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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 42872
	)	
v.	)	FREMONT COUNTY NO.
	)	CR 2013-2123
KYLE V. JORGENSEN,	)	
	)	REPLY BRIEF
Defendant-Appellant.	)	
______________________________	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

HONORABLE GREGORY W MOELLER
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and
Course of Proceedings 2

ISSUE PRESENTED ON APPEAL 3

ARGUMENT 4

The District Court Violated Mr. Jorgensen's Fifth Amendment Rights
By Imposing A Longer Sentence As The Result Of Mr. Jorgensen's
Decision To Exercise His Right To Not Answer Questions During
A Psychosexual Evaluation 4

A. The District Court Did Not Lose Authority To Rule On
Mr. Jorgensen's I.C.R. 35 Motion 4

1. The District Court Had Authority To Rule On Mr. Jorgensen's
Motion Under I.C.R. 35(a) 4

2. Alternatively, The District Court Ruled On The Motion
Within A "Reasonable Time" 5

B. The District Court's Reliance On Mr. Jorgensen's Decision To Remain
Silent During The Psychosexual Evaluation To Justify Withdrawing
From The Binding Plea Agreement, And So, Impose A Longer
Unified Sentence, Violated Mr. Jorgensen's Fifth Amendment
Rights 11

1. Proper Application Of Idaho Supreme Court Precedent
Reveals That The District Court Violated
Mr. Jorgensen's Fifth Amendment Rights 11

2. To The Extent There Is An Open Question As To Whether The
District Court Can Draw Adverse Inferences About Future
Dangerousness From A Defendant's Invocation Of The
Fifth Amendment, This Court Should Rule In
The Negative 18

a. The Idaho Supreme Court's Precedent, When Properly Understood And Applied, Resolves This Issue 19

b. The State Overstates The Scope Of The Purported Open Question..23

CONCLUSION 25

CERTIFICATE OF MAILING 26

TABLE OF AUTHORITIES

Cases

Diggs v. United States, 740 F.2d 239 (3rd Cir. 1987) 6

DiGiovanni v. United States, 596 F.2d 74 (2nd Cir. 1979) 20

Estelle v. Smith, 451 U.S. 454 (1981) .... *passim*

Estrada v. State, 143 Idaho 558 (2006) .... *passim*

Houghland Farms, Inc. v. Johnson, 119 Idaho 72 (1990) 21

Johnson v. United States, 318 U.S. 189 (1943) 12, 13, 17, 19

Mallory v. Hogan, 378 U.S. 1 (1964) 17

McKune v. Lile, 536 U.S. 24 (2002) 12

Mitchell v. United States, 526 U.S. 314 (1999) 24

State v. Armstrong, 146 Idaho 372 (Ct. App. 2008) 1

State v. Chapman, 121 Idaho 351 (1992) 6, 7, 8, 9

State v. Clements, 148 Idaho 82 (2009) 5

State v. Clinton, 155 Idaho 271 (2013) 20, 21

State v. Fisch, 142 Idaho 781 (Ct. App. 2006) 7, 8, 10

State v. Jimenez, ___ P.3d ___, 2015 WL 7785141 (Idaho Ct. App. Dec. 4, 2015) ....
passim

State v. Jockumsen, 148 Idaho 817 (Ct. App. 2010) 16

State v. Lute, 150 Idaho 837 (2011) 5

State v. McKean, 159 Idaho 75 (2015) 21

State v. Moore, 150 Idaho 17 (2010) 19

State v. Oliver, 144 Idaho 722 (2007) 15

State v. Tranmer, 135 Idaho 614 (Ct. App. 2001) 6

State v. Van Komen, ___ P.3d ___, 2015 WL 7785342 (Ct. App. Dec. 4, 2015) 20

State v. Velasco, 154 Idaho 534 (Ct. App. 2013) 23

State v. Veloquio, 141 Idaho 154 (Ct. App. 2005) 8, 10

State v. Wilkins, 125 Idaho 215 (1994)... 13

United States v. Jackson, 390 U.S. 570 (1968).. 17

United States v. Smith, 650 F.2d 206 (9th Cir. 1981) 6

White v. Woodall, ___ U.S. ___, 134 S. Ct. 1697 (2014) 23

Rules

I.C.R. 35 .... *passim*

Additional Authorities

https://isb.idaho.gov/licensing/attorney_roster_ind. cfm?IDANumber=3007 9

28 U.S.C. § 2254(d) 23, 24

STATEMENT OF THE CASE

Nature of the Case

Kyle Jorgensen appeals, contending the district court violated his Fifth Amendment rights by relying on his decision to invoke his right to remain silent and not participate in the psychosexual evaluation (PSE) when it withdrew from a binding plea agreement and imposed a longer sentence on him. He preserved this challenge through a motion filed pursuant to I.C.R. 35. The State contends that the district court lost "jurisdiction"[1] over that motion because it did not rule within 120 days of the judgment without reasonable justification, and that the district court's reliance on Mr. Jorgensen's decision to stand silent did not violate his rights. The State is mistaken in both respects.

