8-9-2012

Murray v. State Appellant's Brief Dckt. 39400

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY DANE MURRAY,	)	
	)	
Petitioner-Appellant,	)	NO. 39400
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Jeffrey Dane Murray appeals following the district court's dismissal of his petition for post-conviction relief following an evidentiary hearing. He asserts that the district court erred when it dismissed claims that his attorney was ineffective for failing to discuss with him his rights under *Estrada v. State*, 143 Idaho 558 (2006), and advise him concerning whether he should waive those rights before he pled guilty and participated in a court-ordered domestic violence evaluation, and for failing to advise him that he could obtain a confidential domestic violence evaluation before he pled guilty and participated in a court-ordered domestic violence evaluation. As part of Mr. Murray's argument involves a request that this Court overruled the Idaho Court of Appeals' decision in *Gonzales v. State*, 151 Idaho 168 (Ct. App. 2011), he respectfully requests that this Court retain his case on appeal.

Statement of the Facts and Course of Proceedings

In the criminal case from which Mr. Murray petitioned for post-conviction relief, he entered a plea agreement with the State, assisted by his attorney Jared Martens, under the terms of which he agreed to plead guilty to a charge of felony domestic violence (amended from a charge of attempted strangulation) in exchange for which the State agreed to "cap its recommendation at three plus seven, 120 days Ada County Jail, no contact with the victim, need to get a domestic violence and alcohol evaluation," with Mr. Murray free to argue for less, including requesting a withheld judgment to which the State would not object based on the results of his Presentence Investigation Report

(*hereinafter,* PSI) and related evaluations. As part of the agreement, Mr. Murray was required to waive his rights under *Estrada v. State*, 143 Idaho 558 (2006). (Plaintiff's Exhibit 2, p.6, L.12 – p.8, L.19.) Mr. Murray pleaded guilty pursuant to the plea agreement. (Plaintiff's Exhibit 2, p.18, L.19 – p.20, L.20.)

As required under the terms of his plea agreement, Mr. Murray participated in a court-ordered domestic violence evaluation conducted by Tom Wilson. (Plaintiff's Exhibit 3.) During the evaluation, Mr. Murray minimized his part in the conduct for which he pleaded guilty, denying that he acted with any ill intent. He did not express remorse, instead "focus[ing] on the fact that he was attempting to help the victim with unknown medical problems." And he "did not acknowledge that he is in need of treatment and is not concerned either about his alcohol use or his risk for domestic violence." Partly as a result of his statements to the evaluator, Mr. Wilson concluded that Mr. Murray's "readiness for treatment is considered minimal," he represented a "medium to high risk range for domestic violence," and "he does appear to display several characteristics of . . . [narcissistic personality disorder] that would increase the risk for violence," including lacking empathy. (Plaintiff's Exhibit 3, pp.1-3, 9-12.)

At the sentencing hearing, the State requested a sentence that was in line with the plea agreement. (Plaintiff's Exhibit 2, p.27, L.24 – p.28, L.17.) Mr. Martens requested that the district court "follow the agreement . . . ." (Plaintiff's Exhibit 2, p.30, Ls.13-14.) Ultimately, the district court, after discussing the PSI and the domestic violence evaluation, including Mr. Murray's statements to Mr. Wilson in which he minimized his conduct, declined to follow the parties' recommendation, and imposed a unified sentence of ten years, with three years fixed. (Plaintiff's Exhibit 2, p.31, L.2 –

p.37, L.21.) Mr. Murray did not file a Notice of Appeal from the judgment of conviction. (R., p.4.)

Mr. Murray then filed a timely verified petition for post-conviction relief. In that petition, he raised a number of claims, only two of which are being pursued on appeal. Those claims are that his attorney was ineffective for failing to advise him of his *Estrada* rights and discuss whether he should waive those rights prior to his guilty plea and participation in the court-ordered domestic violence evaluation, and failing to advise him of his right to obtain a confidential domestic violence evaluation prior to deciding whether to plead guilty. (R., pp.3-12.)

Following an evidentiary hearing at which several witnesses, including Mr. Murray and Mr. Martens, testified, the district court issued an order dismissing all of the claims raised in his post-conviction petition. (R., pp.93-112.) Mr. Murray filed a Notice of Appeal timely from the filing of the district court's order dismissing his petition for post-conviction relief. (R., p.114.)

