

10-8-2014

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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

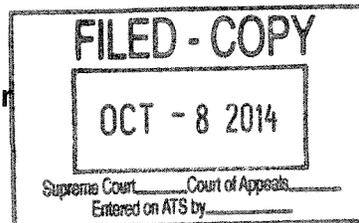
HONORABLE MELISSA MOODY  
District Judge

SARA B. THOMAS  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

ERIK R. LEHTINEN  
Chief, Appellate Unit  
I.S.B. #6247

BRIAN R. DICKSON  
Deputy State Appellate Public Defender  
I.S.B. #8701  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712



ATTORNEYS FOR  
PETITIONER-APPELLANT

ATTORNEY FOR  
RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

Heath Clyne appeals, contending that the district court abused its discretion when it denied his motion for leave to amend his petition for post conviction relief, and when it summarily dismissed his petition for relief.

In regard to the decision to summarily dismiss the petition, Mr. Clyne contends that the evidence before the district court presented two genuine issues of material fact. The first issue was that Mr. Clyne received ineffective assistance of counsel when his defense counsel argued against Mr. Clyne's interests by arguing he was not a good candidate for probation, even though the plea agreement provided for a recommendation of probation from the State. The second issue was that Mr. Clyne received ineffective assistance of counsel when his defense counsel failed to seek or secure a mental health evaluation that met the requirements of I.C. §§ 19-2522, -2523, and/or -2524.

Mr. Clyne had moved for leave to amend his petition to clarify and add factual support for those allegations. In denying that motion, the district court abused its discretion in two regards. First, it erroneously concluded that the claim regarding the mental health evaluation had been raised in Mr. Clyne's direct appeal from the denial of his motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35 motion). Second, it erroneously concluded that no amendment was necessary on the claim regarding trial counsel arguing against Mr. Clyne's interests because that issue had been presented in Mr. Clyne's *pro se* petition. It made that decision despite the fact that it intended to

summarily dismiss the petition based on the belief that it only presented bare and conclusory allegations.

As a result of these errors, this Court should reverse the order denying Mr. Clyne's motion for leave to amend his petition, vacate the judgment of dismissal, and remand this case for further proceedings.

### Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Clyne pled guilty, pursuant to a plea agreement, to one count of burglary. (Augmentation – Judgment of Conviction.)<sup>1</sup> The plea agreement called for the State to recommend that the district court suspend Mr. Clyne's sentence for a period of probation. (R., pp.64-66; see R., p.79.) The district court ordered a mental health evaluation be performed on Mr. Clyne as part of the presentence report (*hereinafter*, PSI). (Augmentation – Order for PSI.) However, at the sentencing hearing, district court discussed the adequacy of the report generated in that regard: "having ordered a mental health evaluation, the Court's in a position where essentially I don't have one. This evaluation is so terrible that it is the equivalent of nothing." (R., p.83.) However, based on the representations of Mr. Clyne's attorney, it did not order a new evaluation and proceeded with the sentencing hearing. (R., p.85.)

During that hearing, defense counsel uttered the recommendation from the plea bargain, recommending that the district court commute Mr. Clyne's sentence or, alternatively, suspend it for a two-year period of probation. (R., p.85.) However,

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<sup>1</sup> A motion requesting that this Court augment the record with, and take judicial notice of, several documents of which the district court took judicial notice below has been filed contemporaneously with this brief. Citations to any of those documents will identify the documents as "Augmentation."

defense counsel effectively disavowed that recommendation by making several assertions to the effect that Mr. Clyne was not a suitable candidate for probation. (R., pp.84-85.) The district court ultimately imposed a unified sentence of five years, with one year fixed, and it retained jurisdiction. (Augmentation – Judgment of Conviction.) The district court subsequently relinquished jurisdiction and executed Mr. Clyne’s sentence. (Augmentation – Order Relinquishing Jurisdiction.) Thereafter, Mr. Clyne filed a Rule 35 motion asking for a reduction of his sentence. (Augmentation – Rule 35 Motion.) The district court denied that motion, noting that Mr. Clyne had not presented any additional documentation in support of his motion. (Augmentation – Order Denying Rule 35 Motion.) Mr. Clyne filed a notice of appeal which was timely only from the order denying his Rule 35 motion. (See Augmentation – Appellant’s Brief, pp.3-4.) The Court of Appeals affirmed the order denying the Rule 35 motion because Mr. Clyne did not present new or additional information in support of his motion. *State v. Clyne*, 2014 Unpublished Opinion No. 410 (Ct. App. Mar. 11, 2014).

