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State v. Jockumsen Appellant's Brief Dckt. 34581

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL L. JOCKUMSEN, Defendant-Appellant.	)	NO. 34581 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

After being initially deemed incompetent to stand trial, and subsequently receiving treatment for schizophrenia and being determined to be competent, Michael Jockumsen pleaded guilty to attempted strangulation. Mr. Jockumsen's competency evaluations, performed pursuant to I.C. § 18-211, were appended to the Presentence Investigation Report (*hereinafter,* PSI) and were further referenced multiple times during the sentencing hearings conducted by the district court.

Despite acknowledging a lack of information regarding the degree to which Mr. Jockumsen's mental illness contributed to his offense or to his potential risk to the community, the district court did not order a mental health evaluation pursuant to I.C. § 19-2522 prior to sentencing. Rather, the court sentenced Mr. Jockumsen to eight years, with five years fixed, and retained jurisdiction. The court further provided Mr. Jockumsen's competency evaluations, along with other materials, to a psychiatrist from the Department of Correction during the period of retained jurisdiction, and asked the psychiatrist to draw an opinion from these materials with regard to Mr. Jockumsen's prognosis and suitability for probation. The district court subsequently relinquished jurisdiction.

Mr. Jockumsen timely appeals from the district court's order relinquishing jurisdiction, and asserts that the district court's use of his competency evaluations at sentencing and the rider review hearing was an abuse of discretion and constituted a violation of his Fifth Amendment rights against self-incrimination and compelled testimony. Additionally, Mr. Jockumsen submits that the district court abused its

discretion and acted in manifest disregard of I.C.R. 32, when the court failed to *sua sponte* order a mental health evaluation in accordance with I.C. § 19-2522.

Statement of the Facts and Course of Proceedings

Mr. Jockumsen was charged with second degree kidnapping and attempted strangulation. (R., pp.48-49.) Pursuant to an oral motion by defense counsel, the district court ordered an evaluation pursuant to I.C. § 18-211 to determine whether Mr. Jockumsen was competent to stand trial. (R., pp.34-35.)

Based on Dr. John Christensen's determination that Mr. Jockumsen was not competent to stand trial, the district court ordered Mr. Jockumsen's commitment for 90 days pending a determination of whether Mr. Jockumsen would be fit to stand trial in the foreseeable future. (R., pp.42-43.) The district court also ordered Dr. Christensen to conduct a follow-up evaluation to determine whether Mr. Jockumsen was competent to stand trial several weeks later. (R., pp.53-54.)

The district court held a hearing with regard to this second competency evaluation. (2/14/07 Tr.[1], p.5, L.5 – p.18, L.24.) The court heard telephonic testimony from Dr. Christensen, who testified that Mr. Jockumsen was competent for purposes of standing trial and entering a guilty plea. (2/14/07 Tr., 7, L.25 – p.14, L.6, p.14, Ls.3-6.) Dr. Christensen testified that his latest evaluation of Mr. Jockumsen's competency indicated that he was malingering, and that he had the capacity to understand the proceedings against him at the time of the hearing. (2/14/07 Tr., p.8, L.3 – p.9, L.14.)

[1] Because there are multiple volumes of transcripts of proceedings, for ease of reference, citations to the transcripts in this case will be made with regard to the date on which the proceedings occurred.

However, Dr. Christensen did note that Mr. Jockumsen's "psychiatric state" could vary in its impacts on Mr. Jockumsen's behavior or understanding over time. (2/14/07 Tr., p.9, Ls.15-21.) Counsel for Mr. Jockumsen did not challenge the findings of Dr. Christensen. (2/14/07 Tr., p.15, Ls.16-17.) The district court found that Mr. Jockumsen was competent. (2/14/07 Tr., p.17, L.15 – p.18, L.24.)

At this same hearing, Mr. Jockumsen entered a guilty plea to attempted strangulation. (2/14/07 Tr., p.20, L.8 – p.21, L.7, p.33, Ls.9-16.) In exchange, the State dismissed its allegation of kidnapping. (2/14/07 Tr., p.21, L.12 – p.22, L.9.) Appended to the PSI that was prepared for this case were all of the competency evaluations that were performed pursuant to I.C. § 18-211. (PSI, pp.17-39.[2])

During the initial sentencing hearing, one of the main points of contention was the degree to which Mr. Jockumsen's mental illness was a factor at sentencing and how this factor should influence the court's sentencing determination. (4/3/07 Tr., p.36, L.24 – p.62, L.3.) The district court acknowledged that mental illness was an issue that it should consider in this case. (4/3/07 Tr., p.37, Ls.20-21.) Mr. Jockumsen, through counsel, repeatedly asserted that his mental illness was a contributing factor to his underlying offense, such that it had a material impact on Mr. Jockumsen's underlying culpability for his crime. (4/3/07 Tr., p.38, L.7 – p.39, L.21.) However, the district court cut off Mr. Jockumsen's argument regarding the degree to which his condition contributed to his offense. (4/3/07 Tr., p.39, Ls.22-25.)

