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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|---|---|---|
| TYLER SHAWN CLAPP, | ) | |
| | ) | S.Ct. No. 42258 |
| Petitioner-Appellant, | ) | Ada Co. No. CV-PC-2013-15226 |
| vs. | ) | |
| | ) | |
| STATE OF IDAHO, | ) | |
| | ) | |
| 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

HONORABLE MIKE WETHERELL,
District Judge

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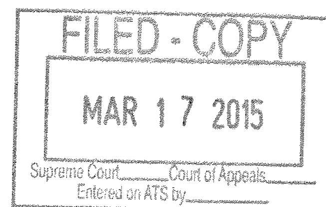

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## II. ARGUMENT IN REPLY

### A. *The District Court Erred by Dismissing a Portion of Mr. Clapp's First Cause of Action on a Basis Not Raised in the State's Motion for Summary Disposition Without First Giving Him Twenty-Days Notice of its Intent to Dismiss on That Basis.*

Mr. Clapp's first cause of action was that trial counsel was ineffective for failing to properly investigate and obtain evidence in mitigation of the crime, "to wit: mental health treatment records from Nampa Medical Clinic, and an updated mental health evaluation that complied with the requirements of Idaho Code 19-2524." R 201. The state argues on appeal that

> The record demonstrates that the state requested dismissal of lack of sufficient supporting evidence and because the claim was disproven by the underlying record. The district court granted the motion, dismissing the claim because it was disproved by the underlying record.

Respondent's Brief, pg. 5. However, that is not the case. In fact, the state's specific argument was that this claim should be dismissed because "the Defendant had a Mental Health Evaluation performed a year earlier. . . . The Defendant acknowledged this and states that use of the prior Mental Health Evaluation was appropriate." R 230-1. That is a waiver argument, *i.e.,* that Mr. Clapp could not complain about counsel's failure to obtain both existing medical records and a new mental health evaluation because he agreed the prior mental health evaluation was adequate. While the trial court dismissed the portion of the claim dealing with failure to request an updated mental health evaluation on the same basis as argued by the state,[1] it dismissed the second portion of the claim on a different basis: "In addition, Mr. Clapp informed the court that he had been suffering from depression and that he had been treated for it. Therefore, the court had the

[1] The court wrote: "Trial counsel was not ineffective for failing to obtain an updated mental health evaluation because both trial counsel and Mr. Clapp told the court one was not necessary. R 280.

information which the Nampa Medical records showed at the time of sentencing." R 280. This is a conclusion that counsel's alleged deficient performance was not prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984), because the court was told about the information in the medical records. That is not the argument made by the state.

It follows from the above that Mr. Clapp was entitled to twenty-days notice of the court's intent to dismiss on a basis other than that argued by the state as required by I.C. § 19-4906(b). *Buss v. State,* 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009) ("If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the ground therefore pursuant to I.C. § 19-4906(b)."); *see also, Kelly v. State,* 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010); *see also Baxter v. State*, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010). Further, the court's reason for dismissal of the medical records claim (lack of prejudice) is "different in kind" from the state's argument (waiver). Thus, the dismissal of the portion of the first cause of action which alleges ineffective assistance of counsel for failure to obtain medical records should be vacated.

While the state argues that a "remand in this case would accomplish nothing," Respondent's Brief, pg. 6, that conclusion is not supported by the record. The attached reports from the Nampa Medical Clinic include evidence not considered by the court when imposing the suspended sentence. While the court knew that "he was under treatment for his depression and that he was making significant strides in reducing his alcohol consumption," R 280, the medical records would have made a difference because they showed that at the time of the probation violation Mr. Clapp was likely suffering from "major depression," a serious mental illness which

suggested Mr. Clapp's "functionality is impaired." R 43. Thus, while the records confirm what the sentencing court was aware of, they add to that knowledge. They also would have permitted counsel to argue that Mr. Clapp's depression was so severe that it caused the loss of functionality in his day-to-day life which in turn lead to his relapse, but that the imposition of the sentence was not appropriate because his depression could be treated in the community. Remand is required.

