11-6-2012

Murray v. State Respondent's Brief Dckt. 39400

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY DANE MURRAY,	)	
	)	
Petitioner-Appellant,	)	NO. 39400
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Jeffrey Dane Murray appeals from the district court's order dismissing his petition for post-conviction relief after an evidentiary hearing.

Statement Of Facts And Course Of The Underlying Criminal Proceedings

Pursuant to a plea agreement, Murray pled guilty to one count of felony domestic violence[1] and the state agreed to limit its sentencing recommendation to a suspended sentence of ten years, with three years fixed, and to allow Murray to argue for a lesser sentence. (See R., p.3; see generally Exhibit 2.) The agreement also required Murray to get a domestic violence and alcohol evaluation. (Exhibit 2, p.7, Ls.7-8.) After the parties placed the terms of the agreement on the record, the following discussion occurred:

> THE COURT: Okay, is there an Estrada[2] waiver?
>
> [PROSECUTOR]: I believe so.
>
> THE COURT: Well, I think there would have to be. I'm not going to take it without an Estrada waiver.
>
> [DEFENSE COUNSEL]: Just a moment, let me talk to the prosecutor.
>
> (Brief delay.)

---

[1] The state originally charged Murray with attempted strangulation, which carries a maximum penalty of 15 years, I.C. § 18-923, and misdemeanor battery. (R., p.94.) The plea agreement allowed Murray to plead guilty to a single amended charge of felony domestic violence, which carries a maximum penalty of 10 years for a first offense, I.C. § 18-918. (R., p.94.)

[2] Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006).

[DEFENSE COUNSEL]: Yes, that's fine. He will waive, Your Honor.

THE COURT: Is that what you want to do, Mr. Murray?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is there anything else you are expecting I didn't hear about?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. And so you do want to plead guilty under these terms today?

[DEFENSE COUNSEL]: Yes, ma'am.

THE DEFENDANT: Yes, ma'am.

(Exhibit 2, p.7, L.25 – p.8, L.20.)

The court also later inquired, during Murray's plea colloquy, whether Murray understood he was "giving up [his] rights under State versus Estrada," which meant that he could not "refuse to answer any question or provide any information that might tend to show [he committed] some other crime," and that he would need to "talk freely and openly with the presentence investigator and with any domestic violence evaluator about any problems that [he] might have that might have a bearing upon sentencing." (Exhibit 2, p.16, L.22 – p.17, L.6.) Murray responded, "Yes, ma'am," and reiterated that response when the court affirmed whether he was "aware of that." (Exhibit 2, p.17, Ls.7-9.[3])

[3] Paragraph 2 of the guilty plea questionnaire, which Murray initialed prior to entering his guilty plea, also addressed the nature of an Estrada waiver. (Exhibit 1.) Paragraph 2 reads:

> The waiver of your right to remain silent only applies to your plea of guilty to the crime(s) in this case unless you are waiving your rights

Consistent with the terms of the plea agreement, the court ordered Murray to obtain a domestic violence evaluation and an alcohol evaluation. (Tr., p.21, Ls.10-22.) The domestic violence evaluator completed an evaluation, which was submitted to the court. (Exhibit 3.) Based on the information provided to the court at sentencing, including the domestic violence evaluation, the court imposed a unified ten-year sentence with three years fixed, but declined to follow the state's recommendation to suspend the sentence in lieu of 120 days in jail. (Exhibit 2, pp.31-37.)

Although Murray reserved his right to appeal his sentence, he did not do so. (R., pp.4, 33; Exhibit 2, p.17, L.24 – p.18, L.10.) Murray did, however, file a Rule 35 motion and filed a notice of appeal timely only from the denial of that motion. (See R., p.4.) The Court of Appeals affirmed the denial of Rule 35 relief on the ground that Murray failed to support his motion with new or additional information not considered at the time of sentencing. State v. Murray, Docket No. 37482, 2010 Unpublished Opinion No. 693 (Idaho App. Nov. 1, 2010).

Course Of Post-Conviction Proceedings

While is Rule 35 appeal was pending, Murray, through counsel, filed a petition for post-conviction relief. (R., pp.3-12.) In his petition, Murray alleged (1)

> under *State v. Estrada.* Unless you waive your rights under *Estrada*, even after pleading guilty, you will still have the right to refuse to answer any question or to provide any information that might tend to show you committed some other crime(s). You can also refuse to answer or provide any information that might tend to increase the punishment for the crime(s) to which you are pleading guilty.