First, the record demonstrates the district court maintained authority to rule on Mr. Jorgensen's motion under I.C.R. 35(a), which provides that a motion to correct an illegal sentence may be filed at any time. Alternatively, to the extent that Mr. Jorgensen's motion is construed as a plea for leniency or a motion to correct as sentence imposed in an illegal manner under I.C.R. 35(b), the district court maintained authority over that motion because it ruled within a reasonable time.

Second, when the controlling authority is properly understood, the district court's reliance on Mr. Jorgensen's decision to stand silent is revealed to be a violation of his constitutional rights. Therefore, this Court should reduce Mr. Jorgensen's sentence as it

[1] In this context, the term "jurisdiction" is more properly understood to be the district court's authority to rule on the motion. *State v. Armstrong*, 146 Idaho 372, 375 (Ct. App. 2008).

deems appropriate or, alternatively, remand this case for a new sentencing determination.

The State contends the merits of this issue fall under an open question in Idaho. Mr. Jorgensen asserts that, while the Idaho Supreme Court has not expressly ruled on that question, a proper understanding and application of its precedent resolves the issue. Since the Response Brief was filed, the Court of Appeals has evaluated this issue in similar cases, which Mr. Jorgensen contends is in contrast with the Idaho Supreme Court's precedent on this issue. As such, the Idaho Supreme Court should retain this case to resolve the confusion on this issue.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court violated Mr. Jorgensen's Fifth Amendment rights by imposing a longer sentence as the result of Mr. Jorgensen's decision to exercise his right to not answer questions during a psychosexual evaluation.

ARGUMENT

The District Court Violated Mr. Jorgensen's Fifth Amendment Rights By Imposing A Longer Sentence As The Result Of Mr. Jorgensen's Decision To Exercise His Right To Not Answer Questions During A Psychosexual Evaluation

A. The District Court Did Not Lose Authority To Rule On Mr. Jorgensen's I.C.R. 35 Motion

Mr. Jorgensen's motion is unclear as to whether it is filed pursuant to I.C.R. 35(a) or I.C.R. 35(b):

> The Defendant, by and through his attorney of record . . . pursuant to Rule 35, Idaho Criminal Rules, respectfully moves the Court to reconsider the indeterminate portion of the sentence previously imposed . . . by and for the reason that a Defendant's exercise of his 5th Amendment rights to refuse to answer questions on a psychosexual evaluation cannot be used against him as part of the basis for his sentence.

(*See* R., p.96) While the State contends this claim should be evaluated under I.C.R. 35 (b) (Resp. Br., pp.5-6), Mr. Jorgensen maintains that it alleges an illegal sentence under I.C.R. 35(a), as Mr. Jorgensen claimed the sentence was based on negative inferences unlawfully drawn from his exercise of his constitutional right to remain silent. Regardless, under either provision, the district court maintained authority to rule on Mr. Jorgensen's motion.

1. The District Court Had Authority To Rule On Mr. Jorgensen's Motion Under I.C.R. 35(a)

The district court had authority to rule on Mr. Jorgensen's motion. Idaho Criminal Rule 35(a) states: "The court may correct a sentence that is illegal from the face of the record at any time." Mr. Jorgensen has claimed the sentence is illegal because it is premised on a violation of his Fifth Amendment rights.

The Idaho Supreme Court has explained, "the term 'illegal sentence' under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing."[2] *State v. Clements*, 148 Idaho 82, 86 (2009). In this case, the relevant facts are clear: the statements which demonstrate the district court's improper consideration of Mr. Jorgensen's decision to remain silent during the PSE are memorialized in written documents and the verbatim transcripts of the hearings in this case. (*See* App. Br., pp.6-17 (discussing the various comments which detail the district court's error).) Therefore, the record was clear because there were no questions of fact that would need to be resolved for the courts to adequately assess the alleged illegality of the sentence. *Compare Clements*, 148 Idaho at 87. As a result, the district court had continuing authority to rule on Mr. Jorgensen's motion under I.C.R. 35(a).

2. Alternatively, The District Court Ruled On The Motion Within A "Reasonable Time"

The State contends that Mr. Jorgensen's motion should be evaluated under I.C.R. 35(b) as it interprets that motion as a request to correct a sentence imposed in an illegal manner. (*See* Resp. Br., p.5-6.) It also argues that the record does not show a reasonable delay which would justify allowing the district court to rule on that motion beyond the 120-day filing deadline. (Resp. Br., pp.6-7.) Even if the State is correct and

[2] Mr. Jorgensen recognizes that, in some recent decisions, Idaho's courts have evaluated I.C.R. 35(a) in terms of "clear from the face of the judgment." *See, e.g., State v. Wolfe*, 158 Idaho 55, 66 (2015) ("Wolfe's reliance on [*State v. Lute*, 150 Idaho 837 (2011)] is unavailing, as it is not clear from the face of the judgment that Wolfe's sentence was illegal . . . ."). However, the plain language of the rule is not so limited – the error must simply be clear from the face of the record. I.C.R. 35(a).

Mr. Jorgensen's motion is properly analyzed under I.C.R. 35(b), the district court did not lose authority to rule on his motion because, based on the facts of this case, the district court ruled within a reasonable time.