[2] For ease of reference, unnumbered pages of the PSI are hand-numbered consecutively, beginning at page 17.

Mr. Jockumsen also personally testified to the fact that his psychosis was a predominate factor in triggering his underlying offense in this case. (4/3/07 Tr., p.42, Ls.11-19.) He also provided additional information about his personal struggles with mental illness for a significant period of his adult life, and as to the benefits to his mental health now that he was taking appropriate medications to treat his mental illness. (4/3/07 Tr., p.45, Ls.18-20, p.46, Ls.15-21, p.47, L.23 – p.48, L.1.)

The district court acknowledged the sentencing factors regarding appropriate considerations of a defendant's mental health conditions found in I.C. § 19-2523. (4/3/07 Tr., p.51, Ls.19-22.) However, the district court relied on information contained in evaluations performed to assess Mr. Jockumsen's competency to stand trial in finding that there was conflicting evidence regarding his mental illness and whether he could be malingering. (4/3/07 Tr., p.53, Ls.2-20.) The district court also explicitly referenced the contents of a competency evaluation performed by Dr. Christensen in February, 2007, including some of Mr. Jockumsen's statements made during the course of the competency evaluation, as part of its consideration on the record at the initial sentencing hearing. (4/3/07 Tr., p.56, Ls.4-12.) Although the court believed that Mr. Jockumsen posed a potential risk to society, the district court also admitted, "It's just difficult for me to measure just how great that risk is. So it's worrisome to me." (4/3/07 Tr., p.54, Ls.21-24.)

Despite the court's own acknowledgement of the centrality of Mr. Jockumsen's mental health issues to the pertinent considerations of fashioning an appropriate sentence, the district court did not *sua sponte* order a mental health evaluation pursuant to I.C. § 19-2522. Instead, the district court continued the sentencing hearing in order to

contact someone with Department of Correction to see whether they could perform a psychological assessment of Mr. Jockumsen during his period of retained jurisdiction. (4/3/07 Tr., p.61, Ls.2-18.) And, despite a lack of a psychological evaluation prepared for purposes of sentencing, the district court announced its intention to impose a prison sentence. (4/3/07 Tr., p.16, Ls.19-23.)

At the second sentencing hearing, the district court revealed that it had attempted to get in touch with Dr. Mary Perrien[3], a staff psychiatrist with the Department of Correction, in order to obtain more information about an assessment of Mr. Jockumsen's mental health conditions specifically for purposes of sentencing. (4/9/07 Tr., p. 4, Ls.14-19.) The district court then indicated that it intended upon imposing sentence and retaining jurisdiction, but would ask for the Department of Correction to provide additional information regarding Mr. Jockumsen's mental health for use at the rider review hearing. (4/9/07 Tr., p.6, Ls.19-25.)

The State objected to the district court retaining jurisdiction, asserting, "I think that just because he has a mental health – I guess some questions about his mental health, I think that can still be addressed at prison." (4/9/07 Tr., p.8, Ls.14-17.) Mr. Jockumsen argued in favor of the court retaining jurisdiction. (4/9/07 Tr., p.9, Ls.10-18.)

The district court again noted its difficulties in assessing Mr. Jockumsen's potential risk to the community in light of his significant mental health problems. The court stated:

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[3] It appears that Dr. Perrien's name is misspelled in the transcript for the second sentencing hearing. (See, e.g., 4/9/07 Tr., p.4, L.20; Letter to district court from Dr. Perrien, dated August 3, 2007.)

> The fact of the matter is that right now, Mr. Jockumsen, you are a risk to the community. What I'm having trouble getting my arms around is whether it's because that's a result of your criminal thinking or whether it's the result of issues of mental illness or whether it's some combination of the two.

(4/9/07 Tr., p.14, Ls.15-21.) However, the district court was apparently unaware of the provisions of I.C. § 19-2522, since the court when on to state that, "The only way I can know whether [release into the community] is appropriate is to wait and see how you might do in the retained jurisdiction setting and wait and see what the Department of Correction's psychiatrist may have to say about your mental health issues." (4/9/07 Tr., p.16, Ls.7-12.)

