5-23-2018

Mendenhall v. State Appellant's Brief Dckt. 45526

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAMUEL WALTER MENDENHALL,	)	
	)	**NO. 45526**
Petitioner-Appellant,	)	
	)	**ADA COUNTY NO. CV-PC-2016-14045**
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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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Samuel Mendenhall filed a timely petition for post-conviction relief arguing that his trial counsel was ineffective in failing to obtain a pre-sentence mental health evaluation pursuant to I.C. § 19-2522, after he pled guilty to two counts of injury to a child and one count of felon in possession of a firearm. Mr. Mendenhall asserts the district court erred by summarily dismissing this claim, as there is a genuine issue of material fact as to whether his counsel's failure to obtain a § 19-2522 evaluation was a tactical decision. Furthermore, if his counsel's failure to obtain a § 19-2522 evaluation is found not to be a tactical decision, Mr. Mendenhall asserts that he has shown prejudice, as the absence of a § 19-2522 evaluation rendered his sentencing hearing presumptively unreliable.

Statement of the Facts and Course of Proceedings

Samuel Mendenhall pled guilty to two counts of injury to a child, and one count of felon in possession of a firearm. (Ex. 1, p.4, L.4 – p.23, L.5.)[1] After the district court accepted Mr. Mendenhall's guilty plea, his trial counsel asked the district court to order a psychological evaluation pursuant to I.C. § 19-2522; however, the district court stated that it was inclined only to order a mental health screening pursuant to I.C. § 19-2524, and Mr. Mendenhall's counsel stated, "[t]hat would be wonderful." (Ex. 1, p.24, L.2 – p.25, L.15.) Trial counsel indicated that

[1] Mr. Mendenhall did not appeal from his judgment of conviction (R., p.6); therefore, transcripts of his entry of plea and sentencing hearings were not prepared prior to Mr. Mendenhall filing his petition for post-conviction relief. The State supported its motion for summary dismissal with State's Exhibit 1 – a transcript of the entry of plea and sentencing hearings, which is found at pages 79-93 of the Clerk's Record. Citations to these transcripts will use the designation "Ex 1" and will include the more precise page and line numbers contained within the transcript itself, rather than the page numbers associated with the Clerk's Record.

he believed an evaluation would be useful because Mr. Mendenhall's criminal actions were "aberrational" and "way out of character for him." (Ex. 1, p.25, Ls.16-22.)

Based upon the police reports, the PSI writer described Mr. Mendenhall's charges as stemming from him repeatedly physically and emotionally abusing his 14-year-old stepson over a month and a half period. (PSI, pp.33-35.)[2] Mr. Mendenhall's wife described him as being "very paranoid about everything" and he even pointed a gun and himself, threatening to pull the trigger in front of her. (PSI, p.34.) Mr. Mendenhall told the PSI writer that a few months before his crimes, he lost his job and he "started hearing voices in 'manic stages.'" (PSI, p.38.) Mr. Mendenhall started using what he believed was methamphetamine but later learned was bath salts, he became "paranoid, confused, and angry," had a "psychotic breakdown," and he convinced himself that his stepson was responsible for the problems Mr. Mendenhall was having. (PSI, pp.35-38.) Although Mr. Mendenhall did not remember all of the times he abused his stepson, he did remember striking him on multiple occasions and he expressed his remorse for his actions. (PSI, pp.35-38.)

A licensed professional counselor with the Idaho Department of Health and Welfare conducted a Global Assessment of Individual Needs (GAIN) for Mr. Mendenhall. (PSI, pp.70-72.) The assessor provided AXIS I diagnoses including "Rule Out - Mood Disorder NOS," and "Rule Out – Generalized Anxiety Disorder." (R., p.70.) The assessor noted that she was not a "licensed mental health clinician," and that "the term 'rule out' is commonly used by IDOC staff or contracted GAIN assessors when the assessor is not licensed to diagnosis mental illness. The

[2] The district court took judicial notice of relevant portions of the Presentence Investigation Report and its attached documents that were created for Mr. Mendenhall's sentencing hearing. (R., p.110.) Citations to those exhibits will use the designation "PSI" and will include the page number associated with the 628 page electronic file containing those documents.

use of 'rule out' indicates that the diagnosis as generated by the GAIN, is provisional." (R., p.70.) The assessor further recognized that she "may not have access to all the information regarding this defendant." (R., p.70.)

Despite her admitted professional limitations, the assessor found indications that Mr. Mendenhall suffered from a serious mental illness (SMI), based upon the fact that Mr. Mendenhall reported he had previously been diagnosed with Bipolar Disorder and Schizophrenia. (R., p.70.) Mr. Mendenhall informed the assessor that he was currently suffering from mental health symptoms and that he was receiving treatment from the Ada County Jail staff. (R., pp.70-71.) In addition to Bipolar Disorder and Schizophrenia, Mr. Mendenhall informed the assessor that he had previously been diagnosed with anxiety disorder and depression, and that he had previously undergone mental health treatment. (R., p.71.) The assessor recommended that Mr. Mendenhall continue to get mental health treatment, but that no additional mental health assessment was necessary. (R., p.71.)