Mr. Jorgensen's motion was filed on July 11, 2014, approximately three months after the judgment was entered in his case. (*See* R., p.78 (the order of commitment, file-stamped Apr. 22, 2014); R., p.96 (Mr. Jorgensen's motion).) Two months after the motion was filed, on September 19, 2014, a hearing was scheduled for November 25, 2014, on Mr. Jorgensen's motion. (*See* R., p.4.) The district court issued its order the same day as the hearing. (R., p.105.) Therefore, the motion was resolved within four months of the timely filing of the motion.

As an initial matter though, the Idaho courts have explained, the rationale underlying the requirement for a ruling within the 120-day period in the first place is to protect against the district court invading the province of the parole board, and so, violating the separation of powers doctrine. *State v. Chapman*, 121 Idaho 351, 353 (1992) (quoting *United States v. Smith*, 650 F.2d 206, 208-09 (9th Cir. 1981)). However, as the Idaho Court of Appeals has subsequently explained, such a violation arises when the delay in ruling on the motion is designed to allow the district court to "consider a defendant's subsequent conduct while incarcerated" in its ultimate decision. *State v. Tranmer*, 135 Idaho 614, 618 (Ct. App. 2001). Thus, the rule is: "The 'reasonable time' granted to the trial court is 'a reasonable time to decide the issue presented by the rule 35 motion, *not a license to wait and reevaluate the sentencing decision in the light of subsequent developments*." *Id*. at 616 (quoting *Diggs v. United States*, 740 F.2d 239, 246-47 (3rd Cir. 1987) (emphasis from *Tranmer*).

The corollary to that rule, as the Court of Appeals has also explained, is that, when the issues raised in a Rule 35 motion are not aimed at having the district court usurp the power of the parole board, nor would a favorable decision on the issues raised have done so, the justification for enforcing the requirement for a ruling within 120 days. *State v. Fisch*, 142 Idaho 781, 785 (Ct. App. 2006). For example, in *Fisch*, the Court of Appeals found a thirteen-month delay in ruling on a Rule 35 motion was reasonable because the record did not disclose any act by the trial court indicating the purpose or effect of infringing on the authority of the parole board. *Id*. Rather than seeking to reevaluate the defendant based on his behavior while incarcerated, the Court was awaiting completion of a psychosexual evaluation it deemed necessary to fully address the claim for sentence reduction raised in the Rule 35 motion because it was necessary to adequately consider "mental health, character and likelihood of recidivism," in that decision. *Id*. Thus, without evidence that the district court was, in fact or in effect, usurping the parole board's function, the Court of Appeals rejected the State's argument for strict adherence to the requirement of a ruling within the 120-period. *Id.*; *see also Chapman*, 121 Idaho at 355 (explaining that, in a case involving a twenty-nine-month delay, the decision might still impermissibly, "although perhaps unintentionally," usurp the parole board's authority).

Like the motion at issue in *Fisch*, Mr. Jorgensen's motion does not invoke the concerns which the requirement for a ruling within the 120-day period is designed to address, as he is not asking for a reduction of his sentence based on his conduct while incarcerated. (*See* R., p.96.) Rather, he is asking the courts to address a violation of his Constitutional rights which occurred during the initial imposition of sentence.

(R., p.96.) Because the issue raised by the motion was static and Mr. Jorgensen's conduct in custody was not relevant to the resolution of that issue, the risk that a decision on his motion would violate the separation of powers doctrine is not present. *Compare Fisch*, 142 Idaho at 785. Therefore, it was reasonable for the district court to rule on that motion outside the 120-day period.

The record in this case also shows that the delay in the ruling was reasonable. *Compare State v. Veloquio*, 141 Idaho 154, 155-56 (Ct. App. 2005). In *Veloquio*, the Court of Appeals explained that a five-month delay in ruling on the defendant's Rule 35 motion was reasonable based on the specific facts in the record, which included the need for counsel to investigate the motion, the need for a hearing to be held, and the need for the district court to duly consider all the information presented in regard to the motion. *Id*. Many similar facts exist in the record in this case.

For example, Mr. Jorgensen's motion required a hearing. Critically, when the district court decided to set that hearing, it had to set it for two months later. (*See* R., p.4 (register of actions noting that the hearing was scheduled on September 19, 2014, for November 25, 2014.) That is unsurprising, since the district court judge presiding over the case does not normally sit in Fremont County.[3] *See Chapman*, 121 Idaho at 353 (indicating a judge's obligations to serve in another district

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[3] This Court should take judicial notice of the fact that the district court judge presiding over this case, Judge Moeller, is chambered in Madison County. Idaho Judicial Directory, p.9, available at http://isc.idaho.gov/files/judicial_directory.pdf (last accessed Jan. 26, 2016). This Court should also take judicial notice of the fact that this district court judge has obligations in several other counties in the Seventh Judicial District beside his home county. *See, e.g., State v. Jimenez*, ___ P.3d ___, 2015 WL 7785141, *6 (Ct. App. Dec. 4, 2015) (noting this same district court judge has also been asked to preside over cases as far south as Bingham County), *pet review filed.*

is one potential justification for not resolving a Rule 35 motion within the 120-day period). The judge's calendar is not the only relevant calendar in this regard. Defense counsel would also have to be available for the hearing, and according to the Idaho State Bar attorney roster, he, too, would be traveling from a different county. *See* Idaho State Bar, Attorney Roster Search, https://isb.idaho.gov/licensing/attorney_roster_ind.cfm?IDANumber=3007 (last accessed Jan. 25, 2016) (listing defense counsel's office as located in Idaho Falls, which, this Court can take judicial notice, is in Bonneville County).