The district court proceeded to sentence Mr. Jockumsen to eight years, with three years fixed, for his guilty plea to attempted strangulation. (4/9/07 Tr., p.17, Ls.1-4.) After announcing Mr. Jockumsen's sentence, the district court then retained jurisdiction and stated its intentions with regards to obtaining more information regarding Mr. Jockumsen's mental health conditions. (4/9/07 Tr., p.19, L.12 – p.20, L.4.) The court indicated that it would send Mr. Jockumsen's prior competency evaluations to Dr. Perrien to be considered in conducting the mental health evaluation of Mr. Jockumsen. (4/9/07 Tr., p.19, Ls.13-19.) The court further indicated that it would ask Dr. Perrien to provide the court with any opinions regarding Mr. Jockumsen's mental health and whether he could be successful in a supervised probation setting. (4/9/07 Tr., p.19, L.20 – p.20, L.4.) Neither Mr. Jockumsen nor the State objected to the district court retaining jurisdiction prior to obtaining a mental health evaluation pursuant to I.C. § 19-2522. (4/9/07 Tr., p.20, Ls.5-8.)

At the rider review hearing, the district court gave substantial consideration both to the prior competency evaluations and to the letter drafted by Dr. Perrien that was based, in large part, on the competency evaluations. (8/27/07 Tr., p.30, Ls.9-23.) The court also considered the Addendum to the Presentence Investigation Report (*hereinafter,* APSI), which recommended that the district court relinquish jurisdiction. (8/27/07 Tr., p.7, L.13 – p.11, L.18; APSI, p.4.) Mr. Jockumsen argued that many of his disciplinary issues while he was serving his rider were attributable to the fact that he was not receiving medication at the time. (8/27/07 Tr., p.8, Ls.6-18.) He also asserted that, with proper treatment, he could be safely placed on probation. (8/27/07 Tr., p.13, L.24 – p.15, L.6.)

The district court relinquished jurisdiction over Mr. Jockumsen's case and executed his original sentence of eight years, with three years fixed. (8/27/07 Tr., p.34, Ls.13-19; R., pp.75-77.) In describing the court's conclusions in support of its decision to relinquish jurisdiction, the district court relied heavily both on the evaluations conducted to determine Mr. Jockumsen's competency to stand trial, and on Dr. Perrien's letter that was also largely predicated on the competency evaluations. (8/27/07 Tr., p.30, Ls.9-23, p.33, L.20 – p.34, L.5.) Mr. Jockumsen timely appeals from the district court's order relinquishing jurisdiction and executing his sentence. (R., p.79.)

ISSUES

1. Did the district court abuse its discretion and violate Mr. Jockumsen's Fifth Amendment privilege against self-incrimination and I.C. § 18-215, when it improperly used information obtained for purposes of determining Mr. Jockumsen's competency at sentencing?

2. Did the district court abuse its discretion and act in manifest disregard for 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. Jockumsen prior to sentencing?

ARGUMENT

I.

The District Court Abused Its Discretion And Violated Mr. Jockumsen's Fifth Amendment Privilege Against Self-Incrimination And I.C. § 18-215, When It Improperly Used Information Obtained For Purposes Of Determining Mr. Jockumsen's Competency At Sentencing

A. Introduction

Mr. Jockumsen asserts that the district court improperly considered his statements, and the medical conclusions based directly upon these statements, contained within his competency evaluation for purposes of aggravation at sentencing. A defendant has a Fifth Amendment right against self-incrimination that applies to statements made in the course of competency evaluations. It is a violation of the defendant's Fifth Amendment rights to use his statements, made in the context of a competency evaluation, against him at sentencing in absence of appropriate warnings and a valid waiver by the defendant at the time of the competency examination. In addition, under I.C. § 18-215, the defendant's statements in competency evaluations cannot be used against the defendant at sentencing in absence of a valid waiver.

The district court's use of the competency evaluations, and Mr. Jockumsen's statements therein, against Mr. Jockumsen at sentencing violated both constitutional and statutory standards attendant on the court's use of discretion. Moreover, the failure of the district court to excise the information from the competency evaluations that were attached to and incorporated within the presentence report likewise constituted an abuse of the court's discretion.