(Exhibit 1, p.1.)

his guilty plea was invalid because he was "not aware at the time [he] entered the guilty plea that the Court did not have to follow the terms of the plea agreement" even though he signed a guilty plea questionnaire advising him of such (R., pp.4-5); (2) ineffective assistance of counsel at the change of plea hearing based on counsel's failure to explain to Murray what it meant to waive his rights under Estrada and counsel's failure to obtain a "confidential domestic violence evaluation prior to entering a plea of guilty" (R., pp.6-7); (3) ineffective assistance of counsel at sentencing for failing to discuss the domestic violence evaluation with Murray prior to sentencing or "take any actions to try to correct those factual misunderstandings in the court-ordered evaluations," and for failing to seek a continuance of the sentencing to allow more time to discuss the presentence investigation ("PSI") and attempt to "disprove" "false statements" contained in the PSI (R., pp.6-9); (4) ineffective assistance of counsel "post-sentencing" for failing to advise Murray of his ability to file a motion to withdraw his guilty plea and a notice of appeal[4] (R., pp.9-10); and (5) ineffective assistance of counsel for failing to advise Murray that he "could obtain another evaluation in order to rebut the findings in the court-ordered evaluation and support [his] Rule 35 motion" (R., pp.10-11).

Murray's post-conviction case ultimately proceeded to an evidentiary hearing after which the district court issued a Decision denying Murray's request

[4] This ineffective assistance of counsel claim was alleged against two attorneys – the attorney that represented Murray through sentencing and a different attorney who appeared as Murray's counsel "nine days after the judgment and sentence was filed." (R., pp.9-11.) The only claims raised on appeal relate to Murray's original trial counsel who represented him through sentencing.

for post-conviction relief. (See generally Tr.; R., pp.93-112.) Murray filed a timely notice of appeal. (R., pp.114-117.)

ISSUE

Murray states the issue on appeal as:

> Did the district court err when it dismissed Mr. Murray's petition for post-conviction relief?

(Appellant's Brief, p.4.)

The state rephrases the issue on appeal as:

Has Murray failed to show error in the district court's denial of his post-conviction petition?

ARGUMENT

Murray Has Failed To Establish The District Court Erred In Denying Relief On His Claim That Counsel Was Ineffective In Advising Him Of His Rights In Relation To The Domestic Violence Evaluation

A. Introduction

Murray contends the district court erred in denying relief on his claim that counsel was ineffective "for failing to discuss with him his rights under *Estrada v.* State, 143 Idaho 558 (2006), and advise him as to whether he should waive those rights before he entered a plea of guilty and participated in a court-ordered domestic evaluation." (Appellant's Brief, p.5.) Murray further asserts error in the denial of relief on his related claim that counsel was ineffective "for failing to advise him that he could obtain a confidential domestic violence evaluation prior to pleading guilty." (Appellant's Brief, p.5.) A review of the evidence presented at the post-conviction hearing and the applicable legal standards supports the district court's conclusion that Murray is not entitled to relief on these claims.

B. Standard Of Review

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which her claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be

given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. Murray Has Failed To Establish He Met His Burden Of Proving Counsel Was Ineffective In Relation To His Advice Regarding Murray's "*Estrada* Rights" And His Ability To Obtain A Confidential Evaluation

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). The United States Supreme Court has recently reiterated:

> Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.

Harrington v. Richter, 131 S.Ct. 770, 788 (2011) (citations and quotations omitted).

Murray contends he received ineffective assistance of counsel in relation to the court-ordered domestic violence evaluation. (Appellant's Brief, pp.5-17.) The district court correctly concluded Murray is not entitled to relief on this claim.

In Estrada, the defendant participated in a court-ordered psychosexual evaluation after pleading guilty to rape. 143 Idaho at 560, 149 P.3d at 835. Estrada's attorney advised him that he needed to fully cooperate in the evaluation. Id. The evaluation of Estrada was ultimately unfavorable and was relied on by the district court in imposing a life sentence with 25 years fixed. Id. Estrada subsequently filed a post-conviction petition contending his attorney was deficient for failing to advise him that he was not required to participate in the evaluation and that he was prejudiced as a result because, without the evaluation, he would have received a more favorable sentence. Id. The district court denied relief and Estrada appealed. Id. at 561, 149 P.3d at 836.