Additionally, the fact that, when the hearing was scheduled in September 2014, it had to be scheduled for two months later is particularly important in this case, since Mr. Jorgensen timely filed his motion with only forty days (slightly over one month) left in the 120-day period. (*See* R., p.78 (the judgment of conviction, file-stamped Apr. 22, 2014); R., p.96 (Mr. Jorgensen's motion, file-stamped July 11, 2014). Thus, the concern the Idaho Supreme Court identified in *Chapman* is fully evident in this case: the district court could not have reasonably scheduled the needed hearing on Mr. Jorgensen's timely-filed motion within the 120-day period. *Compare Chapman*, 121 Idaho at 353-54 (indicating this is the sort of situation where the district court's authority to rule on the motion will continue for a reasonable time beyond the 120-day period).

Furthermore, these scheduling issues demonstrate that the implied concern in the State's argument – that Mr. Jorgensen had not precipitated action on his motion (*see* Resp. Br., p.6) – is mistaken. Action was, in fact, precipitated on the motion on September 19, 2014, as a hearing was scheduled on the motion. (*See* R., p.4.) The two-month period between the initial filing of the motion and the setting for a hearing in

September 2014 is also not unreasonable because it allowed time for a potential response from the State or such other follow-up documents the parties may have deemed necessary to be filed.

In addition to the scheduling issues, the district court pointed out that this case was complex, and so, reasonably required additional time to adequately consider the motion: "I would let you know, [defense counsel], that in preparation for the hearing today I went back and reviewed my notes of the original sentencing as well as the original PSI and have re-familiarized myself with the difficult case that was complex, and I think I've got my head wrapped back around it." (Tr., Vol.3, p.4, Ls.10-15.) The order the district court ultimately issued on the motion also indicates that the district court needed time to "review[] the offered exhibits, and consider[] the oral argument of counsel" before it could make its decision. (R., p.105.) Thus, forcing the district court to try and resolve Mr. Jorgensen's timely Rule 35 motion within the 120-day period would have been impracticable on the particular facts of this case. As a result, it continued to have authority to rule on that motion for a reasonable time beyond that 120-day period. The motion was, in fact, resolved within a reasonable time of the motion's filing (four months). *Compare Fisch*, 142 Idaho at 785 (finding a thirteen-month delay was reasonable on similar facts); *Veloquio*, 141 Idaho at 155-56 (finding a five-month delay was reasonable on similar facts).

For all these reasons, the record demonstrates that the district court's delay in ruling on the motion was reasonable, and as such, the district court had continuing authority to rule on Mr. Jorgensen's Rule 35 motion.

B. The District Court's Reliance On Mr. Jorgensen's Decision To Remain Silent During The Psychosexual Evaluation To Justify Withdrawing From The Binding Plea Agreement, And So, Impose A Longer Unified Sentence, Violated Mr. Jorgensen's Fifth Amendment Rights

1. Proper Application Of Idaho Supreme Court Precedent Reveals That The District Court Violated Mr. Jorgensen's Fifth Amendment Rights

The State contends that a district court does not err by drawing adverse inferences about the defendant's risk to reoffend from the defendant's decision to stand silent during the PSE process, and so, asserts there was no error in this case. (Resp. Br., pp.14-22.) That argument ignores the United States Supreme Court's discussion of this precise issue in *Estelle v. Smith*: "If, upon being adequately warned, respondent [defendant] had indicated he would not answer [the psychiatrist's] questions, . . . the State must make its case on future dangerousness in some other way." *Estelle v. Smith*, 451 U.S. 454, 468-69 (1981).

That determination was the product of the Fifth Amendment protection, which the Supreme Court explained was "as broad as the mischief against which it seeks to guard, and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty . . . for such silence*." *Id.* (internal quotations omitted; ellipsis from original) (emphasis added); *c.f. Estrada v. State*, 143 Idaho 558, 564 (2006). The State concedes this is so: "Therefore, a defendant may decline participation in a psychosexual evaluation ordered by the district court, and the court may not penalize the defendant for this decision." (Resp. Br., p.8.)

Despite its concession about the scope of the Fifth Amendment right, the State contends that drawing adverse inferences about future dangerousness does not

constitute a penalty for invoking the right to not disclose. (Resp. Br., p.8 n.2 (summarizing the nature of the State's argument); *see generally* Resp. Br., pp.14-22.) First, as the United States Supreme Court has indicated, whether something is a "penalty," as opposed to withholding a benefit, is a meaningless distinction. *McKune v. Lile*, 536 U.S. 24, 46 (2002) (four-Justice plurality explaining that the answer to this question "rests entirely in the eye of the beholder. For this reason, emphasis of any baseline, while superficially appealing, would be an inartful addition to an already confused area of jurisprudence"); *McKune*, 536 U.S. at 64-65 (four-Justice dissent explaining that such a distinction is irrelevant because it is also unconstitutional to "threaten to take away privileges as the cost of invoking Fifth Amendment rights").