B. The District Court Abused Its Discretion And Violated Mr. Jockumsen's Fifth Amendment Rights Against Self-Incrimination And I.C. § 18-215, When It Considered Statements Made By Mr. Jockumsen, And Diagnoses That Were Made Based Upon His Statements, In Aggravation At Sentencing

Use of a defendant's statements made during the course of a competency evaluation may not constitutionally be considered by the trial court in aggravation at sentencing in absence of a warning to the defendant that he has a Fifth Amendment right to remain silent at the time the competency evaluation is performed. *Estelle v. Smith*, 451 U.S. 454, 462-474 (1981). The Fifth Amendment right against self-incrimination applies in the context of psychological evaluations, including competency evaluations. *Id.* at 465; *see also Estrada v. State*, 143 Idaho 558, 563, 149 P.3d 833, 838 (2006). Moreover, where a medical diagnosis from a competency evaluation is partly predicated on the statements of the defendant, that diagnosis should likewise not be considered at sentencing. *Estelle*, 451 U.S. at 464. In particular, the Court in *Estelle* highlighted that it was improper to introduce at sentencing the competency evaluator's conclusion that the defendant lacked remorse because this determination, and the overall assessment of future dangerousness contained within the competency examination, was based on the defendant's own statements that he made in absence of a warning of his Fifth Amendment right to remain silent. *Id.* While such unwarned statements can be used for the limited purpose of establishing competency, they cannot be used in aggravation at sentencing. *Id.* at 468-469.

Such a use of information obtained in the course of conducting competency evaluations also runs afoul of the provisions of I.C. § 18-215. This statute provides, in pertinent part, that statements made by a person during a psychological or psychiatric exam ordered pursuant to I.C. § 18-211, "shall not be admissible in evidence in any

criminal proceeding against [the defendant] on any issue other than the defendant's ability to assist counsel at trial or to form any specific intent which is an element of the crime charged, except that such statements of a defendant to a psychiatrist or psychologist as are relevant for impeachment purposes may be received subject to the usual rules of evidence governing matters of impeachment." I.C. § 18-215.

In interpreting this provision, the Idaho Supreme Court has held that it constitutes an abuse of discretion if information and statements from a competency evaluation are improperly relied upon at sentencing. *State v. Cope*, 142 Idaho 492, 499, 129 P.3d 1241, 1248 (2006). "Ultimately, the determination of whether a particular sentence is an abuse of discretion depends upon the information that is used in framing the sentence." *Id.* While the Court in *Cope* found that the improperly included information from the competency evaluations did not infect the sentence, the same cannot be said in this case. *Id.* at 500-501, 129 P.3d at 1249-1250.

Here, the district court plainly sought information for use in fashioning a sentence directly from the competency evaluations themselves, and a letter from Dr. Perrien that was expressly based upon the competency evaluations, at the initial sentencing hearings and at Mr. Jockumsen's rider review hearing. The court considered these evaluations directly at Mr. Jockumsen's initial sentencing hearing. (4/3/07 Tr., p.53, Ls.2-13, p.56, Ls.4-12.) The court also sent copies of the competency evaluations to Dr. Perrien to use as the basis for an evaluation on her part regarding how Mr. Jockumsen's mental health issues should impact on his sentencing, particularly with regard to his potential placement on probation. (4/9/07 Tr., p.19, L.13 – p.20, L.4.) A review of Dr. Perrien's letter in response to the court's request reveals that she did not

undertake a separate evaluation of Mr. Jockumsen, but rather formed her opinions based upon the documentary materials provided her by the district court. (Letter to the district court from Dr. Perrien, dated August 3, 2007.) These materials were the sum and substance of the evidence relied on by the district court to evaluate Mr. Jockumsen's mental health conditions at the rider review hearing. (8/27/07 Tr., p.30, Ls.9-23.)

Unlike *Cope*, where there was expert testimony at sentencing regarding the defendant's mental health conditions that was wholly independent of the competency evaluations, there was no source of information in this case on Mr. Jockumsen's mental health conditions that was not fatally infected with improper reliance on the inadmissible competence evaluations and Mr. Jockumsen's statements therein. *See Cope*, 142 Idaho at 500-502, 129 P.3d at 1249-1251. As such, the district court abused its discretion when the court improperly relied on the information contained in Mr. Jockumsen's competency evaluation as aggravating evidence at sentencing.

C. The District Court Abused Its Discretion And Violated Mr. Jockumsen's Fifth Amendment Rights Against Self-Incrimination and I.C. § 18-215, When The Court Failed To Remove Mr. Jockumsen's Competency Evaluations That Were Improperly Included Within The Presentence Investigation Report

As previously noted, it is unconstitutional to use a defendant's statements, made without warning of his Fifth Amendment privilege against self-incrimination, in aggravation at sentencing. In this case, not only did the district court improperly considered this information in aggravation at sentencing, but the district court also failed to remove this information that was improperly included within Mr. Jockumsen's PSI. As the Idaho Supreme Court noted in *Cope*, the improper inclusion of competency

evaluations or statements therefrom in presentence investigation reports may constitute an abuse of discretion if this evidence infects the sentence. *Cope*, 142 Idaho at 500, 129 P.3d at 1249.