While that direct appeal was pending, Mr. Clyne filed a *pro se* petition for post conviction relief, and the post conviction petition was timely from the judgment of conviction. (R., pp.4-10; Augmentation – Judgment of Conviction.) He alleged that his trial attorney was ineffective for several reasons, including having a conflict of interest, failing to present evidence in mitigation at the sentencing hearing, and providing insufficient argument at the sentencing hearing. (R., pp.5-6, 9-10.) He also moved for the appointment of counsel. (R., pp.25-27.) The State denied those allegations, and moved for an order summarily dismissing the petition. (R., pp.34-40.)

The district court decided to appoint counsel to represent Mr. Clyne. (R., p.42.) The district court subsequently “gave Petitioner’s counsel additional time to meet and confer with Petitioner and, if warranted, file an amended petition.” (R., p.52.) Thereafter, the district court entered a notice of intent to dismiss the petition, which adopted the reasons articulated in the State’s motion for summary dismissal as the basis for the district court’s decision. (R., p.61.)

On the same day the district court filed its notice of intent dismiss the petition, Mr. Clyne, through post conviction counsel, filed a motion for leave to amend the petition for post conviction relief. (R., pp.63-66.) That motion included the proposed amended petition, which would have revised the allegations to assert three claims for relief: (1) trial counsel provided ineffective assistance by failing to properly investigate the case and obtain mitigating evidence, specifically, a mental health evaluation which conformed with I.C. §§ 19-2522, -2523, and/or -2524; (2) the district court deprived Mr. Clyne of due process by failing to order said statutorily-adequate mental health evaluation; and (3) trial counsel provided ineffective assistance of counsel by arguing against Mr. Clyne’s interests at the sentencing hearing, specifically, by arguing against Mr. Clyne’s suitability for release on probation even though the plea agreement provided that the State would recommend probation. (R., pp.64-66; see R., p.79.) The proposed amendment also alleged that, as a result of not having a statutorily-adequate mental health evaluation, the district court “failed to consider” whether Mr. Clyne could have been treated in the community for his mental health issues when it decided to retain jurisdiction over Mr. Clyne instead of suspending his sentence. (R., p.65.)

However, despite its previous permission for post conviction counsel to file an amended petition, the district court denied the motion because it determined that two of the claims were not properly raised in the post conviction case, and that the third claim had already been presented in Mr. Clyne's *pro se* motion. (R., pp.90-91.) In regard to the claim about trial counsel's failure to obtain a mental health evaluation, the district court determined that the same issue had been raised in Mr. Clyne's direct appeal.<sup>2</sup> (Tr., p.22, Ls.2-11.) As to the claim that the district court deprived Mr. Clyne of due process, the district court determined that it should have been raised on direct appeal.<sup>3</sup> (Tr., p.21, L.21 - p.22, L.1.) Finally, on the claim that trial counsel argued against Mr. Clyne's interests at the sentencing hearing, the district court pointed out that the claim had been presented to the district court in Mr. Clyne's *pro se* petition; therefore, while the district court noted that it would consider the merits of that claim, it denied the motion to amend. (Tr., p.21, Ls.6-20.)

Post conviction counsel subsequently filed an objection to summary dismissal and a cross motion for summary disposition. (R., pp.97-105.) Post conviction counsel discussed more facts which supported Mr. Clyne's claims for relief, and also argued that the district court's decision to deny the motion to amend the petition was erroneous. (R., pp.98-104.) However, the district court concluded that post conviction counsel's objection did not address the concerns in the notice of intent to dismiss (*i.e.*, that the *pro se* motion alleged insufficient facts to make out a claim for relief (R., pp.38-40, 61)),

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<sup>2</sup> Mr. Clyne's direct appeal only challenged the decision to deny his Rule 35 motion. (Augmentation – Appellant's Brief.)

<sup>3</sup> Mr. Clyne does not challenge the district court's conclusion on the second contention, conceding that, insofar as that claim could have been raised on direct appeal, it should have been.

declined to reconsider its ruling on the motion to amend the petition, denied the cross motion for summary judgment, and summarily dismissed Mr. Clyne's petition for relief. (R., pp.107-110.) Mr. Clyne filed a notice of appeal timely from that judgment. (R., pp.112-14.)