Second, the State's argument is erroneous because it ignores *Estrada*'s holdings in regard to the Fifth Amendment right in this context. As the Idaho Supreme Court explained: "The real issue presented [in *Estrada*] is the significance and extent of a defendant's right against self-incrimination." *Estrada*, 143 Idaho at 564. In resolving that issue, the Supreme Court held: "Imposition of a harsher sentence within this expansive range [of permissible sentencing under the applicable statute] based on a defendant's statements in a psychological evaluation is a violation of the right against self-incrimination." *Estrada*, 143 Idaho at 564.

The United States Supreme Court has also recognized that a corollary to that right against self-incrimination: a defendant who is assured by the court "that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . . Elementary fairness requires that an accused should not be misled on that score." *Johnson v. United States*, 318 U.S. 189, 197

(1943). Thus, "[i]f he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and the rule against comment will be observed." *Id*. And while *Johnson* was addressing the right in the context of a comment on silence during the guilt phase, its analysis and reasoning are equally applicable to the application of the right in the penalty phase. As both the United States and Idaho Supreme Courts have held, there is no discernable reason for the right to function differently in the penalty phase than it does in the guilt phase. *Estelle*, 451 U.S. at 462-63; *State v. Wilkins*, 125 Idaho 215, 218 (1994) (expressly extending *Estelle*'s rule to the penalty phase of a case resolved by guilty plea).

Since the Idaho Supreme Court in *Estrada* assured defendants they have the right to know they have the right to not disclose information during a PSE, those defendants have every right to expect that decision was made in good faith and the rule against comment on their exercise of that right will be observed. Holding otherwise would be fundamentally unfair, rendering *Estrada* an empty promise. On a related note, the district court itself assured Mr. Jorgensen at the change of plea hearing that he had the right to not answer questions in during the PSE. (Tr., Vol.1, p.22, L.17 - p.23, L.24.) Therefore, Mr. Jorgensen had assurances from two courts that he could choose to remain silent during the PSE if he, on the advice of counsel, so chose. Therefore, he had every right to expect those assurances were made in good faith and the rule against comment on his decision to exercise that right would be observed.

However, the district court's explanations of its decision to withdraw from the binding plea agreement reveal that it was not holding to those assurances. The

expressed reason it withdrew from that plea agreement was that Mr. Jorgensen invoked his right to not disclose information during the PSE process: "[A]s the Court has previously indicated, that because the defendant didn't fully participate in a presentence investigation or produce a non deceptive polygraph, the Court is withdrawing consent" to the binding plea agreement. (Tr., Vol.2, p.8, Ls.7-11 (summarizing the explanations it gave in its notice of withdrawal of consent); *see also* R., pp.67-68 (the district court's notice of withdrawal of consent, identifying the first reason for withdrawing that consent was "1. Defendant refused to disclose information or answer any questions concerning his past sexual history").) Therefore, the district court did more than comment on Mr. Jorgensen's decision to exercise his right; it penalized him for his decision to stand silent by using his silence as the basis to increase the term of his sentence. That is contrary to the valid expectations he would have had from the courts' assertions about his right to stand silent.

The district court proceeded to impose a longer unified sentence than contemplated by the binding plea agreement on Mr. Jorgensen. (*Compare* R., pp.48-49 (binding plea agreement calling for a unified sentence of five years, with two years fixed), *with* R., p.78 (district court ultimately imposing a unified sentence of fifteen years, with two years fixed).) In imposing that sentence, it again expressly commented on the fact that Mr. Jorgensen did not provide information about past offenses, using that silence to justify its refusal to retain jurisdiction in that decision: "if the defendant isn't going to cooperate in answering questions about other offenses, I can only conclude that retained jurisdiction would be pointless in further ascertaining his risk." (Tr., Vol.2, p.23, Ls.2-17.) Applying the rules from *Estelle*, *Estrada*, and *Johnson* to this record, it is

clear that, by abandoning the binding agreement to a particular sentence and imposing a harsher sentence based on Mr. Jorgensen's decision to stand silent, the district court violated his Fifth Amendment right.

In this regard, it is irrelevant that the district court's primary objection to the plea agreement was to the indeterminate portion of the sentence and that it ultimately imposed the same fixed term contemplated by the plea agreement. (*See* Resp. Br., pp.12-13.) The State's argument in that regard is inconsistent with the record. Regardless of whether the parties had discussed a plea with a longer indeterminate portion, the agreement submitted to, and subsequently rejected by, the district court called for it to impose a five-year unified sentence. (R., pp.48-49; R., p.67 (in withdrawing from the binding plea agreement, "Specifically, the Court rejects paragraphs 3 and 5 of the Plea Agreement, which bind the Court to impose no more than a unified sentence of five years, with two years fixed and three years indeterminate.").)

Furthermore, when reviewing the length of a sentence, "we consider the defendant's entire sentence," fixed and indeterminate components together. *State v. Oliver*, 144 Idaho 722, 726 (2007). Therefore, the proper focus of whether a sentence is "harsher" under *Estrada* is on the unified term of the sentence, not its constituent fixed or indeterminate components. The district court imposed a unified sentence ten years longer than the one contemplated in the binding plea agreement. (*See* R., p.78.) Thus, regardless of the focus of its objection, it still imposed a harsher sentence on Mr. Jorgensen based on his decision to not disclose information in the PSE. (*See* R., pp.67-68 (explaining why the district court withdrew its consent).) That increase in

the term of the overall unified sentence constitutes a violation of the Fifth Amendment right under *Estelle* and *Estrada*.