After submitting the original PSI, including the GAIN assessment, the PSI writer submitted an addendum containing records from Intermountain Hospital of four separate times Mr. Mendenhall was hospitalized for mental health issues. (PSI, pp.2-30.) These records revealed that in 1993, at the age of 15, Mr. Mendenhall was hospitalized for a two-week period after repeatedly expressing a desire to kill himself. (PSI, pp.17-22.) He was diagnosed with major depression with suicidal ideation, suspected bipolar disorder, and ADHD by history. (PSI, p.21.) Eight months later, and after he had stopped regularly taking his medication, Mr. Mendenhall again entered Intermountain Hospital. (PSI, pp.23-29.) He was again diagnosed with Bipolar Disorder and, after a three-week stay, he was transferred to the Idaho Youth Ranch for further counseling. (PSI, p.27.) In 1996 at the age of 18, Mr. Mendenhall was

again admitted to Intermountain Hospital, this time for one week, after he crashed his truck during a hypomanic state, and he was again diagnosed with Bipolar Disorder. (PSI, pp.6-8, 10-16.) Finally, in 2008 at the age of 30, Mr. Mendenhall checked himself in for an overnight stay at Intermountain Hospital because he was suffering from increasing panic and anxiety, and he was diagnosed with Bipolar Disorder NOS, Polysubstance abuse in partial remission, and Panic Disorder. (PSI, pp.5, 9, 30.) Even after getting all of the information about Mr. Mendenhall's history of mental illness, trial counsel did not file a new motion for the court to order a § 19-2522 evaluation prior to the sentencing hearing.

During the sentencing hearing, the prosecutor claimed that Mr. Mendenhall's attempts to take responsibility for his actions are filled with "minimizations, excuses, and delusions." (Ex. 1, p.32, Ls.16-24.) The prosecutor argued, "[t]he biggest untruth in all of this, Your Honor, is when he says he isn't a monster. And what he did to that child is the very definition of a monster." (Ex. 1, p.34, Ls.6-9.) Trial counsel pointed out that Mr. Mendenhall has a long history of mental health issues and argued that Mr. Mendenhall's crimes appear to be a result of a psychotic break, and counsel asked that Mr. Mendenhall be "mentally evaluated" and put on medication while serving his prison term, so "this type of break does not happen again . . ." (Ex. 1, p.38, L.21 – p.43, L.22.) Mr. Mendenhall concluded his allocution by stating, "I love my family deeply. And I have struggled with this illness my entire life. That doesn't mean I am any less accountable for it, but I ask you to please consider it." (Ex. 1, p.47, Ls.12-15.) In pronouncing sentence, the district court did not mention Mr. Mendenhall's history of mental illness; instead, the court indicated it believed Mr. Mendenhall's violent behaviors were caused by his use of bath salts. (Ex. 1, p.48, L.4 – p.55, L.22.) The court sentenced Mr. Mendenhall to a total unified term of 25 years, with 10 years fixed. (Ex. 1, p.53, L.22 – p.54, L.9.)

Mr. Mendenhall filed a timely Petition and Affidavit for Post Conviction Relief. (R., pp.5-28.) Among his claims,[3] Mr. Mendenhall asserted that he was denied effective assistance of counsel when his attorney "failed to follow through and investigate mitigating evidence," by failing to obtain a psychological evaluation, as Mr. Mendenhall believed had been ordered by the court prior to sentencing. (R., p.6.) Mr. Mendenhall claimed that both he and his father had asked his trial counsel to obtain a "psych eval at pleading," but his counsel later "denied doing so and denied [Mr. Mendenhall] that [defense]." (R., p.7.) In his affidavit in support of his petition, Mr. Mendenhall stated,

> I was denied effective assistance of coun[sel] at sentencing when coun[sel] failed to investigate mitigating evidence that [would] have [lessened] petitioner's responsibility and blame. Defen[s]e [counsel] was asked several times to investigate mental health of petitioner. Where at pleadings he did so "only" request an evaluation be done and was granted so by the judge. He then pretended to have no knowledge of this at last moment[] though I insisted and [he] instead claimed we would not need it!

(R., pp.10-11.) Mr. Mendenhall attached some records of his stays at Intermountain Hospital as exhibits to his petition, and the district court granted his motion for the appointment of counsel. (R., pp.12-28, 37-42.)