Mr. Jockumsen's competency evaluations were appended to the PSI in this case. (PSI, pp.17-39.) In addition, the presentence investigator commented directly on Mr. Jockumsen's statements made during the course of his competency evaluation as part of the factual background of this case and Mr. Jockumsen's social history. (PSI, pp.9, 10.) The evaluator discussed at length the substance of Mr. Jockumsen's competency evaluations with regard to his overall mental health conditions. (PSI, pp.11-13.) Also of note is the fact that the presentence investigator presented only the conclusions indicating that Mr. Jockumsen was "malingering" for purposes of the competency determination from the prior competency examinations, and further misrepresented one of Mr. Jockumsen's anti-psychosis medications as treating insomnia in the section addressing the investigator's analysis and comments on the defendant's condition. (PSI, p.15; *see also* Point II *infra*.)

The investigator never mentioned that Mr. Jockumsen was actively receiving treatment for schizophrenia while being assessed for competency, or that the psychiatric evaluations continued to recognize that Mr. Jockumsen may suffer from psychosis. (PSI, pp.14-15, 21-22, 28, 32, 39.) As such, not only did the presentence investigator improperly and extensively rely on the competency evaluations in reaching her conclusions in this case, but the investigator also appears to have selectively presented only that information from the evaluations that was harmful to Mr. Jockumsen at sentencing.

The Court of Appeals in *State v. Rodriguez* has aptly noted how information improperly contained in presentence investigation reports has the potential to prejudice a defendant beyond the district court's immediate sentencing decision. *State v. Rodriguez*, 132 Idaho 261, 262 n.1, 971 P.2d 327, 328 (Ct. App. 1998). The *Rodriguez* court observed:

> The use of a PSI does not end with the defendant's sentencing. The report goes to the Department of Corrections and may be considered by the Commission of Pardons and Parole in evaluating the defendant's suitability for parole. *See* I.C.R. 32(h). In addition, if the defendant reoffends, any prior PSI is usually presented to the sentencing court with an update report from the presentence investigator. Thus, a PSI follows a defendant indefinitely, and information inappropriately included therein may prejudice the defendant even if the initial sentencing court disregarded such information.

Id.

In the case, the potential for Mr. Jockumsen's statements made in the course of his competency evaluations, the conclusions of the evaluators that flowed therefrom, and the selective referencing of these reports by the presentence investigator, have the potential for repeated future violations of Mr. Jockumsen's Fifth Amendment rights. This information was improperly included in his presentence investigation report, and has every potential be used against Mr. Jockumsen when it comes to his ability to obtain release on parole. As noted by the *Rodriquez* Court, this information follows Mr. Jockumsen indefinitely. *Rodriguez*, 132 Idaho at 262 n.1, 971 P.2d at 328. In light of this, the district court abused its discretion, and failed to act in accordance with I.C. § 18-215, when the court failed to remove Mr. Jockumsen's competency evaluations, and references to the contents of the evaluations, from the PSI.

II.

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. Jockumsen Prior To Sentencing

The decision whether to order a mental health evaluation pursuant to I.C. § 19-2522 is discretionary with the district court. *See, e.g., State v. Collins*, 144 Idaho 408, 409, 162 P.3d 787, 788 (Ct. App. 2007). However, as with any exercise of discretion, the district court's determination must be consistent with applicable legal standards. *State v. Coonts*, 137 Idaho 150, 152, 44 P.3d 1205, 1207 (Ct. App. 2002). "The legal standards governing the court's decision whether to order a psychological evaluation and report are contained in I.C. § 19-2522." *Collins*, 144 Idaho at 409, 162 P.3d at 788. Idaho Code § 19-2522 provides that a mental health evaluation is *mandatory*, rather than discretionary, if there is reason to believe that the mental condition of the defendant will be a significant factor at sentencing and for good cause shown. *Coonts*, 137 Idaho at 152, 44 P.3d at 1207; *State v. McFarland*, 125 Idaho 876, 879, 876 P.2d 158, 161 (Ct. App. 1994). This Court will uphold the failure of the district court to order a mental health evaluation if the record supports the finding that there was no reason to believe that the defendant's mental condition would be a significant factor at sentencing or if the information already before the district court meets the requirements of I.C. § 19-2522. *State v. Craner*, 137 Idaho 188, 189, 45 P.3d 844, 845 (Ct. App. 2002).