On appeal, the Idaho Supreme Court held Estrada's attorney was deficient in "failing to inform Estrada of his right to assert the privilege against self-incrimination," which right it found applied to the psychosexual evaluation. Estrada, 143 Idaho at 564, 149 P.3d at 839. The Court also held Estrada met his burden of demonstrating prejudice because the "sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it did play an important role in the sentencing." Id. at 565, 149 P.3d at 840.

Relying on Estrada, Murray alleged in his post-conviction petition that his attorney was deficient for failing to advise him what it meant to waive his rights under Estrada. (R., p.6.) Although trial counsel testified that he "[p]robably didn't fully explain [the Estrada] rights in detail" (Tr., p.110, Ls.12-19), and he "may not have" explained to Murray that he was waiving his right against self-incrimination (Tr., p.111, Ls.1-7), the district court ultimately concluded this deficiency did not entitle Murray to relief because the court itself advised Murray of the nature of the rights he was waiving under Estrada (R., p.107). Specifically, the court cited the Estrada language from the guilty plea questionnaire, which Murray initialed. (R., p.107.) The court also discussed the waiver with Murray during his plea colloquy. (Exhibit 2, p.16, L.22 – p.17, L.6.) As noted by the district court, under Gonzales v. State, 151 Idaho 168, 254 P.3d 69 (Ct. App. 2011), the information it provided to Murray regarding his waiver satisfied the requirements of Estrada. (R., p.107.)

Murray acknowledges Gonzales "[u]nquestionably . . . stands for the principle cited by the district court." (Appellant's Brief, p.10.) Nevertheless, Murray "maintains that *Gonzales* was incorrectly decided by the Idaho Court of Appeals, especially in light of the principles set forth by the Supreme Court in *Estrada* and *State v. Wood*, 132 Idaho 88 (1998)." (Appellant's Brief, p.10.) Murray also argues his "case can be distinguished from those [sic] in *Gonzales*." (Appellant's Brief, p.10.) Murray's arguments fail.

Idaho jurisprudence requires respect for its own precedent. The rule of stare decisis dictates that controlling precedent be followed "unless it is

manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002); State v. Humphreys, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)); see also State v. Guzman, 122 Idaho 981, 1001, 842 P.2d 660, 680 (1992) ("[P]rior decisions of this Court should govern unless they are manifestly wrong or have proven over time to be unjust or unwise."); State v. Odiaga, 125 Idaho 384, 388, 871 P.2d 801, 805 (1994) ("Having previously decided this question, and being presented with no new basis upon which to consider the issue, [the Court is] guided by the principle of stare decisis to adhere to the law as expressed in [its] earlier opinions."); State v. Card, 121 Idaho 425, 440-52, 825 P.2d 1081, 1096-1108 (1991) (McDevitt, J., specially concurring). Murray has failed to meet his burden of showing Gonzales should be overruled.

Murray contends Gonzales was wrongly decided because the Court in that case failed to recognize that defense counsel must provide advice regarding whether to assert the right not to participate in the evaluation. (Appellant's Brief, p.12.) According to Murray,

> To hold that a district court's statements concerning a defendant's *Estrada* rights are the functional equivalent of an attorney's *advice* on the subject, as the Court of Appeals did in *Gonzales* and the district court did in this case, makes too little of the requirement that defense counsel 'advise' a defendant with respect to whether to submit to a potentially-incriminating evaluation.

(Appellant's Brief, p.12.)

Murray's argument ignores the crux of his own claim. In his petition, Murray asserted that he was never advised "what rights [he] had under '*State v. Estrada*.'" (R., p.6.) His argument on appeal and his complaint about Gonzales, however, focuses on counsel's role in advising *whether* to participate in such an evaluation. As to whether Murray was adequately advised of what his Estrada rights were, the Court in Gonzales was precisely right: "While it is preferable for counsel to advise a defendant of his right to remain silent and to discuss the consequences of submitting to the evaluation, counsel may not be deficient for failing to readvise the defendant once the sentencing court has done so." Gonzales, 151 Idaho at 173, 254 P.3d at 74.