The State filed an Answer denying all of Mr. Mendenhall's claims, a motion for summary dismissal, and a brief in support of its motion for summary dismissal, which included transcripts of the entry of plea and sentencing hearings as an exhibit. (R., pp.63-93.) Regarding Mr. Mendenhall's claim that his counsel was ineffective in failing to obtain a pre-sentence

[3] Mr. Mendenhall also claimed his trial counsel was ineffective in coercing him to plead guilty by making false promises, knowing Mr. Mendenhall was under the influence of Suboxone, and that the court lacked jurisdiction over his case, because the victim of his injury to a child was over the age of 13. (R., pp.5-11.) Mr. Mendenhall did not oppose the State's motion for summary dismissal of any of these claims, and does not assert error in dismissing those claims in this appeal. (R., p.97.)

mental health evaluation, the State argued Mr. Mendenhall's claim was bare and conclusory, and that he failed to raise a genuine issue of material fact. (R., p.71.) Without citing to any authority, the State argued that Mr. Mendenhall must prove the "*contents of the psychological exam* would have applied to one of the sentencing factors the court was required to consider *and* it would have resulted in a shorter sentence." (PSI, p.72 (emphasis original).) Arguing he failed to show either, the State moved to summarily dismiss this claim. *Id.*

Mr. Mendenhall's post-conviction counsel filed a memorandum in opposition to the State's motion for summary disposition. (R., pp.96-98.) Based in large part on the Court of Appeals' decision in *Vick v. State*, 131 Idaho 121 (Ct. App. 1998), Mr. Mendenhall's counsel argued,

> Given the lack of reports complying with section 19-2522, the trial court here was not adequately equipped to address the issue of mental health as required under section 19-2523, Idaho Code. Given Mr. Mendenhall's past successful treatment, there is a reasonable likelihood that a full psychological evaluation could have provided mitigation to be used at sentencing; furthermore, Mr. Mendenhall's counsel was ineffective in his failure to provide such a report to the trial court at sentencing. Since there is a dispute of material fact as to whether Mr. Mendenhall's counsel[']s representation was deficient in a way that had a reasonable probability of affecting the outcome of the case, summary dismissal is inappropriate in this matter.

(R., pp.96-98.)

During a hearing on the State's motion for summary dismissal, the State argued that, because Mr. Mendenhall had not supported his claim of ineffective assistance of counsel for failure to obtain a § 19-2522 evaluation, with an actual § 19-2522 evaluation, the court should summarily dismiss that claim. (Tr., p.7, L.18 – p.11, L.25.) The prosecutor suggested Mr. Mendenhall could have obtained a psychological evaluation in support of his post-conviction petition, but since he had as-of-yet failed to do so, summary dismissal was appropriate. (Tr., p.12, L.1 – p.13, L.13.) Counsel for Mr. Mendenhall argued that trial counsel was

ineffective in withdrawing his request for a § 19-2522 evaluation and instead acquiescing in the court's desire for a § 19-2524 evaluation, and that an evidentiary hearing was necessary to determine whether trial counsel's decision was strategic. (Tr., p.13, L.16 – p.28, L.11.) On rebuttal, the State again argued that summary dismissal was appropriate because Mr. Mendenhall had not yet produced an actual § 19-2522 evaluation. (Tr., p.28, L.18 – p.33, L.20.) The court took the matter under advisement. (Tr., p.33, L.22 – p.38, L.16.)

The district court issued a written order granting the State's motion for summary dismissal, and a judgment dismissing Mr. Mendenhall's petition. (R., pp.109-17.) The court found that Mr. Mendenhall's trial counsel was not deficient in failing to request a § 19-2522 evaluation, because counsel first asked for such an evaluation, but then later deferred to the court's decision to order a § 19-2524 evaluation only. (R., p.113.) Furthermore, the court found Mr. Mendenhall failed to show that his trial counsel's performance was deficient because the § 19-2524 assessor concluded that no further evaluation was necessary. (R., p.113.) The court noted that trial counsel argued Mr. Mendenhall's mental health in mitigation and found no deficient performance. (R., p.113.)

Additionally, the court found that, even if trial counsel's performance was deficient, Mr. Mendenhall was still required to show prejudice. The court acquiesced to the State's prejudice analysis, finding Mr. Mendenhall was,

> required to show reasonable probability that the outcome (sentence) would have been different. To do that, if this matter were to go to an evidentiary hearing, he would have to show that contents of the psychological exam would have applied to one of the sentencing factors the court was required to consider and that it would have resulted in a shorter sentence. This would require him to actually produce the conclusions from such a psychological examination so the Court could determine whether it would have made a difference in the final sentence.

(R., p.114.) The court noted that it had prior mental health evaluations at the time of sentencing, and found that Mr. Mendenhall had not shown that, had there been an additional evaluation, the outcome of the proceeding would have been different. (R., p.114.) The district court ultimately held that, "[s]ince [Mr. Mendenhall] has failed to produce any evidence of what such a psychological examination would have concluded, he has failed to raise a genuine issue of material fact as to whether he was prejudiced." (R., p.114.)

Mr. Mendenhall filed a timely Notice of Appeal. (R., pp.118-20.)

