allowed to amend the petition, he would have requested funds from the district court to have a mental health evaluation performed, so that he would be able to properly articulate the actual prejudice that the State asserts is necessary. However, Mr. Clyne was denied the opportunity to seek that evidence because the district court refused to allow him to amend his petition to include this claim. As such, either Mr. Clyne has presented sufficient evidence on the prejudice prong of this proposed claim, or else the district court's decisions denied him the meaningful opportunity to do so. Either way, he is entitled to relief.

B. The State's Contention That Mr. Clyne Did Not Need To Amend His Petition As To The Claim That Trial Counsel Argued Against Mr. Clyne's Interests At Sentencing Is Erroneously Narrow In Scope And Improperly Promotes Form Over Substance

Mr. Clyne also tried to amend his petition to supplement his claim that his trial attorney was ineffective because he argued against Mr. Clyne's interests at the sentencing hearing by disavowing probation as a viable sentencing alternative in Mr. Clyne's case. For instance, Mr. Clyne sought to allege and introduce evidence that trial counsel was ineffective because he failed to set forth a reasonable probation plan.

(R., p.66.) The State responds that “[Mr.] Clyne did not, however, need to amend his petition in order to avoid summary dismissal of his petition” on this claim because “[t]he district court expressly invited him to respond to the state’s motion [for summary dismissal] and ‘give [it] the reasons why this should be heard at an evidentiary hearing.’” (Resp. Br., pp.9-10 (quoting Tr., p.25, Ls.2-5).)

That contention is erroneously narrow, as it ignores the fact that part of post conviction counsel’s job is to assist the petitioner in properly framing the issues. See, e.g., *Charboneau*, 140 Idaho at 793. It would do Mr. Clyne no good to reply to the State’s motion for summary dismissal if the contentions the State raised in its motion for summary dismissal were responding to a mis-framed issue in the *pro se* petition. In that case, even if Mr. Clyne completely refuted all the State’s contentions, his mis-framed claim would still be subject to summary dismissal for not presenting a viable basis for relief.

In this case, the amended petition sought to flesh out the claim in regard to the prejudice prong of the *Strickland* test. (See R., p.66.) As the State argued in regard to Mr. Clyne’s mental health evaluation claim, the failure to allege prejudice means the claim does not allege a sufficient basis for relief and should be summarily dismissed. (See Resp. Br., pp.16-17 (citing *Schoger v. State*, 148 Idaho 622, 624 (2010).) As such, it seems disingenuous for the State to turn around and argue that the district court properly denied the request to amend the petition in regard to the claim that trial counsel argued against Mr. Clyne’s interests at sentencing, when post conviction counsel was trying to make sure the claim adequately alleged prejudice. As such, the State’s

argument that Mr. Clyne could have just presented this additional information in response to its motion for summary dismissal is erroneous and should be rejected.

Additionally, the State's argument is erroneous because it promotes form over substance. Under the State's analysis, Mr. Clyne has to make these assertions in a response to the State's motion rather than in an amended petition, never mind the fact that substantive points he would be making in either case would be the same. The Idaho Supreme Court has declared that such a result is inappropriate; "[s]ubstance not form governs." *State v. Jakoski*, 139 Idaho 352, 355 (2003). The reason for this rule is that "the purpose of our modern rules of pleading [is] to promote the resolution of disputes on their merits rather than to bar suit based on antiquated pleading requirements." *Trimble v. Engelking*, 130 Idaho 300, 303 (1997). To decide Mr. Clyne's claims on their merits, the district court would need to consider the claims he raised, which were based, in part, on the evidence he sought to present in the amended petition. The form in which those claims and supporting evidence is presented should not govern whether or not they are considered, and yet, that is exactly the position that the State is advancing in this case. As a result, the State's arguments, which seek to do exactly what the Idaho Supreme Court has declared inappropriate, should be rejected.

Furthermore, the State simply dismisses as irrelevant the fact that the district court told Mr. Clyne's post conviction attorney, at least three times, that he would be allowed to file an amended petition if he deemed it necessary. (Resp. Br., p.10.) However, those statements are not irrelevant. They speak to, *and directly contradict*, the State's contention that the proper way for Mr. Clyne to raise the additional and clarified claims was a response to the State's motion for summary dismissal. The

district court's statements about post conviction counsel's option to file an amended petition demonstrate that, not only was an amended petition a viable mechanism to present this additional information, but that it would be up to post conviction counsel which procedural mechanism he would use to present that information. And yet, when post conviction counsel tried to exercise his option, the district court refused to let him do so. The fact that the district court would not consider the substance of Mr. Clyne's information demonstrates the abuse of discretion in the district court's decision to deny the motion to amend the petition.

Ultimately, in whatever form Mr. Clyne presented his additional information about trial counsel's arguments against his interests, that additional information was relevant and should have been considered by the district court in its decision to summarily dismiss the petition. Since the district court refused to allow Mr. Clyne to present that additional information, the district court abused its discretion by denying the motion to amend the petition in this issue.

II.