Murray's claim that Gonzales is not applicable because it is "distinguishable" also lacks merit. (Appellant's Brief, p.13.) Murray argues:

> Unlike the facts of *Gonzales*, here the district court provided conflicting statements concerning Mr. Murray's *Estrada* rights, specifically stating in the guilty plea questionnaire that, by pleading guilty, Mr. Murray was *retaining* his *Estrada* rights (Plaintiff's Exghibit 1, p.1), while at the plea colloquy, stating,
>
> > And you understand you are giving up your rights under State versus Estrada [sic], and that means that you cannot refuse to answer any question or provide any information that might tend to show you committed some other crime?
> >
> > You need to talk freely and openly with the presentence investigator and with any domestic violence evaluator about any problems that you might have that might have a bearing upon sentencing.

(Appellant's Brief, p.13 (emphasis original) (quoting Exhibit 2, p.16, L.22 – p.17, L.6).)

This argument is unsupported by the record. The questionnaire advised Murray his waiver of the right to remain silent only applied to his guilty plea "unless" he was waiving his rights under Estrada. (Exhibit 1, p.1.) Because it was clear the court required an Estrada waiver given the terms of the plea agreement (Exhibit 2, p.7, L.25 – p.8, L.10), which Murray knew before completing the questionnaire and engaging in his plea colloquy (Exhibit 2, p.9, L.11 – p.21, L.4), his claim that Gonzales does not apply because he was "provided conflicting statements concerning [his] *Estrada* rights" is meritless.

Murray further asserts, "Aside from the fact that the two pieces of information provided by the district court contradict each other, the latter statement was incorrect." (Appellant's Brief, p.13.) Murray's contention that "the latter statement was incorrect" is premised upon the assertion that he could have "reasserted his Fifth Amendment privilege against self-incrimination at any time prior to, or during, the evaluation" in violation of the plea agreement. (Appellant's Brief, p.13.) Murray's acknowledgement that he could have breached the plea agreement by failing to comply with one of its terms does not make the court's statements about the meaning of his waiver incorrect. Moreover, Murray cites no authority for the proposition that a proper advisement regarding a Fifth Amendment waiver, particularly in the context of a negotiated plea agreement, must include advice on the practical ability to ignore the waiver and breach the agreement.

To the extent Murray is also claiming counsel's advice to cooperate in the evaluation was deficient, his claim fails. (Appellant's Brief, p.7.) The state's offer

was predicated, in part, on Murray's participation in and cooperation with the evaluation. (Exhibit 2, p.7, Ls.7-8.) That the evaluation was ultimately unfavorable to Murray does not mean the advice to participate in the evaluation in order to take advantage of the plea offer was deficient.

Nor was Murray's trial counsel deficient in failing to obtain a confidential evaluation prior to advising Murray whether to plead guilty pursuant to the state's plea offer. In denying relief on this claim, the district court again relied on Gonzales. (R., p.108.) Like Murray, Gonzales, relying on State v. Wood, 132 Idaho 88, 967 P.2d 702 (1998), asserted his attorney was ineffective "because, without first obtaining a confidential evaluation, trial counsel could not have made an informed decision about whether to advise . . . against participating in the court-ordered evaluation." Gonzales, 151 Idaho at 173, 254 P.3d at 74. In rejecting this claim, the Court of Appeals reasoned:

> In *Wood*, the Idaho Supreme Court held that trial counsel was deficient for failing to object to the inclusion of, as part of the presentence report, a psychological evaluation prepared by a doctor appointed to assist in Wood's defense. *Wood*, 132 Idaho at 97, 101, 967 P.2d at 711, 715. The Court further held that trial counsel's failure to object to the doctor's testimony at sentencing was unreasonable. *Id.* at 101, 967 P.2d at 715. *Wood* is distinguishable from this case because the psychological evaluation in *Wood* had already taken place, but the report had not yet been written at the time of the doctor's testimony. The Court in *Wood* held that trial counsel should have objected to the doctor's testimony and the inclusion of the evaluation as part of the presentence report because trial counsel was not aware of the evaluation's possibly damaging contents. *Id.* Here, the issue is not the inclusion of a possibly damaging defense evaluation. Rather, the issue is whether counsel was deficient for failing to initiate an independent evaluation in the first place. As the Idaho Supreme Court held in *Wood*, once such an evaluation is conducted, trial counsel should be informed as to the evaluation's contents and object to its inclusion at sentencing should it possibly contain

> incriminating information. *Id.* However, *Wood* does not stand for the proposition that trial counsel is ineffective for failing to arrange an independent evaluation which may reveal incriminating evidence prior to a court-ordered evaluation.