ISSUE

Did the district court err in summarily dismissing Mr. Mendenhall's claim that his counsel was ineffective in failing to obtain an Idaho Code § 19-2522 evaluation?

ARGUMENT

The District Court Erred In Summarily Dismissing Mr. Mendenhall's Claim That His Counsel Was Ineffective In Failing To Obtain An Idaho Code § 19-2522 Evaluation

A. Introduction

Whenever there is reason to believe that mental condition will be a significant sentencing factor, Idaho law requires the court to appoint a psychiatrist or psychologist to examine and report upon the defendant's mental condition, if requested by the defendant. I.C. § 19-2522. Prior to sentencing, the PSI writer provided the parties and the district court with information indicating Mr. Mendenhall suffered from a serious mental illness, and that his illness played a role in his criminal activity. These reports, however, did not satisfy the requirements of I.C. § 19-2522.

The evidence before the district court demonstrates that Mr. Mendenhall's mental condition was a significant factor at his sentencing, and that his trial counsel failed to obtain the district court to order a § 19-2522 evaluation. The district court erred in finding trial counsel's performance was not deficient and in summarily dismissing Mr. Mendenhall's petition on this basis. Additionally, Mr. Mendenhall asserts the lack of a § 19-2522 evaluation rendered his sentencing hearing presumptively unreliable, and the district court erred when it summarily dismissed his post-conviction petition.

B. Relevant Jurisprudence And Standards Of Review

A post-conviction petition initiates a proceeding that is civil in nature and, like a plaintiff in a civil action, the applicant must prove his or her allegations upon which the requests for relief are based by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008). However, unlike a plaintiff in other civil cases, the original post-conviction petition must allege

more than merely "a short and plain statement of the claim." *Id*. at 443-44. The application must present or be accompanied by admissible evidence supporting the allegations contained therein, or else the post-conviction petition may be subject to dismissal. *Id*.

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Thomas v. State*, 145 Idaho 765, 769 (Ct. App. 2008). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel's performance was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); A*ragon v. State*, 114 Idaho 758, 760 (1988). Where a defendant shows that his counsel was deficient, prejudice is shown if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694; *Aragon* at 760. "[I]neffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because 'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001).) When a proceeding in question is "presumptively reliable," a petitioner must establish actual prejudice; however, prejudice will be presumed "when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (citations omitted).

A district court may summarily dismiss a post-conviction petition only where the petition and supporting evidence fail to raise a genuine issue of material fact that, if resolved in the petitioner's favor, would entitle him or her to the relief requested. *Yakovac*, 145 Idaho at 444. "A material fact has 'some logical connection with the consequential facts[,]' *Black's Law Dictionary*, 991 (7th Ed.1999), and therefore is determined by its relationship to the legal theories presented by the parties." *Id.* On review of a dismissal of a post-conviction relief

application without an evidentiary hearing, the appellate court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions, together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993). The underlying facts alleged by the petitioner "must be regarded as true" for purposes of summary dismissal. *Rhoades v. State*, 148 Idaho 247, 250 (2009). Any disputed facts are construed in favor of the non-moving party, and "all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Vavold v. State*, 148 Idaho 44, 45 (2009).

C. The Evidence Before The Court Demonstrates That Trial Counsel Was Constitutionally Deficient In Failing To Obtain A Mental Health Evaluation Pursuant To Idaho Code § 19-2522 Prior To Sentencing, And The District Court Erred In Summarily Dismissing Mr. Mendenhall's Petition On This Basis

The district court found that Mr. Mendenhall's trial counsel was not deficient because he initially asked the district court to order an evaluation pursuant to I.C. § 19-2522, but the court instead decided to order only a § 19-2524 assessment. (R., p.113.) The court noted that the assessor who completed the § 19-2524 assessment concluded that, "no additional mental health assessment is necessary," and the court reasoned that Mr. Mendenhall failed to explain how his trial counsel's failure to continue to argue for a § 19-2522 evaluation would be constitutionally deficient. (R., p.113.) The district court's ruling is factually and legally incorrect.

1. Mr. Mendenhall's Counsel Abandoned His Request For An Idaho Code § 19-2522 Evaluation And Instead Acquiesced In The District Court's Order For An Idaho Code § 19-2524 Evaluation, Inviting The District Court's Error And Depriving Mr. Mendenhall The Right To Seek Redress Through Direct Appeal

The district court's finding that Mr. Mendenhall's counsel was not ineffective because he initially requested an evaluation pursuant to I.C. § 19-2522, is mistaken. After the district court accepted Mr. Mendenhall's guilty plea (Ex. 1, p.23, Ls.1-5), the following exchange occurred:

MR. SCHILD (defense counsel): I would like the – the evaluation, to benefit the Court, to include a 19-2522 exam in light of his bipolar condition and the anxiety disorder. And I think that information will be helpful to the Court.

THE COURT: When was he diagnosed; do you know, Mr. Schild?