Admittedly, Mr. Jockumsen did not object to the lack of a psychological evaluation in accordance with I.C. § 19-2522 prior to the district court retaining jurisdiction in this case. However, it is well recognized that a district court may be under an independent duty to order a mental health evaluation under I.C. § 19-2522 under

certain circumstances, even in absence of a request on the part of the defendant. "A claim that the district court abused its discretion by failing to *sua sponte* order a psychological evaluation of a defendant before sentencing can be made on appeal without an objection to the lack of an evaluation or a request for an evaluation before the district court." *State v. Durham*, 146 Idaho 364, 366, 195 P.3d 723, 725 (Ct. App. 2008). If the defendant does not object to the failure of the district court to order a mental health evaluation, the defendant must demonstrate that the district court manifestly disregarded the relevant provisions of I.C.R. 32 by failing to order the psychological examination. *Id.* This Court generally looks to the information contained within, or omitted from, the Presentence Investigation Report to identify the need for a psychological evaluation. *Collins*, 144 Idaho at 409, 162 P.3d at 788.

If the court's comments indicate that it found the defendant's mental condition and rehabilitative potential to be significant factors, and the district court nonetheless proceeds to sentencing "without the benefit of a professional diagnosis of that condition and prognosis for improvement," this is a factor that supports the finding that there is reason to believe that the mental condition of the defendant will be a significant factor at sentencing. *McFarland*, 125 Idaho at 881, 876 P.2d at 163. Here, the record is replete with the district court's acknowledgement of the importance of Mr. Jockumsen's mental health conditions to its sentencing determination, as well as the recognition that the court was without necessary information in order to properly determine how Mr. Jockumsen's mental illness should impact his sentence.

At the initial sentencing hearing, the district court expressly stated that Mr. Jockumsen's mental illness was an issue that the court felt it should consider.

(4/3/07 Tr., p.37, Ls.20-21.) The court also noted the statutory criteria provided in I.C. § 19-2523 regarding consideration of the defendant's mental conditions at sentencing. (4/3/07 Tr., p.51, Ls.19-22.)

Despite knowing that Mr. Jockumsen's mental conditions were relevant and should be given weight at sentencing, the district court also made several statements indicating that it was without the necessary information at the time of sentencing to determine precisely how Mr. Jockumsen's conditions should effect his sentence. The court noted that the evidence of Mr. Jockumsen's mental conditions were "somewhat ambiguous," and not always consistent. (4/3/07 Tr., p.53, Ls.2-20.) Despite a sense that Mr. Jockumsen may pose a danger to the community, the court also acknowledged, "*It's just difficult for me to measure just how great that risk is. So it's worrisome to me.*" (4/3/07 Tr., p.54, Ls.21-24.) The district court reiterated this concern at the subsequent sentencing hearing, where the court stated: "The fact of the matter is that right now, Mr. Jockumsen, you are a risk to the community. What I'm having trouble getting my arms around is whether it's because that's a result of your criminal thinking or whether it's the result of issues of mental illness or whether it's some combination of the two." (4/9/07 Tr., p.14, Ls.15-21.)

Beyond the district court's own explicit acknowledgment that Mr. Jockumsen's mental health conditions were a central factor at sentencing, and the extensive argument presented by Mr. Jockumsen and the State regarding how Mr. Jockumsen's mental health conditions should impact the court's sentencing decision, other factors in this case demonstrate that his mental condition was a significant factor at sentencing.

Mr. Jockumsen's prior criminal record reveals no past crimes of violence until approximately one month prior to the charge at issue in this appeal. (PSI, pp.4-6.) His prior offenses were mainly charges of petit theft and driving under the influence. (PSI, pp.4-6.) This sudden escalation from relatively petty crimes to allegations of a series of violent offenses is an important indication of the need for a mental health evaluation. *See Durham*, 146 Idaho at 367, 195 P.3d at 726; *Collins*, 144 Idaho at 409, 162 P.3d at 788; *Craner*, 137 Idaho at 190, 45 P.3d at 846; *McFarland*, 125 Idaho at 880, 876 P.2d at 162.

As has been noted by the court in *Coonts*, the court's awareness from an early stage in the proceedings that the defendant suffered from a serious mental illness, coupled with an awareness that the defendant was receiving medications to treat that illness, is also sufficient to alert the court that the defendant's mental condition would be an important consideration at sentencing. *Coonts*, 137 Idaho at 152-153, 44 P.3d at 1207-1208. Here, the court knew at a very early stage that Mr. Jockumsen had mental health issues, because Mr. Jockumsen's counsel asked that he be evaluated for competency at a preliminary hearing, and there were questions of his competency that persisted during the initial stages of this criminal case. (R., pp.32, 34-36, 40, 42-44, 53-54, 62-63.) Moreover, there was significant evidence before the district court at sentencing that Mr. Jockumsen was receiving anti-psychosis medications. (4/3/07 Tr., p.47, L.23 – p.48, L.1; 4/9/07 Tr., p.10, Ls.10-16; PSI, pp.12, 15, 28.)