Similarly, the potential that the risk assessment in the PSE might have been different[4] had Mr. Jorgensen not exercised his right to remain silent is irrelevant because the district court expressly imposed the sentence it did based on the evaluation the PSE actually returned: "*Because you were evaluated as a high risk*, I want to ensure that you have a long period of supervision, and so the [indeterminate portion of the sentence] is going to be significant." (Tr., Vol.2, p.21, Ls.14-17 (emphasis added).) The district court's reasons for rejecting the binding plea agreement demonstrate that the risk assessment actually made in the PSE was based on Mr. Jorgensen's decision to exercise his right to not disclose information during the PSE. (R., p.67 ("Given the incomplete information available to him, [the evaluator] has rated Defendant at a minimum as a 'high-moderate' risk to reoffend and concluded he requires incarceration for community protection purposes.").)

As the Court of Appeals has explained, a defendant's "Fifth Amendment rights come into play if disclosures made during a competency evaluation, *or medical conclusions derived from such disclosures*, are later used against the defendant at either the guilt or penalty phase of the proceedings." *State v. Jockumsen*, 148 Idaho 817, 820 (Ct. App. 2010) (citing *Estelle*, 451 U.S. at 465 and *Estrada*, 143 Idaho at 564) (emphasis added). Since the district court actually based its sentencing decision on the

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[4] The district thought Mr. Jorgensen's risk level might actually be lower had he participated fully in the PSE. (Tr., Vol.3, p.5, Ls.15-18 ("And the feeling I had reading the report is that it was probably higher than it would have been if he had talked about information about his past . . . . ."). However, the State argued, based on comments in the PSE itself, Mr. Jorgensen's risk level could have been higher. (Resp. Br., p.10.)

conclusion of the PSE evaluator, and the PSE evaluator's conclusion was inflated because Mr. Jorgensen exercised his right to not disclose information during the PSE, the harsher sentence based on that conclusion violates the Fifth Amendment under *Estrada* and *Estelle*.

Finally, the fact that the district court claimed it did not intend to consider Mr. Jorgensen's silence or punish him for asserting his Fifth Amendment right is irrelevant. (*Compare* Resp. Br., p.12; *see e.g.,* R., pp.67-68 (recognizing Mr. Jorgensen's rights under *Estrada*).) Incidental violations of Constitutional rights are still violations of Constitutional rights. *Cf. United States v. Jackson*, 390 U.S. 570, 582 (1968) (holding that, when the district court's imposition of sentence would have the effect of chilling others from exercising their constitutional rights in future cases, "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.").

In fact, the fact that the district court told Mr. Jorgensen that he could exercise that right (Tr., Vol.1, p.22, L.17 – p.23, L.10), then punished him for his subsequent exercise of that right is particularly problematic regardless of the district court's intent: "When [the court] grants the claim of privileges but allows it to be used against the accused to his prejudice, *we cannot disregard the matter*. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory power."[5] *Johnson*, 318 U.S. at 199 (emphasis added).

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[5] When the *Johnson* decision was issued in 1948, its supervisory authority was limited to the federal courts, as the right against self-incrimination would not be incorporated against the states until 1964. *See Mallory v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating that right). Therefore, *Johnson*'s interpretation of that right and its prohibition against

Therefore, the district court's intent was irrelevant – its actions violated Mr. Jorgensen's Fifth Amendment rights and this Court should not disregard the matter.

Ultimately, the district court withdrew from the binding plea agreement based on Mr. Jorgensen's decision to remain silent. It relied on the PSE author's conclusion as to the risk of future dangerousness, which was inflated based on Mr. Jorgensen's decision to remain silent, to impose a longer sentence than contemplated by the binding plea agreement. As a result, the district court imposed an enhanced, harsher sentence based on Mr. Jorgensen's decision to exercise his Fifth Amendment right to remain silent. This fact remains true regardless of whatever other sentencing factors the district court considered in that decision because of the unique facts presented by this case. (*See generally* Resp. Br., pp.9-13 (arguing that there was no error because the district court considered other factors).) Since the State concedes that *Estrada*, based on *Estelle*, provides the district court cannot enhance the penalty imposed because of the defendant's decision to exercise his right (Resp. Br., p.8), and proper application of *Estrada*, *Estelle*, and *Johnson* reveals that is exactly what the district court did in this case, there was a violation of Mr. Jorgensen's Fifth Amendment right.