## ISSUES

1. Whether the district court abused its discretion when it denied Mr. Clyne's motion to amend his petition.
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

##### A. Introduction

Mr. Clyne contends that the district court did not reach its decision to deny his motion to amend regarding his claims of ineffective assistance of counsel through an exercise of reason. The motion for leave to amend sought to add factual allegations and clarify the claims being raised in the petition for relief. However, the district court decided the amendment was not necessary because it erroneously determined that one of the amended claims had been raised on direct appeal, and it determined that the amendment to a second claim was unnecessary because it had been presented in the *pro se* petition (even though the district court had indicated it intended to dismiss the *pro se* petition because it presented only bare, conclusory claims for relief). Those decisions constitute an abuse of the district court's discretion.

Post conviction proceedings are civil in nature, and therefore, are governed by the Idaho Rules of Civil Procedure (I.R.C.P.). *McKinney v. State*, 133 Idaho 695, 699-700 (1999). In the relevant circumstance, those rules provide: "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." I.R.C.P. 15(a). As a result of this rule, motions to amend pleadings "are to be *liberally* granted." *Estate of Becker v. Callahan*, 140 Idaho 522, 528 (2004) (emphasis added). "The purpose behind allowing a party to amend its complaint is so that all claims will be decided on their merits and provide notice of the claim and all facts at issue." *Iron Eagle Development, LLC v. Quality*

*Design Systems, Inc.*, 138 Idaho 487, 492 (2003). It is preferable for claims to be resolved “on the merits rather than on technicalities.” *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 871 (1999).

Ultimately, the decision of whether to allow a party to amend its pleading is addressed to the discretion of the district court. *Estate of Becker*, 140 Idaho at 528.

When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

*State v. Hedger*, 115 Idaho 598, 600 (1989) (internal quotation omitted). The district court’s decision to deny the motion to amend the petition in this case fails on the second and third levels of the *Hedger* test. As such, that decision inconsistent with the rule to liberally allow amendments to pleadings. Therefore, that decision constituted an abuse of the district court’s discretion.

B. The District Court’s Decision To Deny The Motion To Amend The Post Conviction Petition Was Inconsistent With Precedent And Was Not Reached Through An Exercise Of Reason

When petitioners file *pro se* petitions for post conviction relief, those “petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete.” *Charboneau v. State*, 140 Idaho 789, 792 (2004) (quoting *Brown v. Sate*, 135 Idaho 676, 679 (2001), *superseded by statute on other grounds*). In recognition, we appoint counsel in and allow liberal amendment of the pleadings in those cases. In fact, the only justification for summarily dismissing Mr. Clyne’s petition was that Mr. Clyne’s petition was conclusory and incomplete:

Petitioner provides no specifics as to what was argued, how counsel's arguments were ineffective, or what could have been argued that would have been more effective . . . other than making bare assertions or allegations of ineffective assistance, he has provided nothing to allege or show deficiency of performance. Additionally he has failed to show prejudice . . . . In short, Petitioner has failed to meet his burden as he has not shown a reasonable probability of a different outcome had different arguments been made and therefore his claims of ineffective assistance of counsel should be summarily dismissed without a hearing.

(R., pp.38-40; see also R., pp.61, 107-08 (the district court adopting the State's argument as its justification for summary dismissal).)

The fact that the district court denied the motion to amend the petition is deeply concerning *because the amended petition sought to rectify those shortcomings* in Mr. Clyne's *pro se* petition. The proposed amended petition alleged specific facts that clarified the claims for relief. (R., pp.64-66.) In that regard, post conviction counsel was simply doing his job: "If [the petitioner] alleges facts to raise the possibility of a valid claim, the district court should appoint counsel in order to give the petitioner an opportunity with counsel *to properly allege the necessary supporting facts.*" *Charboneau*, 140 Idaho at 793 (emphasis added).