Mr. Jockumsen's own statements also indicated the need for a mental health evaluation. Mr. Jockumsen repeatedly expressed the belief that evil witchcraft or sorcery was the cause of the commission of his crimes. (8/27/07 Tr., p.23, L.25 – p.24,

L.8; p.27, Ls.12-18.) He also has consistently maintained that his current offense was the result of a psychotic break when he was not adequately medicated for his mental illness. (4/3/07 Tr., p.42, Ls.16-19, p.45, Ls.18-20; 4/9/07 Tr., p.10, Ls.10-16.)

While the record clearly demonstrates that there was every reason to believe that Mr. Jockumsen suffered from severe mental health issues, nothing in the record otherwise met with the requirements for the types of informed considerations that must be made pursuant to I.C. § 19-2522(3).

As an initial matter, it should be noted that the district court's decision to order a mental health evaluation from the Department of Correction has already been held not to satisfy the mandate of I.C. § 19-2522. *Coonts*, 137 Idaho at 153, 44 P.3d at 1208. In *Coonts*, the court held:

> Section 19-2522 does not require a psychological evaluation merely to enlighten officials who must make decisions on the defendant's conditions of confinement and treatment while incarcerated; the statute requires that the evaluation be conducted *before* sentencing so that the trial court will have the benefit of the evaluator's insights in fashioning an appropriate sentence.

Id. (*See also* 4/3/07 Tr., p.57, Ls.11-19.) In addition, the letter provided from Dr. Perrien addresses none of the factors required under I.C. § 19-2522(3), and therefore cannot provide an adequate basis in the record to excuse the court's failure to order a proper mental health evaluation. (Letter to the district court from Dr. Perrien, dated August 3, 2007.)

Likewise, the competency evaluations in this case cannot stand as a substitute for a mental health evaluation conducted for purposes of sentencing pursuant to I.C. § 19-2522. *See State v. Banbury*, 145 Idaho 265, 270, 178 P.3d 630, 635 (Ct. App. 2007). First, as has been noted, such a use of the contents of a competency evaluation

at sentencing violates Mr. Jockumsen's Fifth Amendment rights, as well as the expressed provisions of I.C. § 18-215. *See* Point I *supra*; *Banbury*, 145 Idaho at 270, 178 P.3d at 635. Second, the district court apparently felt that the information contained within these reports was insufficient to address sentencing concerns, as the court requested an additional report from Dr. Perrien while Mr. Jockumsen was on his rider. *See Banbury*, 145 Idaho at 270, 178 P.3d at 635. (4/9/07 Tr., p.16, Ls.7-12.)

Finally, competency evaluations are conducted to determine fundamentally different questions, and thus will address fundamentally different concerns, than mental health evaluations conducted for sentencing purposes under I.C. § 19-2522. Competency evaluations serve the purpose of determining whether the defendant may legally be subjected to any trial, conviction, sentencing, or punishment at all. *See* I.C. §§ 18-210-212. As such, the diagnostic thrust of competency evaluations looks to whether the defendant has the "capacity to understand the proceedings against him and to assist in his own defense." I.C. § 18-211(c). However, "psychological 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)." *Banbury*, 145 Idaho at 270, 178 P.3d at 635. The analysis of the defendant's diagnosed conditions under I.C. § 19-2522 focuses instead on factors relevant to appropriate punishment, such as the degree of the defendant's illness and level of impairment, which may impact upon the defendant's overall culpability for the offense; the available treatments for his condition, along with the risks and benefits of treatment or nontreatment; and a consideration of the risk of danger that the defendant might pose if released back into

the community. I.C. § 19-2522(3). As such, the inclusion of the competency evaluations within the PSI in this case cannot be said to constitute sufficient compliance with the requirements of I.C. § 19-2522(3).

In addition to the improper inclusion of Mr. Jockumsen's competency evaluations, the presentence evaluator also appears to have misinformed the district court within the PSI regarding the actual indications of Mr. Jockumsen's medications for his psychosis. The investigator stated within this report that, "It should be note (sic), though Michael reports he is taking Seroquel for schizophrenia, Dr. Christianson's (sic) reported dated February 1, 2007, indicates 'Sleep is nonproblematic with prescription Seroquel.'" (PSI, p.12.) Apparently interpreting this remark to mean that Seroquel's primary or sole indication was for insomnia, the evaluator then asserted, "He claimed he is taking the medication Seroquel for [schizophrenia/psychosis]; however, psychological records indicate this medication is for sleep." (PSI, p.15.)