MR. SCHILD: As a teenager. It's been kind of a lifelong deal.

THE COURT: Have you had a recent hospitalization, Mr. Mendenhall?

[MR. MENDENHALL]: At the age of 29, I believe.

THE COURT: And how long ago was that?

[MR. MENDENHALL]: It was approximately eight years ago.

THE COURT: Okay. So I was going to say, if there has been a recent hospitalization, it probably wouldn't matter. And you don't believe a 19-2524 would be adequate, Mr. Schild?

MR. SCHILD: It probably would.

THE COURT: Well, there is a difference. A 19-2524 is essentially a screening done based off of the GAIN –

MR. SCHILD: Uh-huh.

THE COURT: -- by a licensed professional.

MR. SCHILD: Sure.

THE COURT: A 19-2522 is done by at least a master's level psychologist. So …

MR. SCHILD: I would defer to the Court on what level of screening you think would be most helpful to you for sentencing.

THE COURT: What I am inclined to do is review the 19-2524, and, if it recommends further evaluation, we will take it up from there.

MR. SCHILD: That would be wonderful.

THE COURT: That is part of what it's supposed to do as part of the 19-2524 is advise the Court whether further assessment and evaluation is necessary.

MR. SCHILD: I think that – I think that would be good because, from the defense perspective, this was an aberrational occurrence. And I'm not, you know,

> speaking to justify any – anything of what was done, but it was certainly way out of character for him. And with his history, I'd like the Court to have that information.

(Ex. 1, p.24, L.2 – p.25, L.22.) This exchange demonstrates that while Mr. Mendenhall's counsel initially asked for a § 19-2522 evaluation, counsel immediately abandoned that request when the court indicated that it was inclined to order a § 19-2524 assessment. "'It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible.'" *State v. Lankford*, 162 Idaho 477, 484–85 (2017) (quoting *State v. Dunlap*, 155 Idaho 345, 379, 313 P.3d 1, 35 (2013)) (further citations omitted). By agreeing that a § 19-2524 evaluation would be sufficient and "wonderful," Mr. Mendenhall's counsel effectively withdrew his request for a § 19-2522 evaluation.[4]

The record establishes that Mr. Mendenhall's counsel acquiesced in the district court's failure to order an evaluation pursuant to I.C. § 19-2522. The court's finding that Mr. Mendenhall's counsel could not be deficient because he initially requested a § 19-2522 evaluation is erroneous.

[4] During the hearing on the State's motion for summary dismissal, the district court suggested the possibility that Mr. Mendenhall's claim might be precluded by I.C. § 19-4901(b), reasoning that he could have argued the court erred in failing to order a § 19-2522 evaluation on direct appeal. (*See generally*, Tr.) The court ultimately did not dismiss this claim on this ground and for good reason – the invited error doctrine would have precluded Mr. Mendenhall from raising this claim, had he appealed from his judgment of conviction. *See Lankford*, 162 Idaho at 484–85. Additionally, Mr. Mendenhall would not have been able to raise the district court's failure to *sua sponte* order a § 19-2522 evaluation as fundamental error. *See State v. Carter*, 155 Idaho 170 (2013).

2. In Light Of The Information Known About Mr. Mendenhall's Mental Condition At The Time Of Sentencing, The District Court Would Have Been Required To Grant A Motion For An Idaho Code § 19-2522 Evaluation

Even if Mr. Mendenhall's counsel was not deficient by acquiescing in the district court's initial decision to decline to order a § 19-2524 assessment instead of a § 19-2522 evaluation, counsel was deficient in failing to request a § 19-2522 evaluation after receiving the GAIN assessment and the hospital records. Had counsel made such a request, well-established Idaho precedent would have required the district court to order a § 19-2522 evaluation.

Idaho Code § 19-2522 states that, "If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least one (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant." I.C. § 19-2522(1). "Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime." I.C. § 19-2523. "The defendant's mental condition is a significant factor at sentencing if the sentencing court is aware of a defendant's lengthy history of serious mental illness." *State v. Hanson*, 152 Idaho 314, 319–20 (2012).

After reviewing all of the PSI materials, including the GAIN assessment and Mr. Mendenhall's hospital records, the district court was aware that Mr. Mendenhall suffered from a serious mental illness and that his mental condition would be a significant factor at sentencing. At the time of sentencing, the district court was aware that, during the time period in which he committed his criminal acts, Mr. Mendenhall was being "very paranoid about everything" and had threatened to kill himself, that he "started hearing voices in 'manic stages,'" and that he became "paranoid, confused, and angry," and had a "psychotic breakdown." (PSI, pp.34-38.) The court had multiple reports from Intermountain Hospital demonstrating that

Mr. Mendenhall had been hospitalized on four separate occasions due to his mental illness. (PSI, pp.2-30.) The court was aware that Mr. Mendenhall had been previously diagnosed with Bipolar Disorder, Schizophrenia, anxiety disorder, and depression, that he had previously undergone mental health treatment, and that he was currently suffering mental health symptoms and was receiving treatment in the jail. (R., pp.70-71; PSI, pp.2-30.)