As a result, the district court's decision effectively prevented Mr. Clyne from responding to the stated justifications for summary dismissal. That, in and of itself, demonstrates the district court's abuse of discretion and justifies relief on appeal, since, as the Idaho Supreme Court has held: "A petitioner is entitled to notice of the trial court's contemplated grounds for dismissal *and an opportunity to respond* before a petition for post-conviction relief is dismissed. Failure to provide such notice and opportunity to be heard may result in the reversal of a summary dismissal of a petition for post conviction relief." *Ridgley v. State*, 148 Idaho 671, 676 (2010).

Furthermore, the reasons the district court gave for denying the motion to amend the petition were inconsistent with precedent and were not reasonable in light of the justification for summarily dismissing the petition. As a result, the denial of the motion to amend the petition constituted an abuse of the district court's discretion.

1. The District Court's Decision To Deny The Motion To Amend The Petition Regarding The Claim That Trial Counsel Failed To Obtain A Statutorily-Adequate Mental Health Evaluation Was Inconsistent With Precedent And Did Not Constitute An Exercise Of Reason, And So, Was An Abuse Of Discretion

In regard to the claim that trial counsel failed to seek or secure a statutorily-adequate mental health evaluation, the district court denied the motion to amend the petition because the same issue "is being raised directly in the appeal from the Court's decision denying the Rule 35 motion." (Tr., p.22, Ls.5-7.) Besides being factually wrong, that analysis ignored precedent that either expressly disallows for such claims to be, or highly recommends that claim not be, addressed in the direct appeal. Therefore, that decision was not within the district court's discretion.

First, the district court's assertion that the same issue was raised in the direct appeal is factually wrong. In the Rule 35 appeal, Mr. Clyne simply argued that, *based on the evidence already in the record*, particularly the information about Mr. Clyne's mental health condition, the district court's decision to deny his Rule 35 motion constituted an abuse of discretion. (Augmentation – Appellant's Brief.) As such, on direct appeal, Mr. Clyne challenged *the district court's* decisions *after* the sentencing hearing, whereas, in the post conviction case, Mr. Clyne challenged *his attorney's* decisions *prior* to the sentencing hearing. Demonstrating this difference, in the direct appeal, Mr. Clyne had to acknowledge that no new or additional information had been

presented in support of his Rule 35 motion, as required by the Idaho Supreme Court's decision in *State v. Huffman*, 144 Idaho 201, 203 (2007). Contrarily, in the post conviction petition, Mr. Clyne claimed that trial counsel provided ineffective assistance *because* he had not sought and presented mitigating evidence. (R., pp.64-66.) Therefore, while the post conviction argument may have been related to the argument pursued on direct appeal, it certainly was not the same issue.

In fact, it would have been foolish, if not improper, for Mr. Clyne to have raised a claim of ineffective assistance of trial counsel in his direct appeal from the Rule 35 motion. Idaho's appellate courts have made it clear that claims for ineffective assistance of counsel are not appropriately raised on direct appeal. *Matthews v. State*, 122 Idaho 801, 806 (1992) (“[A] petition for post-conviction relief is the preferred forum for bringing claims of ineffective assistance of counsel”); *State v. Saxton*, 133 Idaho 546, 549 (Ct. App. 1999) (noting that “the trial record on direct appeal is rarely adequate for review of [post conviction type] claims”). Idaho's appellate courts have also been clear about the limited scope of Rule 35 motions. See *State v. Clements*, 148 Idaho 82, 84-87 (2009) (discussing the scope of Rule 35 motions); *State v. Housley*, 119 Idaho 885, 889 (Ct. App. 1991) (“allegations, attacking the validity of [the] conviction, are beyond the scope of a Rule 35 motion. Other remedies, such as . . . a petition for post conviction relief, are available” to make those claims).

As a result, the district court's conclusion – that the claim of ineffective assistance included in the proposed amended petition had been raised in the direct appeal – is not based on substantial or competent evidence, and should be disregarded as clearly erroneous. See, e.g., *Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003).

Therefore, the district court's justification for denying Mr. Clyne's motion to amend his petition in regard to Claim 1 was inconsistent with the legal standards applicable to that decision and was not reached through an exercise of reason. As such, that decision should be reversed.