Gonzales, 151 Idaho at 174, 254 P.3d at 75.

The Court of Appeals further held "the obligation of counsel, recognized in *Estrada*, to advise the defendant regarding a court-ordered psychosexual evaluation does not extend to an obligation to first obtain a confidential defense evaluation to inform the decision whether to submit to a court-ordered evaluation." Gonzales, 151 Idaho at 174, 254 P.3d at 75. Thus, "Counsel's failure to arrange a defense evaluation in order to prepare for the possible incriminating outcome of a subsequent evaluation does not constitute deficient performance." Id. Murray argues this aspect of Gonzales is not controlling because, he asserts, he has "put forth a different argument, namely that his attorney was ineffective for failing to advise him of his right to obtain a confidential domestic violence evaluation *prior to pleading guilty*." (Appellant's Brief, p.16 (emphasis original).) This is not a meaningful distinction because, under either scenario, the question is the same – whether counsel is deficient for failing to obtain an independent evaluation before advising his client on whether to participate in a court-ordered evaluation. Further, Murray's attempt to distinguish Gonzales by differentiating between counsel's advice in relation to his guilty plea and his advice in relation to sentencing evaluations highlights that the heart of his argument is not an Estrada violation but a claim arising under Hill v. Lockhart, 474 U.S. 52, 56 (1985), and its progeny, which Murray does not cite. Application of the Hill standard shows no error.

"This Court applies the *Strickland* test when determining whether a defendant has received ineffective assistance of counsel during the plea process." Booth v. State, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011) (citations omitted). "When a defendant alleges some deficiency in counsel's advice regarding a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 621, 262 P.3d at 264 (quotations and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 130 S.Ct. 1473, 1485 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

Murray cites no authority for the proposition that counsel is deficient in advising a client to accept a plea offer that requires participation in a court-ordered evaluation without first obtaining an independent evaluation, and in fact, Gonzales supports a contrary conclusion. A guilty plea is valid if entered knowingly, voluntarily and intelligently, meaning the defendant has entered his plea understanding the rights he is waiving and the consequences of pleading guilty. State v. Dopp, 124 Idaho 481, 484, 861 P.25 51, 54 (1993). Murray entered his guilty plea being fully advised of these rights and after being advised of, and agreeing to waive, his rights in relation to the court-ordered sentencing evaluations. (See generally Exhibit 2.) That the domestic violence evaluation ultimately cast Murray in an unfavorable light did not render his guilty plea invalid nor did it render counsel's advice in relation to that plea deficient. Murray's

assertion that had counsel advised him of his "right" to obtain a confidential evaluation prior to accepting the plea offer, he would have done so and he "would not have pled guilty and submitted to a court-ordered evaluation had he known that waiving his *Estrada* rights could have resulted in a greater sentence" (Appellant's Brief, p.16), not only muddles the relevant legal standard, it fails to satisfy it.

As noted, Murray has the burden of showing it would have been rational under the circumstances to reject the plea offer. There is no evidence that the plea offer allowed Murray to obtain his own private evaluation first or at all. Rather, the offer required Murray to participate in a court-ordered evaluation that would be available to the court at sentencing. Absent the evaluation, there was no plea offer for Murray to accept or reject. Thus, it is ultimately irrelevant whether Murray could or would have obtained his own evaluation prior to entering his guilty plea. In other words, Murray's claim that he would not have pled guilty "had he known ahead of time that his evaluation would be so unfavorable" (Appellant's Brief, p.17), assumes a factual predicate that does not exist, *i.e.*, that the plea offer was available to him regardless of his participation in the court-ordered evaluation. In addition to this flaw in Murray's argument, he has provided no convincing reason why he would have rejected the plea offer and proceeded to trial on additional charges, one of which carries a greater penalty (compare I.C. § 18-923 with I.C. § 18-918), and without the benefit of a limited sentencing recommendation from the state. Indeed, his claim that he would have proceeded to trial and faced a greater penalty rather than plead guilty

and participate in an evaluation that contributed to a "greater sentence" than the one he was hoping for (albeit still consistent with the state's underlying sentencing recommendation) seems disingenuous.

A review of the applicable law, the record on appeal, and the underlying criminal record, supports the district court's conclusion that Murray failed to meet his burden of proving he us entitled to post-conviction relief.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Murray's petition for post-conviction relief.

DATED this 6th day of November, 2012.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of November 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/pm