The court was also aware that the mental health assessor provided AXIS I diagnoses including "Rule Out - Mood Disorder NOS," and "Rule Out – Generalized Anxiety Disorder," but that the assessor was not qualified or licensed to make any actual diagnoses. (R., pp.70-71.) The assessor found indications that Mr. Mendenhall suffered from a serious mental illness (SMI), based upon the fact that Mr. Mendenhall reported he had previously been diagnosed with Bipolar Disorder and Schizophrenia. (R., p.70.) Additionally, the assessor recommended that Mr. Mendenhall continue to get mental health treatment; however, for reasons unknown, the assessor opined that no additional mental health assessment was necessary. (R., p.71.)

In *State v. Black*, 161 Idaho 867 (Ct. App. 2017), the Court of Appeals found the district court abused its discretion when it denied the defendant's pre-sentence request for an I.C. § 19-2522 evaluation. After pleading guilty to criminal possession of a financial transaction card, Black told the PSI writer that he considered his mental health issues to be "serious," as he had prior diagnoses of anxiety, depression, and Bipolar disorder, had attempted suicide in the past, and he told the PSI writer that he wanted a further assessment. *Id.* at 868-69. A GAIN assessment was conducted and Black's answers "suggested the presence of several clinical disorders including bipolar disorder, generalized anxiety disorder, recurrent major depressive disorder, and attention-deficit/hyperactivity disorder (ADHD)." *Id.* at 869. A counselor with the Department of Health And Welfare prepared a § 19-2524 evaluation acknowledging, "Black may

have a serious mental illness," but stated, "because Black was currently receiving mental health treatment through the jail, no additional mental health treatment or assessments were recommended." *Id.* The district court denied Black's motion for a § 19-2522 evaluation finding that Black had failed to show good cause for the evaluation, and that there was no reason to believe Black's mental condition would be a significant factor at sentencing. *Id.*

The *Black* Court found that the facts known to the district court demonstrated that there was sufficient reason to believe Black's mental condition would be a significant factor at sentencing, and thus abused its discretion by denying Black's request for a § 19-2522 evaluation. *Id.* at 870-72. Although Mr. Mendenhall's case arises through post-conviction, the *Black* opinion demonstrates that trial counsel's performance was presumptively deficient. Like Black, the district court and Mr. Mendenhall's counsel were aware that Mr. Mendenhall suffered from anxiety, Bipolar disorder, and had attempted suicide. (R., pp.70-71; PSI, pp.2-30.) Unlike in *Black*, Mr. Mendenhall's counsel did not request a § 19-2522 evaluation. (Ex. 1, p.24, L.2 – p.25, L.22; p.27, L.4 – p.56, L.3.) Had Mr. Mendenhall's counsel requested a § 19-2522 evaluation, the district court would have abused its discretion if it denied such a request, as the Court of Appeals found Black's counsel to have done.

Additionally, in *Vick v. State*, 131 Idaho 121 (Ct. App. 1998), the Court of Appeals reversed the district court's order summarily dismissing the petitioner's claim that her counsel was ineffective in failing to present evidence of her mental illness at sentencing. Vick had a long history of mental illness and treatment and she asserted "that although trial counsel raised her mental illness as an issue at sentencing, he failed to provide the sentencing court with a fully completed psychological evaluation" resulting in the court inadequately considering her mental illness as a mitigating factor. *Id.* at 123-24.

The Court of Appeals found that evidence of the defendant's mental condition submitted to the trial court prior to sentencing, including a report by a forensic psychiatrist who interviewed the defendant on multiple occasions, did not address the criteria mandated by I.C. §§ 19-2522 and 19-2523. *Id.* at 123-25. Despite the fact the district court stated that it took Vick's mental condition into consideration, the Court of Appeals found that summary dismissal of the claim was error because there was additional information about Vick's history of mental illness and treatment available that defense counsel did not submit to the court. *Id.* at 125-26. The *Vick* Court held,

> Vick's application, supported by documentation, raises material issues of fact as to whether she received ineffective assistance of counsel at sentencing because her attorney did not request or provide a report satisfying the requirements of I.C. § 19-2522, did not object to the imposition of sentence without the benefit of such a report, and did not submit other readily available psychological information that provided a more favorable assessment and prognosis.

Id. at 126. As in *Vick*, Mr. Mendenhall's trial counsel failed to request the district court to order a § 19-2522 evaluation, after discovering an abundance of information showing that Mr. Mendenhall's mental condition would be a significant factor at sentencing, nor did counsel object to the district court proceeding to sentencing without obtaining such an evaluation. (Ex. 1, p.24, L.2 – p.25, L.22; p.27, L.4 – p.56, L.3.)