2. The District Court's Decision To Deny The Motion To Amend The Petition Regarding The Claim That Trial Counsel Argued Against Mr. Clyne's Interests Did Not Constitute An Exercise Of Reason, And So, Was An Abuse Of Discretion

In regard to the claim that counsel provided ineffective assistance by arguing against Mr. Clyne's interests at the sentencing hearing, the district court denied the motion to amend the petition because it concluded that claim was already pending before the district court based on Mr. Clyne's *pro se* petition. (Tr., p.21, Ls.16-20.) However, that is not a reason to deny a motion to amend the petition, especially where the proposed amendment seeks to clarify the claim and provide additional factual allegations in support of that claim. In fact, that is one of the services appointed counsel is supposed to provide. See *Charboneau*, 140 Idaho at 793. That is particularly true in this case since the only justification offered for summarily dismissal was that the allegations in the *pro se* petition were bare, conclusory allegations, which failed to establish a genuine issue of material fact. (R., pp.38-40, 61.)

The proposed amendment alleged that counsel provided ineffective assistance by "fail[ing] to properly interview petitioner and correctly present facts and arguments to the court in mitigation of the crime." (R., p.66.) In support of that clarified claim for relief, it offered the following factual allegations:

The Petitioner claims his attorney presented no evidence on his behalf and advised the court at sentencing that the Petitioner was not a good

candidate for probation, contrary to the plea bargain for probation that his attorney and the State of Idaho had negotiated. Without first obtaining a proper psychological evaluation, the Petitioner's counsel effectively argued against him at sentencing by failing to set forth any reasonable plan for probation, with mental health treatment in the community.

(R., p.66.) The initial petition and affidavit did not provide any such specific factual allegations; Mr. Clyne had simply alleged that trial counsel "failed to argue and ad [sic] rebuttal and allow for more testimony." (See *generally* R., pp.4-9.) Because those additional allegations and clarifications were necessary to flesh out the claim so that it met the requirements to survive summary dismissal, see *Strickland v. Washington*, 466 U.S. 668, 687 (1984), even though the claim itself may have been at issue before the district court, the amendment was necessary to continue pursuing that claim and establish a genuine issue of material fact.

The paradox of the district court's decision is further evidenced by the fact that the district court expressly told defense counsel at least three times that he would be allowed to file an amended petition if he, *trial counsel*, determined that such action was necessary. (Tr., p.7, Ls.12-17 ("I wanted to give you an opportunity to review that case and potentially, **if you deem that there are issue that warrant the filing of an amended petition, allow you to do that.**") (emphasis added); Tr., p.11, Ls.4-5 ("**If you deem warranted, file an amended petition.**") (emphasis added); R., p.52 ("The Court gave Petitioner's counsel additional time to meet with Petitioner, and **if warranted, file an amended petition.**") (emphasis added).) Defense counsel obviously determined that an amended petition was necessary in this case, and so, filed a request to amend the petition per the indications the district court had previously given him. And yet, upon

requesting to amend the petition as he deemed appropriate, and, in effect, replying to the notice of intent to dismiss, the district court denied the motion.

That decision was not reached through an exercise of reason. It certainly does not comport with the rule calling for liberally allowing parties to amend their pleadings, so that claims may be resolved on their merits, rather than on technicalities (like summary judgment for failing to articulate sufficient facts in support of the petition). See *Estate of Becker*, 140 Idaho at 528; *Iron Eagle Development*, 138 Idaho at 492; *Carl H. Christensen Family Trust*, 133 Idaho at 871. Therefore, the denial of Mr. Clyne's motion to amend his petition constituted an abuse of the district court's discretion.

## 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. Introduction

Even if this Court determines that the district court properly denied the motion to amend the petition, the district court still improperly summarily dismissed the petition. Mr. Clyne presented a genuine issue of material fact that his trial counsel provided ineffective assistance by failing to obtain a statutorily-adequate mental health examination and by arguing against his interests at the sentencing hearing. If either claim were resolved in his favor, he would be entitled to relief. Therefore, the district court's order summarily dismissing the petition should be reversed.

In post-conviction cases, a petition may be summarily dismissed only if it does not present a genuine issue of material fact which, if resolved in the petitioner's favor, would entitle him to relief. *Baldwin v. State*, 145 Idaho 148, 153 (2008); see I.C. § 19-

4906(b). In determining whether a genuine issue of material fact exists, “[a] court is required to accept the petitioner’s un rebutted allegations as true . . . .”<sup>4</sup> *Baldwin*, 145 Idaho at 153; *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). Additionally, during the summary judgment phase, the courts “liberally construe the facts and reasonable inferences in favor of the non-moving party.”<sup>5</sup> *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); see also *Charboneau v. State*, 140 Idaho 789, 792 (2004) (“[I]nferences [are] liberally construed in favor of the petitioner.”). When a genuine issue of material fact exists and would, if resolved in the petitioner’s favor, entitle the petitioner for relief, the district court must conduct an evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel’s performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687; *McKeeth v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different, or, in other words, he must undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010).