The District Court Erroneously Summarily Dismissed Mr. Clyne's Petition For Post Conviction Relief In The Face Of At Least One Genuine Issue Of Material Fact

A. Mr. Clyne Presented A Genuine Issue Of Material Fact With Regard To His Claim That His Trial Counsel Provided Ineffective Assistance By Failing To Seek Or Secure A Mental Health Evaluation That Conformed With The Statutory Requirements

As discussed in depth in Section I(A), *supra*, Mr. Clyne sought to present a valid claim for relief based on his trial counsel's failure to seek or secure a statutorily-adequate mental health evaluation prior to his initial sentencing hearing. In Section II(C) of the Appellant's Brief, Mr. Clyne was pointing out that the information he sought

to add with this additional claim for relief did present a genuine issue of material fact, and so, he should have been allowed to amend his petition to include that claim. However, he recognizes that such an argument is more properly addressed in Section I, and so, in this Brief, he has presented that analysis fully in Section I. He apologizes for any confusion his structuring of the argument may have caused.

B. Mr. Clyne Presented A Genuine Issue Of Material Fact With Regard To His Claim That His Trial Counsel Provided Ineffective Assistance By Arguing Against Mr. Clyne's Interests At The Sentencing Hearing

Mr. Clyne contends that his trial attorney was ineffective because he argued against Mr. Clyne's interests by disavowing probation as a viable sentencing option, even though the plea agreement called for the State to recommend probation. To that end, Mr. Clyne contends that, had trial counsel effectively argued on his behalf, trial counsel would have presented a reasonable plan for probation, including a provision for mental health treatment in the community. The State responds that, because Mr. Clyne did not fully explain what that proposed plan for receiving treatment in the community would be in his pleadings, he failed to present sufficient evidence to show that trial counsel performed deficiently by disavowing the possibility that Mr. Clyne would be successful on probation. (Resp. Br., pp.13-14.)

The State's argument misses the whole point of Mr. Clyne's claim. The claim at issue here is that, by arguing against the very sentencing alternative for which Mr. Clyne had negotiated in his plea agreement, trial counsel failed to be a zealous advocate for Mr. Clyne. (App. Br., p.17; see R., p.66.) Attorneys have a fundamental duty to be a loyal, zealous advocate for their clients. *Heinze v. Bauer*, 145 Idaho 232, 238 (2008). As the United States Supreme Court has pointed out, this is "perhaps the most basic of

counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Thus, where a petitioner sets forth facts that would, if viewed in the light most favorable to him, show that counsel was not a zealous advocate on his behalf and that counsel's failure to be a zealous advocate prejudiced him (as Mr. Clyne has done here), he would be entitled to relief. This is true regardless of how specific trial counsel's arguments to the district court were; the fact that his trial counsel disavowed probation as a sentencing option in the face of the plea agreement calling for a suspended sentence demonstrates that he was not acting as a zealous advocate on Mr. Clyne's behalf. Therefore, Mr. Clyne had alleged facts establishing that trial counsel's performance was deficient.

The State also points to the fact that, in the midst of his statements about how Mr. Clyne was not an appropriate candidate for probation, trial counsel submitted a letter indicating that Mr. Clyne had been accepted into the Rising Sun Sober Living House. (Resp. Br., p.14 (citing R., p.85).) Based on the fact that trial counsel presented this piece of evidence, the State contends that trial counsel's sentencing argument was somehow acceptable. (Resp. Br., p.14.) However, the fact that trial counsel presented that single piece of evidence does not demonstrate that trial counsel was an effective, zealous advocate for Mr. Clyne at the sentencing hearing. Even though that piece of evidence demonstrates that Mr. Clyne had been accepted into a treatment program, he still had to convince the district court that the program would serve the sentencing objectives. As such, trial counsel's assertion – that Mr. Clyne could participate in that program but would not be successful on probation anyway – argued that, even if he participated in that program, he would be unlikely to adequately rehabilitate or conform his actions to society's expectations. As a result, trial counsel


was still arguing against Mr. Clyne's interests, which constitutes deficient performance by counsel.

In regard to the second prong of the *Strickland* test, the State maintains that, because Mr. Clyne had not established what specific probation plan trial counsel could have argued, there was not sufficient evidence to establish that counsel's sentencing arguments prejudiced Mr. Clyne. (R., p.15.) However, as discussed in Section I(B), *supra*, it would have been improper for Mr. Clyne to have alleged such facts, as they were not in his personal knowledge. At any rate, to show prejudice under *Strickland*, the petitioner must only show a reasonable probability that, but for counsel's deficient performance, the result might have been different. *Strickland*, 466 U.S. at 694. It is difficult to see how there is not a *reasonable probability* that Mr. Clyne's sentence would have been different if trial counsel had not argued against probation as a viable sentencing option. The prosecutor obviously thought there was a possibility that Mr. Clyne would be successful on probation, since the prosecutor entered an agreement to, and ultimately did, recommend probation. As such, there is a *reasonable probability* that, had Mr. Clyne's trial attorney not undermined that recommendation, the district court would have suspended Mr. Clyne's sentence. Thus, there is sufficient evidence that trial counsel's deficient performance prejudiced Mr. Clyne. Therefore, summary dismissal of the petition was inappropriate.

CONCLUSION

Mr. Clyne respectfully requests that this Court vacate the judgment summarily dismissing his petition, reverse the order denying his motion to amend his petition for post conviction relief, and remand this case for further proceedings.

DATED this 20th day of January, 2015.


for BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of January, 2015, 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:

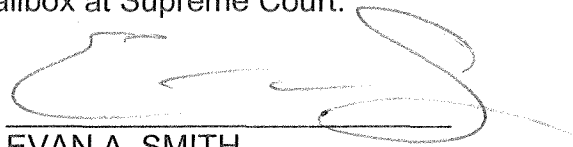
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