Next, the state argues that the dismissal of the first cause of action can be affirmed on the alternative ground that "there is no reason to believe that the Sixth Amendment guarantees of effective counsel apply in this case," Respondent's Brief, pg. 7, n. 3, as the right to counsel in probation revocation proceedings arise out of the due process clause per *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In making this argument, the state argues that the Idaho Supreme Court was "wrong" in stating that there was a Sixth Amendment right in *State v. Young*, 122 Idaho 278, 282, 833 P.2d. 911, 915, 915 (1992), but it does not ask this Court to reconsider that statement. It also fails to mention, much less ask this Court to overrule *State v. King*, 131 Idaho 374, 376, 957 P.2d 352, 354 (Ct. App. 1998) ("A defendant's right to counsel includes legal representation during probation violation proceedings.") or *State v. Lindsey*, 124 Idaho 825, 864 P.2d 663 (Ct. App. 1993). The Court of Appeals stated in *Lindsey* that "Our Supreme Court has held that the Sixth Amendment right to counsel includes the right to be represented by retained counsel at a probation revocation proceedings, and that the right to appointed counsel conferred by I.C. § 19-852, therefore, also extends to probation revocation proceedings." 124 Idaho at 828, 864 P.2d at 666. The Court went on to note that "under the Idaho Supreme Court decision in *State v. Young*, the case-by-case approach to the right to appointed counsel in probation violation hearing defined by the United States Supreme Court in *Gagnon v. Scarpelli* . . . is inapplicable in Idaho." *Id.*, n.

1 (first set of italics added).

Whether *Young*'s reliance on the Sixth Amendment is right or "wrong," the Court held that the right to appointed counsel in probation violation hearings in Idaho was the equivalent to the Sixth Amendment right to retained counsel. Thus, the state's argument is precisely backwards. There is every reason to believe that the Sixth Amendment requirement that appointed counsel be effective counsel applies whether the legal basis for the original appointment is statutory, the Sixth Amendment or the Fourteen Amendment. *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that the Fourteenth Amendment guarantees a criminal defendant the right to counsel during the first appeal of right); *Evitt v. Lucey*, 489 U.S. 387, 396-397 (1985) (The right to counsel established by *Douglas* also guarantees the right to effective assistance of counsel); *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (*Strickland v. Washington* standard applies to claims of ineffective assistance of appellate counsel for failing to raise a merits brief); *see State v. Galaviz*, 291 P.3d 62, 68 (Kan. 2012) ("[A] Kansas criminal defendant has a constitutional right to effective assistance of counsel in a probation revocation proceeding under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").

The state's alternative argument is without merit and this Court should vacate that portion of the order of dismissal and remand for further proceedings.

### B. *The District Court Erred by Dismissing Mr. Clapp's Fifth Cause of Action on a Basis Not Raised in the State's Motion for Summary Disposition Without First Giving Him Twenty-days Notice of its Intent to Dismiss on That Basis.*

Mr. Clapp's ineffective assistance of appellate counsel claim was based upon counsel's failure to raise a challenge to the district court's use of unreliable hearsay at the probation

violation dispositional hearing. R 205. Mr. Clapp argues that the court erred in dismissing this claim on a basis not raised by the state. In response, the state wrote that "[t]he difference Clapp claims to see in the grounds for the motion and the grounds for the order are entirely figments of imagination." Respondent's Brief, pg. 10. The record, however, provides tangible proof that the court dismissed on grounds different from those argued by the state.

The state argued the following regarding the fifth cause of action:

> As noted above, *State v. Martinez* [, 154 Idaho 940, 303 P.3d 67 (Ct. App. 2013),] stands for the exact opposite of what the Petitioner alludes to. In *State v. Martinez*, the Court in its holding states[:]
>
> "In line with the considerable authority, we decline to find that defendant's right to confrontation under the Sixth Amendment and Due Process Clause extends to sentencing proceedings. As such, Martinez has not shown that the district court erred by considering the statement of a co-defendant whom she had not had the opportunity to confront."
>
> *Id.*, at 949. This allegation fails to raise a genuine issue of material fact regarding either deficient performance or resulting prejudice.

R 233-234. Thus, the record shows that the state moved for summary disposition arguing that the claim should be dismissed because there is no right to confrontation at probation dispositional hearings. R 233-34.

On the other hand, the court dismissed this claim writing that:

> [I]t suffices to say once more that the state was entitled to argue conduct underlying dismissed allegation and the Court was entitled to take this conduct into account where it was supported by substantial evidence in the record. In this case, the Court found the allegations by the defendant's probation officer in her report of violation to be credible and substantial evidence regarding the conduct in general, and therefore was entitled to refer to the evidence for purposes of determining whether to revoke probation and impose sentence. Moreover, given the defendant's criminal history and chronic abuse of alcohol, and his admitted violation of probation by drinking on a number of occasions, this Court would have been justified in revoking probation even had no discussion of the conduct

> underlying the dismissed allegations occurred. There is no genuine dispute regarding the prejudice arm of *Strickland* test, hence these claims must be dismissed.

R 284-285 (internal citations omitted). Thus, the record shows that the court dismissed the claim because it found no deficient performance (because there was no due process violation) and no prejudice (because the court could have revoked probation without the disputed information). It did not dismiss for the reason argued by the state, *i.e.*, there is no right to confrontation at sentencing proceedings. The state's argument that Mr. Clapp is making this distinction up is without factual basis.