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<sup>4</sup> Where, as in this case, the State files an answer that denies the allegations in the verified petition (R., pp.30-33), those denials do not affirmatively disprove the allegations. Rather, they only create genuine issues of material fact in regard to those issues, specifically, whether or not the petitioner’s allegations are factually accurate. Because a genuine issue of material fact exists in such cases, summary dismissal is inappropriate. *Baldwin*, 145 Idaho at 153.

<sup>5</sup> In this case, the State is the moving party. (R., pp.34-40.) Therefore, the facts and reasonable inferences are liberally construed in Mr. Clyne’s favor. *Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881.

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

The district court acknowledged that Mr. Clyne's claim – that his attorney argued against his interests at the sentencing hearing – raised a viable claim, “[a]nd that is the claim that I’m most concerned that it be heard and vetted, perhaps by way of an evidentiary hearing, if appropriate.” (Tr., p.21, Ls.6-15.) An attorney's performance is objectively unreasonable if he actively argues against his client's interests. See, e.g., *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000) (recognizing that “an indigent does, in all cases, have the right have an attorney, *zealous for the indigent's interests*, evaluate his case and attempt to discern nonfrivolous arguments”<sup>6</sup>) (emphasis added); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (holding that defense counsel's “principal responsibility is to serve the undivided interests of his client”).

The record supports Mr. Clyne's allegation that his counsel advocated against his interests.<sup>7</sup> For example, the plea agreement Mr. Clyne entered provided as follows:

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<sup>6</sup> Mr. Clyne sought a sentence that was suspended for a period of probation. An argument that suspending a sentence for a period of probation is not a frivolous argument. See, e.g., *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008) (discussing how a sentence for a period of probation addresses all the sentencing objectives and how the court's continuing jurisdiction affects those objectives). That is especially true in this case, since, pursuant to the plea agreement, the prosecutor made an argument that the district court should suspend Mr. Clyne's sentence. (R., p.83.)

<sup>7</sup> Post conviction counsel offered clarification and explanation of the facts in the record in the proposed amended petition. Counsel's explanations and clarifications of the facts in the record should have been considered by the district court, and they further demonstrate that there was a genuine issue of material fact in this case. In addition, post conviction counsel represented that Mr. Clyne was prepared to sign the amended petition, indicating that he proposed to have the amended petition verified. (Tr., p.13, Ls.23-25.) In that case, the proposed amended petition would serve as evidence in its own right. However, that did not happen because the district court denied the motion to amend the petition. As such, if counsel's explanations and clarifications are not properly considered because they were excluded from the record by the district court

The State's going to recommend a four-year period of probation with a five-year sentence, consisting of one plus four suspended. The remaining charges will be dismissed. All other probation terms are basically open to argument. We've agreed to pay restitution, but I don't actually think there's any restitution in this case. I think everything was recovered, but if the State has a figure of restitution related to either the charges he pleads guilty to, the dismissed charges, we agree to pay that. And the remaining charges will be dismissed. The defense can argue for less.

(R., p.79; see *also* Augmentation – Guilty Plea Advisory Form.) The record also demonstrates that, while trial counsel uttered a recommendation consistent with that plea agreement (R., p.85), trial counsel effectively disavowed that recommendation by arguing that Mr. Clyne was not a suitable candidate for probation: “But what we do see from his PSI is that in ways he's going to trip up are likely he's going to drink or he is going to have problems related to mental health. . . . But looking at his history, it would demonstrate that he's going to have trouble probably on probation and parole, supervision. . . . He's probably not going to do probation right or parole right.” (R., pp.84-85.) Therefore, the record demonstrates that counsel was not a zealous advocate on Mr. Clyne's behalf, and as such, the record demonstrates that there is a genuine issue of material fact that trial counsel's performance was objectively unreasonable.<sup>8</sup>

Mr. Clyne also alleged that, had counsel performed reasonably, he would have presented the district court with a reasonable plan for probation, with a provision for

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denying the motion to amend, that further demonstrates why the district court abused its discretion in denying the motion for leave to amend the petition.