2. <u>To The Extent There Is An Open Question As To Whether The District Court Can Draw Adverse Inferences About Future Dangerousness From A Defendant's Invocation Of The Fifth Amendment, This Court Should Rule In The Negative</u>

Despite its concession that *Estrada* holds that a defendant may not be penalized for his decision to remain silent during the PSE process, the State argues that the

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oppressive use of contrary procedures was necessarily incorporated against the states when *Mallory* was issued.

question of whether the district court can draw inferences about a defendant's future dangerousness from his silence and can impose a harsher sentence as a result of that determination is an open question, and this Court should hold that process permissible. (Resp. Br., pp.14-22.) The State's argument is erroneous on several levels.

a. The Idaho Supreme Court's Precedent, When Properly Understood And Applied, Resolves This Issue

While it is true that the Idaho Supreme Court has not issued an express decision on the precise question, the issue is resolved by a proper application of its decision in *Estrada*. Because of the nature of the PSE and the statements typically contained therein, the Idaho Supreme Court concluded that part of the Fifth Amendment right to remain silent is the right to refuse to answer questions in such an evaluation. *Estrada*, 143 Idaho at 562-64. As it has since reaffirmed: "In *Estrada*, we held that a defendant who has pled guilty still had a Fifth Amendment right against self-incrimination with respect to a court-ordered psychological evaluation." *State v. Moore*, 150 Idaho 17, 19 n.1 (2010). This right includes scenarios where the defendant validly claims the right and remains silent, particularly if he does so after the court assures him that his claim to the right will be respected. *Johnson*, 318 U.S. at 197.

As demonstrated in Section B(1), *supra*, proper application of *Estrada* resolves the matter. Therefore, the Idaho Supreme Court has effectively answered the "open" question as to whether the district court can draw negative inferences from the defendant's decision to remain silent during the PSE process. The answer, under Idaho Supreme Court precedent, is that it cannot.

Since the Idaho Supreme Court's precedent resolves the issue, the State's argument in favor of allowing the district court to draw adverse inferences from the defendant's silence, which is based primarily on the decisions from other states, should be rejected. (*See* Resp. Br., pp.19-20.) Idaho's courts are expected to follow the decisions of the Idaho Supreme Court when that Court has ruled on an issue. *See, e.g., State v. Clinton*, 155 Idaho 271, 272 n.1 (2013).

Further, adopting the State's argument would render *Estrada* a nullity. It would result in the defendant being entitled to be advised by counsel that he has a theoretical right to remain silent during the PSE process, but the reality being that he could not exercise that right without subjecting himself to an enhanced sentence based on negative inferences that would be drawn from his silence. The Second Circuit explained the problem with this scenario best: "But while it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent." *DiGiovanni v. United States*, 596 F.2d 74, 75 (2nd Cir. 1979).

This also demonstrates why the Court of Appeals' recent decision in *State v. Jimenez*, ___ P.3d ___, 2015 WL 7785141 (Idaho Ct. App. Dec. 4, 2015), *pet review filed*,[6] where it has adopted a rule allowing the district court to draw precisely this sort of

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[6] The Court of Appeals reached a similar conclusion in a companion case, *State v. Van Komen*, ___ P.3d ___, 2015 WL 7785342 (Ct. App. Dec. 4, 2015), *pet. review filed*. *Van Komen* is based on the same rationales as *Jimenez*, and so, it should also be rejected for the reasons discussed in this brief.

inference, is manifestly wrong and unjust, and so, should not be relied upon as controlling authority in this case.[7] *See Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990) (articulating the standard for rejecting the principle of *stare decisis*).

For example, *Jimenez* construes *Estrada* narrowly, limiting its application to only the Sixth Amendment/effective assistance of counsel context:

> Jimenez does not contest that he received the warnings required under *Estrada*. Second, *Estrada* does not address the scope of the Fifth Amendment protections or the propriety of a sentencing court drawing adverse inferences when a defendant declines to participate in a psychosexual evaluation. Third, neither *Estrada* nor Idaho law, in general, address to what extent a sentencing court may take into account a defendant's refusal to participate in the evaluation when determining a proper sentence. Therefore, Jimenez's reliance on *Estrada* is misplaced.

Jimenez, 2015 WL 7785141, *2. That analysis is contrary to both the *Estrada* opinion itself, as well as previous decisions by the Court of Appeals.

First, *Estrada* itself rejected the notion that it was only addressing the Sixth Amendment's protections: "The real issue presented by this case is the significance and extent of a defendant's right against self-incrimination." *Estrada*, 143 Idaho at 564. The *Estrada* Court also rejected an argument that the Fifth Amendment right should be construed narrowly:

> The State argued in its briefing and at oral argument that this court should interpret incrimination extremely narrowly, such that a defendant's right not to disclose applies only to matters that would subject him to additional

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[7] As *Jimenez* is not yet final, it is not controlling precedent, and so, its erroneous analysis should not be applied in this case. In the event it becomes final in its current form before this Court rules on this case, *Jimenez* should be rejected as binding precedent. Whether that constitutes an abrogation or overruling of *Jimenez* depends on which Court decides this case, as the Idaho Supreme Court does not review to overrule the decisions of the Court of Appeals. *See, e.g., Clinton*, 155 Idaho at 272 n.1; *compare State v. McKean*, 159 Idaho 75, 80 (2015) (explaining the analysis and conclusions in a Court of Appeals' opinion was flawed, and thus, effectively abrogating that decision).

> criminal charges or that would prompt a judge to exceed the sentencing standards that would otherwise apply. Incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements. *Pens v. Bail*, 902 F.2d 1464 (9th Cir. 1990) (holding that use of admission of past crimes, during state-ordered psychotherapeutic treatment, to enhance sentence violated defendant's right against self-incrimination) . . . . Imposition of a harsher sentence within this expansive range [of permissible sentencing under the applicable statute] based on a defendant's statements in a psychological evaluation is a violation of the right against self-incrimination.