Therefore, the dismissal of this cause of action should be vacated because the court failed to give Mr. Clapp the twenty days notice required under I.C. § 19-4906(b) and *Buss v. State, supra.*

**C.** ***In the Alternative, the District Court Also Erred in Dismissing Mr. Clapp's Fifth Cause of Action on the Merits of the Claim. Mr. Clapp Presented a Prima Facie Case That Appellate Counsel Was Ineffective for Failing to Raise the Claim That the Evidence That Mr. Clapp Was Driving Was Not Sufficiently Reliable to Be Considered.***

The state argues that the dismissal on the merits of the claim was proper for two reasons. First, "Clapp has failed to show any Sixth Amendment right to counsel on appeal from probation violation proceedings" and second he "failed to present a viable claim that right was violated." Respondent's Brief, pg. 10. Neither reason is correct.

As argued above, under *State v. Young* and its progeny there is a right to counsel at probation violation hearing and there is the right to appointed counsel on appeal from such a hearing. I.C. § 19-852(2)(b). There is also the right to directly appeal an order revoking probation and imposing sentence. I.A.R. 11(c)(6). Consequently, such an appeal is a "first

appeal as of right" for purposes of *Douglas v. California*, *Evitt v. Lucey* and *Smith v. Robbins*, and the right to effective assistance of counsel applies to that appeal. *See Commonwealth v. Patton*, 934 N.E. 236, 247 (Mass. 2010) (Trial counsel's failure to file a timely appeal from an order revoking probation was ineffective.)

*Ross v. Moffitt*, 417 U.S. 600 (1974), cited by the state, is not apposite because in Idaho an appeal from an order revoking probation and imposing sentence is not a discretionary appeal. It is an appeal as of right. I.A.R. 11(c)(6). In *Ross*, the defendant had an appeal to the state intermediate appeal court and the Supreme Court held he did not have the right to counsel in order to see discretionary review in the State Supreme Court. 417 U.S., at 610.

Further, appellate counsel could have raised the due process issue on appeal notwithstanding the lack of objection by trial counsel at the revocation proceeding. Mr. Clapp had previously objected to the use of the disputed information by the court in setting bond. Counsel told the court that in regards to Mr. Clapp driving his father's truck "my client denies them adamantly" and while "his probation officer clearly thought he was driving or indicated that he admitted to driving, Tyler says that is not true." R 100 (T pg. 22, ln. 10-18). Thus the court was aware that Mr. Clapp denied the allegation and there was no opportunity to object after the court stated Mr. Clapp's alleged driving was used to revoke his probation and imposing sentence.

In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Court held that an unobjected-to error should cause a reversal when the defendant persuades the court that the error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Id.* at 226, 245

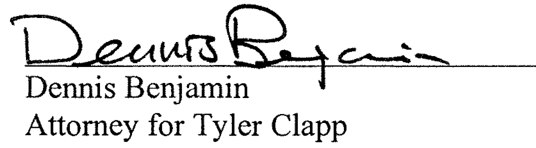
P.3d at 978. Here the error (1) affected Mr. Clapp's unwaived right to be sentenced only upon reliable information, (2) the error is clear from the record and (3) the court's reliance on the erroneous information led the court to impose sentence. It is telling to note that the court only said that it "would have been justified in revoking probation," but did not find that it would have done so. R 285. In addition, the court clearly relied upon the driving allegations in denying Mr. Clapp's post-revocation I.C.R. 35 motion. ("Furthermore, Mr. Clapp has also shown that he is not a good candidiate for supervision in the community–even while on probation for a drinking related offense, Mr. Clapp continued to drink and to drive.") R 37. *See State v. Velasco*, 154 Idaho 534, 537, 300 P.3d 66, 69 (Ct. App. 2013) (finding that sentencing court's erroneous consideration of competency evaluation at sentence required vacation of sentence even though the defendant did not contemporaneously object).

Finally, the claim was meritorious. Mr. Clapp's argument in this regard is set forth at pages 13-16 of the Opening Brief which will not be repeated in the interests of brevity but which are incorporated herein by this reference. Had the due process claim been raised on appeal, the order revoking probation would have been vacated. Thus, the failure to raise the issue on appeal was ineffective assistance of appellate counsel and the court erred by summarily dismissing this claim.

## III. CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Clapp respectfully requests that the order of summary disposition as to his first cause of action be vacated in part. He also respectfully requests that the order of summary disposition as to his fifth cause of action be vacated and the matter be remanded for further proceedings.

Respectfully submitted this 17TH day of March, 2015.



Dennis Benjamin
Attorney for Tyler Clapp

## CERTIFICATE OF SERVICE

I CERTIFY that on March 17th, 2015, I caused two true and correct copies of the foregoing document to be:

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___ hand delivered

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