In actuality, Seroquel is prescribed for the treatment of psychosis, just as Mr. Jockumsen had indicated. *See* http://www.seroquel.com/bipolar-disorder/about-seroquel/what-is-seroquel.aspx. Mr. Jockumsen was also prescribed Zyprexa during his period of involuntary commitment, which is indicated for treatment of schizophrenia. *See* http://www.zyprexa.com/index.jsp. (PSI, p.28.) It is precisely this lack of informed analysis of Mr. Jockumsen's conditions and available treatments that demonstrates why a proper mental health evaluation pursuant to I.C. § 19-2522 was required in this case. In its absence, the district court was left to rely on incomplete data and incorrect assumptions of fact on perhaps the most central issue bearing on the court's sentencing decision in this case.

It should also be noted that, while the APSI recommended that the district court relinquish jurisdiction, the ultimate recommendation of the evaluator was that, "Mr. Jockumsen would benefit from a long-term inpatient treatment program." (APSI, p.4.) A recommendation for treatment contained within a Presentence Investigation Report supports the determination that a mental health evaluation, which includes a discussion of available treatments and their efficacy, was needed in this case. *Durham*, 146 Idaho at 368, 195 P.3d at 727.

The record also contains several references to Mr. Jockumsen's significant family history of mental illness, as well as past commitments to psychiatric institutions for treatment of his mental conditions. (4/3/07 Tr., p.46, Ls.15-21; PSI, pp.4, 11-12.) This is further evidence that demonstrated the need for a mental health evaluation in this case, both to determine the degree to which Mr. Jockumsen's mental illness impacted upon his culpability for his offense and to determine the potential effectiveness of treatments to prevent similar criminal behaviors in the future.

However, the evidence before the district court at sentencing failed to address nearly all of the critical factors that are required to be included within a mental health evaluation for sentencing purposes. Under I.C. § 19-2522(3), the psychological report ordered by the district court must include the following information: (1) a description of the nature of the examination; (2) a diagnosis, evaluation, or prognosis of the mental condition of the defendant; (3) an analysis of the degree of the defendant's illness or defect and level of functional impairment; (4) a consideration of whether treatment is available for the defendant's mental condition; (5) an analysis of the relative risks and benefits of treatment or non-treatment; and (6) a consideration of the risk of danger

which the defendant may create for the public if at large. I.C. § 19-2522(3). The record relied on by the district court did not adequate meet these requirements, and failed to even address several of the key elements of the statutory requirements.

Noticeably absent from the record was any substantive discussion of the degree to which Mr. Jockumsen's mental conditions may have altered or impaired his mental functioning. Given that Mr. Jockumsen had no record of violent criminal charges until approximately one month prior to the charge at issue in this appeal, an analysis of the degree to which Mr. Jockumsen's mental illness may have interfered with his self-control and contributed to his criminal behavior is an especially important consideration.

As important, there was no evaluation of what treatments were potentially available to Mr. Jockumsen in order to address his mental conditions, or any evaluation of the potential risk to the public if Mr. Jockumsen were to receive mental health treatment in lieu of incarceration. The information provided to the district court prior to sentencing made it very clear that there was reason to believe that Mr. Jockumsen's mental conditions would be a significant factor at sentencing. However, this information, on its own, did not adequately meet the requirements of I.C. § 19-2522(3). In light of this, the district court acted with manifest disregard for the provisions of I.C.R. 32 when it failed to order a psychological report for sentencing purposes.

CONCLUSION

Mr. Jockumsen respectfully requests that this Court vacate his sentence, and remand his case for a new sentencing hearing after a complete evaluation of Mr. Jockumsen's mental health conditions is made in accordance with I.C. § 19-2522 and I.C.R. 32. Further, he requests that this Court remand his case to the district court with instructions to order a new presentence investigation report that omits the contents and conclusions of his competency evaluations, and further instruct the district court to forward the new presentence report to the Department of Correction. In the alternative, he asks that this Court reverse the district court's order relinquishing jurisdiction and remand this case for further proceedings.

DATED this 24th day of April, 2009.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of April, 2009, 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:

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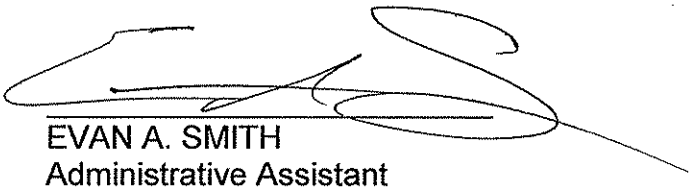

EVAN A. SMITH
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