<sup>8</sup> If this Court determines that the record affirmatively establishes that trial counsel did advocate against his client, and so, affirmatively establishes that trial counsel provided ineffective assistance, this Court should reverse the order denying Mr. Clyne's cross motion for summary judgment, and order summary judgment be entered in Mr. Clyne's favor on this claim.

receiving mental health treatment in the community. (R., p.66.) That, in combination with the fact that the State also recommend that the district court suspend sentence (R., p.83), establishes the reasonable probability that the result (the decision to retain jurisdiction) would have been different; certainly that evidence undermines confidence that the district court would still have opted to retain jurisdiction, as opposed to suspending the sentence. See *McKay*, 148 Idaho at 570. As such, Mr. Clyne's allegations also establish a genuine issue of material fact that trial counsel's deficient performance prejudiced him.

Furthermore, if that claim were resolved in Mr. Clyne's favor, he would be entitled to relief. See, e.g., *Wood v. Georgia*, 450 U.S. 261, 273-74 (1981) (vacating a judgment because the defendant had sufficiently raised the specter of an actual conflict of interest in representation at the trial level which would have deprived the defendant of his constitutional rights, and remanding the case for further proceedings examining the potential conflict). Therefore, Mr. Clyne was entitled to an evidentiary hearing, and thus, the district court erred in summarily dismissing Mr. Clyne's petition for post conviction relief.

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

Mr. Clyne's other claim – that trial counsel provided ineffective assistance by not properly investigating the case and not presenting mitigating evidence at the sentencing hearing, specifically, by failing to seek or secure a psychological evaluation conforming with I.C. §§ 19-2522, -2523, and/or -2524 – also presented a genuine issue of material fact. The requirement that the district courts obtain a mental health evaluation when a

defendant's mental health will be a significant issue at sentencing is mandatory: "the court *shall* appoint at least one (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant."<sup>9</sup> I.C. § 19-2522(1) (emphasis added).

In order to enforce this mandatory requirement, defense counsel needs to request an evaluation be performed or object when the district court seeks to proceed without one. *State v. Carter*, 155 Idaho 170, 173-75 (2013). The necessary corollary to this rule is that, when defense counsel fails to ensure that a statutorily-adequate evaluation is included in the record, counsel's performance has been objectively unreasonable.

It is undisputed that no current, statutorily-adequate evaluation was provided prior to sentencing. Furthermore, the district court asserted, "I need [a proper evaluation] to sentence this defendant." (R., p.83.) With that statement alone, the mandatory requirement from I.C. § 19-2522 for a proper evaluation should have been given effect. *Compare State v. Jockumsen*, 148 Idaho 817, 822-23 (Ct. App. 2010) (holding that, when the district court indicates that defendant's mental health is going to be a significant issue at sentencing, it needs an evaluation conforming with I.C. § 19-2522 before imposing sentence). The prosecutor also recognized that "the prudent course of action" would be to order a second evaluation, one that would conform with the statutory requirements. (R., p.83.) In fact, it was only Mr. Clyne's attorney who

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<sup>9</sup> In this case, a second evaluation was necessary because the district court found that the evaluation originally provided was worthless: "having ordered a mental health evaluation, the Court's in a position where essentially I don't have one. This evaluation is so terrible that it is the equivalent of nothing." (R., p.83.)

eschewed the need to procure a conforming evaluation, pointing instead to other, older evaluations that had made diagnoses of Mr. Clyne in the past. (R., p.84.)

However, trial counsel's attempted reliance on the older evaluations is not sufficient to meet the requirements of I.C. § 19-2522. To make proper sentencing determinations, diagnoses and prognoses need to be current, since the symptoms can change, and as a result, the type of treatment necessary can change. For example, when a person suffers from multiple mental health disorders at the same time,<sup>10</sup> "the severity of both disorders may change overtime. Levels of disability and impairment in functioning may also vary." Psychology Today, "Diagnosis Dictionary: Co-Occurring Disorders," (2008) <http://www.psychologytoday.com/conditions/co-occurring-disorders> (last visited October 1, 2014). As such, the Court of Appeals has recognized that an old evaluation, "[e]ven a psychological report prepared pursuant to I.C. § 19-2522 may be insufficient," to provide the necessary information the district court must consider under I.C. § 19-2523 at the new sentencing hearing. *Durham*, 146 Idaho at 370-71 (holding such even though the district court did have documents from a mental health facility into which the defendant had checked himself which provided a diagnosis of the defendant). In fact, the district court's comment at the sentencing hearing – that "I need it [the current mental health evaluation] to sentence this defendant (R., p.83) – which was made after the district court received all the other information about Mr. Clyne's prior evaluations contained in the PSI (see Tr., p.28, Ls.17-18 (the district court recalling that "I had an enormous amount of material regarding the defendant's mental health")),