ISSUE

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

ARGUMENT

The District Court Erred When It Dismissed Mr. Murray's Petition For Post-Conviction Relief

A. Introduction

Mr. Murray asserts that the district court erred when it dismissed claims in his verified petition for post-conviction relief that his attorney 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 violence evaluation, and for failing to advise him that he could obtain a confidential domestic violence evaluation prior to pleading guilty.

B. Standards Of Review

1. Denial Of Post-Conviction Relief Following An Evidentiary Hearing

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999); *Russell v. State*, 118 Idaho 65, 67 (Ct. App.1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.*

2. Ineffective Assistance Of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to counsel, which includes the effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Further, the Constitution guarantees a fair trial through its Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. *Id.* at 685.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In light of the Sixth Amendment's reliance upon the legal profession's standards, the Idaho Supreme Court has stated that the starting point of evaluating criminal defense counsel's conduct is the American Bar Association's Standards For Criminal Justice, The Defense Function. *Mitchell v. State*, 132 Idaho 274, 279 (1998).

In addition to proving deficient performance, in most instances a defendant also must prove that he was prejudiced. "The defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. As was recognized by

Justice O'Conner, the author of the *Strickland* opinion, in her concurring opinion in *Williams v. Taylor*, 529 U.S. 362 (2000),

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Id. at 405-06 (O'Connor, J. concurring) (quoting *Strickland*, 466 U.S. at 696).

C. The District Court Erred When It Dismissed Mr. Murray's Claim Regarding His *Estrada* Rights

In his verified petition for post-conviction relief, Mr. Murray claimed that his attorney was constitutionally ineffective for failing to advise him concerning his rights under *Estrada* and whether to waive those rights prior to entering a plea of guilty and participating in a court-ordered domestic violence evaluation. The Sixth Amendment guarantees a criminal defendant the right to counsel. U.S. CONST. amend. VI. The United States Supreme Court has interpreted the Sixth Amendment's guarantee to include the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 688, 685-86 (1984). In order to establish a claim of ineffective assistance of counsel, a petitioner must establish that his attorney's actions fell below an objective standard of reasonableness, and that, but for his attorney's deficient performance, there exists a reasonable probability that the result of the proceeding would have been different.

At the evidentiary hearing, Mr. Murray testified that, at the time he entered his guilty plea, he didn't know what his *Estrada* rights were, did not ask Mr. Martens what

those rights were, and Mr. Martens never discussed *Estrada* with him. Furthermore, Mr. Murray believed that, following his guilty plea, his right to remain silent "was over with when I admitted – or pled guilty to the agreeable terms." (Tr., p.18, L.3 – p.19, L.5, p.23, Ls.9-13.) Mr. Murray testified that he only participated in the court-ordered domestic violence evaluation because he "was ordered [by the court] to do so," and that Mr. Martens never gave him any advice with respect to his participation in the evaluation. (Tr., p.24, L.20 – p.25, L.4.) Mr. Murray further testified that, although the district court mentioned *Estrada* rights during his plea colloquy, he did not understand what the district court was saying, reiterated that Mr. Martens never explained what *Estrada* rights were, and that if he had known he would have ended up in prison in part because he waived his *Estrada* rights he would not have pled guilty. (Tr., p.99, Ls.9-25.)

Mr. Martens testified that he told Mr. Murray that it would be a "good idea" to participate in the court-ordered domestic violence evaluation because "[f]rom prior experience, it usually is." When asked whether he failed to "explain to [Mr. Murray] that he was waiving his right against self-incrimination as to other information that might increase his sentence," Mr. Martens testified, "I may not have. I don't remember. If he says I didn't, I will have to take his word on that one." (Tr., p.110, L.22 – p.111, L.7.)

The court-ordered domestic violence evaluation resulted in a report that was damaging and detrimental to Mr. Murray's interests. During the evaluation, Mr. Murray minimized his part in the conduct for which he pleaded guilty, denying that he acted with any ill intent. He did not express remorse, instead "focus[ing] on the fact that he was attempting to help the victim with unknown medical problems." And he "did not

acknowledge that he is in need of treatment and is not concerned either about his alcohol use or his risk for domestic violence." In part as a result of his statements to the evaluator, Mr. Wilson concluded that Mr. Murray's "readiness for treatment is considered minimal," he represented a "medium to high risk range for domestic violence," and "he does appear to display several characteristics of that disorder [narcissistic personality disorder] that would increase the risk for violence," including lacking empathy. (Plaintiff's Exhibit 3, pp.1-3, 9-12.)