In sum, both Mr. Mendenhall's counsel and the district court had an abundance of information indicating Mr. Mendenhall's mental condition would be a significant factor at sentencing. Had defense counsel made such a request after all of this information was presented to the court, but before sentence was imposed, the district court would have abused its discretion if it denied a request for a § 19-2522 evaluation.

3. The Information Contained In The PSI Did Not Meet The Requirements Of Idaho Code § 19-2522, And The GAIN Assessor's Recommendation For No Further Evaluation Does Not Excuse Mr. Mendenhall's Counsel's Deficient Performance

To the extent the district court found that Mr. Mendenhall's counsel was not deficient because the court had *some* information about Mr. Mendenhall's mental condition and defense counsel argued such during the sentencing hearing, the district court's holding is in error. Idaho Code § 19-2522(6) allows the district court to forgo ordering an evaluation, even where a defendant's mental condition will be a significant factor at sentencing, under certain circumstances.

> If a mental health examination of the defendant has previously been conducted, whether pursuant to section 19-2524, Idaho Code, or for any other purpose, and a report of such examination has been submitted to the court, and if the court determines that such examination and report provide the necessary information required in subsection (3) of this section, and the examination is sufficiently recent to reflect the defendant's present mental condition, then the court may consider such prior examination and report as the examination and report required by this section and need not order an additional examination of the defendant's mental condition.

I.C. § 19-2522(6). The requirements listed in subsection (3) are as follows,

> (a) A description of the nature of the examination;
> (b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;
> (c) An analysis of the degree of the defendant's illness or defect and level of functional impairment;
> (d) A consideration of whether treatment is available for the defendant's mental condition;
> (e) An analysis of the relative risks and benefits of treatment or nontreatment;
> (f) A consideration of the risk of danger which the defendant may create for the public if at large.

I.C. § 19-2522(3). For multiple reasons, the evaluation submitted to the district court simply did not meet these requirements.

Most notably, the evaluation did not contain a "diagnosis, evaluation or prognosis" of Mr. Mendenhall's mental condition. (PSI, pp.70-71.) This is understandable considering the

assessor does not have the education or training level to enable her to make such a diagnosis. *Id.* The assessor recognized the answers Mr. Mendenhall gave during the test she administered showed that he had a serious mental illness, and she provided "rule out" diagnoses Mood Disorder NOS, and Generalized Anxiety disorder. *Id.* The inability to diagnosis Mr. Mendenhall made it both practically and legally impossible for the assessor provide an analysis as to whether treatment was available to Mr. Mendenhall, the risks and benefits of such treatment or non-treatment, and the risk of danger Mr. Mendenhall may create for the public at large. (PSI, pp.70-72.) Instead, the assessor simply checked a box stating, "Continue mental health treatment with current provided and/or another provider."[5] (PSI, p.71.) This information is simply insufficient to meet the requirements of I.C. § 19-2522(3).

The *Black* Court recognized that, "not every mental health evaluation conforms with the exacting requirements of I.C. § 19-2522(3)." *Black*, 161 Idaho at 871 (citations omitted). Like the mental health evaluations found to be insufficient in *Black*, the GAIN assessment and the documentation of Mr. Mendenhall's 1994, 1994, 1996, and 2008, hospitalizations, were enough to show the court that a § 19-2522 evaluation was required, but not enough to meet the requirements of I.C. § 19-2522(3). *See* PSI, pp.2-30; *see also Hanson*, 152 Idaho at 324-25 (rejecting the State's argument that the district court's failure to order a § 19-2522 evaluation was harmless because the court recommended the defendant receive a psychological evaluation while incarcerated.)

Furthermore, to the extent the district court found that Mr. Mendenhall's counsel was not deficient in failing to request a § 19-2522 evaluation because the GAIN assessor indicated "no

[5] The assessor, of course, should not be faulted for providing the report she was tasked with providing.

additional mental health assessment is necessary," such a finding is erroneous. Idaho Code § 19-2522(6) makes it clear that attorneys and courts *may not defer* to the wisdom of a social worker, and must instead retain the services of a psychiatrist or psychologist whenever there is reason to believe that a defendant's mental condition will be a significant factor at sentencing, and the information before the court is insufficient to meet the requirements of I.C. § 19-2522(3). The assessor's conclusion that no further evaluation of Mr. Mendenhall was necessary did not relieve Mr. Mendenhall's counsel of his duty to request the court order a § 19-2522 evaluation.