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<sup>10</sup> Mr. Clyne has been previously diagnosed with both bipolar disorder and schizophrenia. (See, e.g., R., p.84.)

demonstrates that the information the district court already had was insufficient to adequately meet the requirements of I.C. § 19-2522.

Furthermore, as the amended petition pointed out, Mr. Clyne's actions *in the current case* could potentially be attributed to particular diagnoses, and based on the consideration of the facts of the current case, the district court could have considered "whether the Petitioner could be treated for mental health concerns in the community instead of in prison." (R., p.65.) Because the facts of the *current case* could impact Mr. Clyne's diagnosis, both in terms of the nature of his mental condition and of potential treatment options, and that more accurate diagnosis could impact the sentencing decision, trial counsel's action – to affirmatively argue against the district court following a mandatory requirement in the statute – was objectively unreasonable. *Compare State v. Durham*, 146 Idaho 364, 368-69 (Ct. App. 2008) (remanding a case for new sentencing with a statutorily-adequate evaluation, emphasizing the fact that the new offense was out of character for the defendant and "factually irrational" as some of the reasons the new evaluation was necessary).

As in *Durham*, the offense in this case was factually irrational. Mr. Clyne was charged with taking a black Bible case, flashlights, and a pair of sunglasses from two cars in an Albertson's parking lot in broad daylight. (Augmentation – Appellant's Brief, p.2; Augmentation – Information.) As post conviction counsel pointed out, that behavior could have been attributable to Mr. Clyne's mental conditions. (R., p.65.) Thus, as in *Durham*, a new evaluation conforming to the requirements of I.C. § 19-2522 needed to be conducted prior to sentencing; the older evaluations were not sufficient in that

regard. *Compare Durham*, 146 Idaho at 367. As such, the district court sentenced Mr. Clyne without the statutorily-required information.

Mr. Clyne also alleged facts establishing a genuine issue of material fact that trial counsel's defective performance in this regard prejudiced him. Mr. Clyne alleged that, had trial counsel performed reasonably and sought a statutorily-adequate evaluation, he would have recommended a term of probation with an appropriate provision for receiving adequate treatment in the community. (R., pp.65-66.) When that is considered in combination with the fact that the State also recommended that the district court suspend Mr. Clyne's sentence (R., p.83), the facts establish the reasonable probability that the result (the decision to retain jurisdiction) would have been different. Essentially, Mr. Clyne alleged that, had the district court had an up-to-date mental health evaluation, which would have evaluated Mr. Clyne's current extent of his mental illness, his current prognosis for improvement and rehabilitation, and the level of care currently necessary to address his condition while protecting the public (as required by I.C. § 19-2523), the district court would not have retained jurisdiction, but instead, would have suspended his sentence. Therefore, Mr. Clyne's allegations established a genuine issue of material fact that trial counsel's deficient performance prejudiced him.

Furthermore, if the issue were resolved in Mr. Clyne's favor, he would be entitled to relief. *Compare Jockumsen*, 148 Idaho at 822-23; *Durham*, 146 Idaho at 367. As a result, Mr. Clyne was entitled to an evidentiary hearing, and thus, the district court erred in summarily dismissing Mr. Clyne's petition.

CONCLUSION

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

DATED this 8<sup>th</sup> day of October, 2014.



BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8<sup>th</sup> day of October, 2014, 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:

HEATH T CLYNE  
INMATE #57076  
IMSI  
PO BOX 51  
BOISE ID 83707

MELISSA MOODY  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

JOSEPH L ELLSWORTH  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand delivered to Attorney General's mailbox at Supreme Court.

  
EVAN A. SMITH  
Administrative Assistant

BRD/eas