In ruling on Mr. Murray's claim that his attorney was ineffective for failing to advise him regarding his *Estrada* rights which prejudiced him by causing him to participate in the damaging court-ordered domestic violence evaluation, the district court found, "[t]here is no question that the petitioner's counsel did not advise him of his right to remain silent at the domestic violence evaluation as required by *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006) nor did he discuss the consequences of waiving that right." (R., p.107.) In denying the claim,[1] the district court found that his attorney's failure to provide advice regarding *Estrada* did not give rise to a post-conviction claim based on the following language from the guilty plea questionnaire[2]:

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[1] Although it did not appear to be a basis for denying Mr. Murray's claim because it was not mentioned in the portion of the district court's order applying the facts to the law, Mr. Murray notes that the district court made a factual finding "that the petitioner did not, in fact, incriminate himself in uncharged criminal matters in the presentence report or the evaluation." (R., p.102.) To the extent that the district court could be said to have relied upon this factual finding in later dismissing this claim, Mr. Murray cites to *Estrada*, in which the Supreme Court provided an expansive definition of the term incrimination, noting that it "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." *Estrada*, 143 Idaho at 564 (citations omitted). As such, any reliance on the factual finding would be legally untenable.

[2] The guilty plea questionnaire was admitted as Plaintiff's Exhibit No. 1. (Tr., p.19, Ls.16-17.)

> I understand that by pleading guilty I am waiving my right to remain silent about the charge I am pleading guilty to both before and after trial.
> 2. 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 under *State v. Estrada* [sic]. 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.
>
> I understand that by pleading guilty to the crime(s) in this case, I still have the right to remain silent with respect to any other crime(s) and with respect to answering questions or providing information that may increase my sentence.

(R., p.107 (quoting Plaintiff's Exhibit 1, p.1).) In reaching its conclusion, the district court noted that, in *Gonzales v. State*, 151 Idaho 168 (Ct. App. 2011),

> [T]he Court of Appeals addressed the identical issue and held that, 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 is not ineffective for failing to re-advise his client after the trial court has done so. Since the Court in this case did advise the petitioner of his rights under *Estrada v. State* prior to any participation in a domestic violence evaluation or a presentence report, his attorney was not required to do so again.

(R., p.107.)

Unquestionably, *Gonzales* stands for the principle cited by the district court. However, Mr. 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). Additionally, the facts of Mr. Murray's case can be distinguished from those in *Gonzales*.

In *Wood*, the Supreme Court considered whether an attorney in a capital murder case provided ineffective assistance of counsel when he consented to the district court's order releasing the contents of a then-unwritten psychological report based on a

confidential evaluation performed by a psychiatrist retained by the defense. In concluding that doing so constituted ineffective assistance of counsel, the Court explained, "[i]f a psychiatrist or psychologist had been appointed by the by the court for purposes of a presentence investigation, counsel for Wood would have had the opportunity to advise his client of the possible uses of the information *and* of the privilege against self-incrimination." *Wood*, 132 Idaho at 714 (emphasis added).

In *Estrada*, the Supreme Court considered whether an attorney was ineffective for failing to advise his client of his right not to incriminate himself by participating in a psychosexual evaluation. The questions addressed in *Estrada* were limited to whether Estrada's attorney provided ineffective assistance in failing to advise him of his right to assert the privilege against self-incrimination prior to participating in the psychosexual evaluation and whether he was prejudiced by his attorney's deficient performance. *Estrada*, 143 Idaho at 839. In setting forth basic principles, the Court explained, "[i]t makes no sense that a defendant would be entitled to counsel up through conviction or entry of a guilty plea, and would also be entitled to representation at sentencing, yet would not be entitled to the advice of counsel in the interim period regarding a psychosexual evaluation." *Id.* at 562. The Court went on to hold that a defendant enjoys a Sixth Amendment right "to at least the advice of counsel regarding his participation in the psychosexual evaluation . . . ." *Id.* at 563.

A reading of the relevant portions of *Wood* and *Estrada*, discussed *supra*, reveals that the effective assistance of counsel to which a person has a Sixth Amendment right when deciding whether to participate in an evaluation is two-fold. The first is that defense counsel must inform the person of his right against self-incrimination. The

second, that went unrecognized by the Court of Appeals in *Gonzales*, is that defense counsel must also provide advice regarding whether to assert that right, including consideration of the possible uses of that information. *See Wood*, 132 Idaho at 714; *Estrada*, 143 Idaho at 838-39 ("[N]oting that '[i]f a psychiatrist or psychologist had been appointed by the court for purposes of a presentence investigation, counsel for Wood would have had the opportunity to advise his client of the possible uses of the information *and of the privilege against self-incrimination*.'") (emphasis and brackets in original) (quoting *Wood*, 132 Idaho at 714).