Estrada, 143 Idaho at 564 (remainder of string citation omitted). That is consistent with the United States Supreme Court's discussion of the scope of the Fifth Amendment: "[t]he Fifth Amendment privilege is as broad as the mischief against which it seeks to guard," which includes that defendants will "suffer no penalty for such silence." *Estelle*, 451 U.S. at 467-68.

However, like the argument *Estrada* rejected, the *Jimenez* decision narrowly limits the scope of the Fifth Amendment right: "prohibiting only negative factual inferences as to the circumstances and details of the crime based upon a defendant's silence." *Jimenez*, 2015 WL 7785141, *2. Since the Idaho Supreme Court has already rejected that sort of narrow reading of the right, *Jimenez*'s determination – that "neither *Estrada* nor Idaho law, in general, address to what extent a sentencing court may take into account a defendant's refusal to participate in the evaluation when determining a proper sentence," *Jimenez*, 2015 WL 7785141, *2 – is manifestly wrong in applying that narrow scope.

Second, in previous decisions, the Court of Appeals itself has given effect to a broader reading of the rule from *Estrada*:

> Fifth Amendment rights come into play, however, if disclosures made during a competency evaluation, or medical conclusions derived from

> such disclosures, are later used against the defendant either at the guilt or penalty phase of the proceedings. [*Estelle*, 451 U.S. at 465]. *See also Estrada*, 143 Idaho at 564, 149 P.3d at 839 ("incrimination is implicated … when punishment could be enhanced as a result of the defendant's statements.")

State v. Velasco, 154 Idaho 534, 536 (Ct. App. 2013). Therefore, *Jimenez*'s attempt to limit *Estrada* to only situations dealing with the Sixth Amendment right to be effectively advised by counsel – "Jimenez does not contest that he received the warnings required under *Estrada*," *Jimenez*, 2015 WL 7785141, *2 – is also manifestly wrong, further evidencing why this Court should abrogate or overrule it.

Ultimately, though, a proper reading of *Estrada* reveals the answer to the question about whether a district court judge can draw adverse inferences from the defendant's decision to exercise his constitutional right to not disclose information during the PSE in Idaho – it cannot. Therefore, this Court should reject the State's argument for a contrary ruling.

b. The State Overstates The Scope Of The Purported Open Question

To the extent this question remains open, it is not as broad as the State believes. The State's argument that this is an open question hinges on the United States Supreme Court's decision in *White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697 (2014). However, in that case, the United States Supreme Court was only evaluating whether the defendant had established the prerequisites to bring a federal *habeas* claim under 28 U.S.C. § 2254(d). *Id.* at 1701-02. Specifically, the defendant had to show the decision below was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States," before his claim could proceed. *Id*. (internal quotation omitted). All the *White* Court held was that the issue was not clearly resolved

by the United States Supreme Court because it had never been directly raised to that Court, and thus, held the defendant had failed to satisfy the prerequisites to raise his claim under Section 2254(d). *Id*. at 1702. In so doing, it left open the possibility that states could have resolved this question on their own, as the Idaho Supreme Court effectively has.

The *White* Court also made it very clear that "[w]e need not decide here, *and express no view on*, whether the conclusion that a no-adverse-inference instruction was required *would be correct in a case not reviewed through the lens of § 2254(d)(1)*." *Id*. at 1703 (emphasis added). Therefore, even if the question were open in the context of Section 2254(d)(1), since Mr. Jorgensen's claim was not brought pursuant to Section 2254(d), the underlying discussions of the Fifth Amendment in cases such as *Estelle* and *Mitchell v. United States*, 526 U.S. 314 (1999), are still controlling in this case. *See White*, 134 Idaho at 1702. Thus, the State's reading of *White* – to the effect that all the United States Supreme Court's prior decisions about the Fifth Amendment in this regard are not controlling in this case (*see* Resp. Br., pp.14-22) – is overbroad and should be rejected.

Since *Estelle* and *Mitchell* are still controlling in Mr. Jorgensen's case, the State's argument, which, as discussed *supra*, is contrary to *Estelle*, should be rejected. Similarly, since it is based on a similar analysis, this Court should reject the analysis in the Court of Appeals' decision in *Jimenez*, as its manifestly-wrong holding is directly contrary to *Estelle*. *Compare Jimenez*, 2015 WL 7785141, *4 (holding that the district court may draw adverse inferences from the defendant's decision to not answer the psychologist's questions); *with Estelle*, 451 U.S. at 468-69 ("If, upon being adequately

warned, respondent [defendant] had indicated he would not answer [the psychiatrist's] questions, . . . the State must make its case on future dangerousness in some other way.").

For any and all of these reasons, the district court's actions regarding Mr. Jorgensen's sentence violated his Fifth Amendment right to not disclose information during the PSE process. Therefore, this Court should vacate that unconstitutional sentence.

CONCLUSION

Mr. Jorgensen respectfully requests this Court reduce his sentence as it deems appropriate or, alternatively, remand this case for a new sentencing determination which comports with the Constitution.

DATED this 2nd day of February, 2016.

__________/s/_______________
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of February, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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