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. As the Court in *Estrada* explained,

> This Court's finding that a Sixth Amendment right to *assistance* of counsel in the critical stage of a psychosexual evaluation inquiring to a defendant's future dangerousness, does not necessarily require the *presence* of counsel during the exam. Because Estrada does not argue his attorney should have been present during the evaluation, this ruling is limited to the finding that *a defendant has a Sixth Amendment right to counsel regarding only the decision of whether to submit to a psychosexual exam.*

Estrada, 143 Idaho at 562-63 (first and second emphases in original; third emphasis added). Because Mr. Murray enjoyed a Sixth Amendment right to counsel regarding the *decision* of whether to submit to a domestic violence evaluation, the district court erred in concluding that its statements to Mr. Murray on the issue amounted to the equivalent of an attorney's advice on the subject. This is particularly true in Mr. Murray's case, as

the district court provided incorrect and contradictory information concerning Mr. Murray's *Estrada* rights as is discussed *infra*.

Factually, this case is distinguishable from *Gonzales*. 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 Exhibit 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.

(Plaintiff's Exhibit 2, p.16, L.22 – p.17, L.6.)

Aside from the fact that the two pieces of information provided by the district court contradict each other, the latter statement was incorrect. Just because Mr. Murray entered a plea agreement containing a term that required him to participate in a domestic violence evaluation and waive his *Estrada* rights does not mean that he could not have reasserted his Fifth Amendment privilege against self-incrimination at any time prior to, or during, the evaluation. *See Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (recognizing that a suspect who waives his right against self-incrimination by answering some questions or volunteering some information "does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned"). While it may have constituted a breach of the

terms of the plea agreement,[3] Mr. Murray could not have irrevocably surrendered his right against self-incrimination, a feat that could only have been accomplished through a grant of immunity. *See Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) (holding that a person cannot be compelled to give incriminating testimony *unless* he is granted immunity from the use of that testimony and its fruits in both state and federal prosecutions).

For the reasons set forth *supra*, Mr. Murray asserts that the district court erred when it dismissed his claim that he received ineffective assistance of counsel with respect to his decision to submit to a court-ordered domestic violence evaluation. He respectfully requests that this Court vacate the district court's order dismissing his petition on this claim, and remand this matter for entry of judgment in his favor on this claim, with the district court to decide which of the requested remedies to employ.[4]

D. The District Court Erred When It Dismissed Mr. Murray's Claim Regarding His Right To Obtain A Confidential Domestic Violence Evaluation Prior To Pleading Guilty

In his verified petition for post-conviction relief, Mr. Murray claimed that his attorney was constitutionally ineffective for failing to explain that "I had a right to obtain my own domestic violence evaluation which would not be released to the Court without

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[3] The question that would arise in the event of a finding that Mr. Murray breached the plea agreement would be the remedy to which the State was entitled. That is not, however, relevant to the question of whether Mr. Murray retained the right to reassert his privilege against self-incrimination at any time.

[4] Mr. Murray sought two specific remedies: (1) withdrawal of his guilty plea, or (2) resentencing. (R., p.11.) Either remedy is appropriate given the fact that he entered his guilty plea without having received advice concerning his *Estrada* rights and whether to assert or waive them. On appeal, Mr. Murray requests that this Court leave it to the parties to argue, on remand, as to which remedy is appropriate.

my permission," and that he was prejudiced by his attorney's deficient performance because "[h]ad I been so informed, I would have obtained my own confidential domestic violence evaluation prior to entering a plea of guilty." (R., p.6.)

At the evidentiary hearing on his petition, Mr. Murray testified consistently with the statements in his verified petition, namely, that his attorney never told him that he could have obtained his own confidential domestic violence evaluation prior to pleading guilty, and that he "probably" would have obtained a confidential evaluation had he known he could get one. (Tr., p.23, L.14 – p.24, L.19.)

Mr. Martens testified that he "sometimes" advises his clients of their right to obtain confidential evaluations prior to pleading guilty, but that he did not advise Mr. Murray of his right to obtain a confidential domestic violence evaluation prior to pleading guilty. He further testified that, at the time that Mr. Murray entered his guilty plea, he did not know how the court-ordered domestic violence evaluation would turn out. However, he did know that Mr. Murray had denied some of the allegations contained in the police reports, and believed that he would probably continue with those denials during the domestic violence evaluation. (Tr., p.111, L.8 – p.113, L.24.) Mr. Martens acknowledged that the court-ordered domestic violence evaluation was "unfavorable to Mr. Murray." The evaluation included a conclusion that Mr. Murray was a medium-to-high risk for domestic violence, his readiness for treatment was minimal, he tends to minimize his current and past behavior, and he doesn't believe he has substance abuse or domestic violence problems. (Tr., p.115, L.9 – p.117, L.1.)

In dismissing this claim, the district court reasoned,

> Counsel at this proceeding has also contended that it was ineffective assistance of counsel for trial counsel not to get another domestic violence

> evaluation either before his plea for use by the defense or before sentencing. There was no showing of any benefit from an additional evaluation at any stage of the proceedings. It is speculative that an additional evaluation would have been of any use. In *Gonzales v. State*, supra., the Court of Appeals held that there was no obligation to obtain a confidential defense evaluation to inform the defense decision to participate in a court-ordered evaluation and that the failure to do so was not ineffective assistance of counsel. The petitioner has failed to meet his burden to show that his counsel was ineffective with respect to additional evaluations.

(R., p.108 (failure to italicize *supra* and use of period after *supra* in original).)

Gonzales is easily distinguishable from the facts of Mr. Murray's case. In *Gonzales*, it was argued that defense counsel was ineffective for, *inter alia*, failing to obtain a confidential psychosexual evaluation before advising Gonzales as to whether he should participate in a court-ordered evaluation. During the court-ordered evaluation, Gonzales disclosed a number of uncharged crimes involving both the victim of the lewd conduct charge to which he pleaded guilty (his minor daughter) and two other victims. In rejecting this claim, the Court noted, "[c]ounsel'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." *Gonzales*, 151 Idaho at 173-74.

Mr. Murray 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*. We know from the unrebutted facts established through Mr. Murray's testimony and verified petition that he would have obtained such a confidential evaluation had he been aware that he had the right to do 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. (R., p.6; Tr., p.23,

L.14 – p.24, L.19.) Considering the damaging nature of the domestic violence evaluation in this case, including its conclusions that Mr. Murray minimized his culpability, was minimally ready for treatment, and did not believe that he had substance abuse and domestic violence problems, it is reasonable to conclude that Mr. Murray would not have pled guilty and agreed to a non-confidential domestic violence evaluation had he known ahead of time that his evaluation would be so unfavorable.

Furthermore, in *Gonzales* the petitioner was aware of his ability to obtain an independent psychosexual evaluation, as his attorney informed the court that he would obtain such an evaluation *in addition to* the court-ordered evaluation at the time it was ordered.[5] *Id.* The failure to advise Mr. Murray of his right to obtain a confidential evaluation and ensure that he receive one prior to deciding to plead guilty represented deficient performance, and prejudiced Mr. Murray by causing him to plead guilty in what did not represent a knowing, intelligent, and voluntary choice.

For the reasons set forth *supra*, Mr. Murray asserts that the district court erred when it dismissed his claim that he received ineffective assistance of counsel with respect to his attorney's failure to advise him of his right to obtain a confidential domestic violence evaluation prior to deciding whether to plead guilty and submit to a court-ordered domestic violence evaluation. He respectfully requests that this Court vacate the district court's order dismissing his petition on this claim, and remand this matter for entry of judgment in his favor on this claim, with the district court to decide which of the requested remedies to employ.[6]

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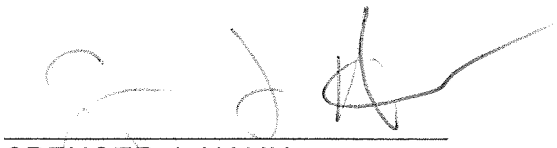
[5] Inexplicably, a separate defense evaluation was not conducted. *Id.* at 173.
[6] *See* n.4, *supra*.

CONCLUSION

Mr. Murray respectfully requests that this Court vacate the district court's order dismissing the claims from his petition for post-conviction relief discussed herein, and remand this matter for entry of judgment in his favor on both claims.

DATED this 9th day of August, 2012.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of August, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
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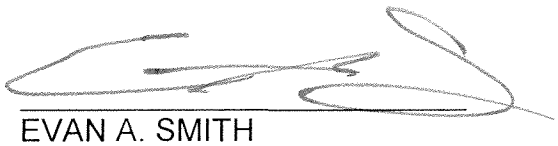

EVAN A. SMITH
Legal Secretary

SJH/eas