4. Arguing The Court Should Consider Mr. Mendenhall's Mental Condition In Mitigation And Asking The Court To Recommend The Department Of Correction Provide Mr. Mendenhall Treatment Did Not Absolve Mr. Mendenhall's Counsel's Deficient Performance

Mr. Mendenhall's Counsel's argument to the district court that it should consider his mental health in mitigation, and his request that the court recommend treatment, did not allay defense counsel's failure to request a § 19-2522 evaluation. As noted above, Idaho law requires the sentencing court to order a § 19-2522 evaluation whenever there is reason to believe a defendant's mental condition will be a significant factor at sentencing. Mr. Mendenhall's counsel did not make up for his deficient performance by asking the district court to recommend Mr. Mendenhall receive treatment in prison. *See e.g. Hanson*, 152 Idaho at 324-25 (rejecting the State's argument that the district court's failure to order a § 19-2522 evaluation was harmless because the court recommended the defendant receive a psychological evaluation while incarcerated).

5. There Is A Genuine Issue Of Material Fact As To Whether Mr. Mendenhall's Counsel Made A Constitutionally Sound Strategic Decision Not To Request A § 19-2522 Evaluation

Mr. Mendenhall's post-conviction counsel conceded the possibility that Mr. Mendenhall's trial counsel made a tactical decision not to request a § 19-2522 evaluation prior to sentencing. (Tr., p.25, L.21 – p.28, L.8.) Mr. Mendenhall thus asks this Court to remand his case to the district court to conduct an evidentiary hearing on this issue.

D. The District Court Erred In Summarily Dismissing Mr. Mendenhall's Petition Based Upon Its Finding That Mr. Mendenhall Failed To Present Evidence That He Was Prejudiced By His Counsel's Failure To Obtain An Idaho Code § 19-2522 Evaluation

Parroting language used by the State in its motion for summary dismissal (*see* R., pp.71-72), the district court held the following,

> Even if we assume the performance of counsel was deficient, the second prong of Strickland requires evidence the Petitioner was prejudiced. This means he is required to show reasonable probability that the outcome (sentence) would have been different. To do that, if this matter were to go to an evidentiary hearing, he would have to show that contents of the psychological exam would have applied to one of the sentencing factors the court was required to consider and that it would have resulted in a shorter sentence. This would require him to actually produce the conclusions from such a psychological examination so the Court could determine whether it would have made a difference in the final sentence. The Addendum to Presentence Report contained records from Mr. Mendenhall's earlier hospitalizations. These are the same records as were attached to the affidavit in Support of the Petition for Post Conviction Relief. Petitioner has not demonstrated that another evaluation, if done at the time of sentencing, would have produced any new or different evidence, let alone that the evidence would be sufficient to raise a reasonable probability that the outcome of the proceeding would have been different. Since he has failed to produce any evidence of what such a psychological examination would have concluded, he has failed to raise a genuine issue of material fact as to whether he was prejudiced.

(R., p.114.) Mr. Mendenhall asserts the district court applied the wrong prejudice analysis.

As noted above, where a defendant shows that his counsel was deficient, prejudice is shown if 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; *Aragon* 114 Idaho at 760. The district court apparently assumed that, in order for Mr. Mendenhall to show prejudice, he would have to produce a § 19-2522 evaluation that would have resulted in him receiving a less-severe sentence, had it been presented to the court prior to that court imposing sentence. Mr. Mendenhall asserts this is incorrect.

The year after *Strickland* was decided, the Supreme Court sought to apply *Strickland*'s prejudice prong to a case where the petitioner claimed his guilty plea was rendered involuntary due to his counsel's false advice about when the petitioner would be eligible for parole. *Hill v. Lockhart*, 474 U.S. 52, 54-55 (1985). The Court ruled as follows:

> We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, [411 U.S. 258, 267 (1973)], and *McMann v. Richardson*, [397 U.S. 759, 771 (1970)]. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show 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 58-59. The *Hill* Court did not require the petitioner to prove he would have prevailed at trial; rather, the petitioner was only required to show that he would have exercised his right to trial.

This concept was expanded upon by the Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The *Roe* Court held "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484. In order to make out a successful ineffective assistance of counsel for failure to file an appeal

claim, a petitioner is not required to "demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed." *Id.* at 486. The *Roe* Court held that prejudice would be presumed when "the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." *Id.* at 484 (citations omitted).

Mr. Mendenhall asserts that his sentencing hearing was presumptively unreliable due to the lack of a § 19-2522 evaluation. As noted above, the language of I.C. § 19-2522 is mandatory, requiring a court to order an mental health evaluation to be conducted by a psychiatrist or psychologist whenever there is reason to believe the defendant's mental condition will be a significant factor at sentencing. *Hanson*, 152 Idaho at 319. Idaho Code § 19-2522 evaluations serve two purposes: one, to provide the court with information about the defendant to be weighed in determining the appropriate punishment; and two, "'to assist the district court at sentencing in determining whether to recommend psychological treatment under section 19-2523 during a defendant's confinement or probation.'" *Id.* at 323 (quoting *State v. Harper*, 129 Idaho 86, 91 (1996)). The erroneous failure to order a § 19-2522 evaluation when requested by the defendant, cannot be found harmless. "In view of this unambiguous expression by our Legislature that sentencing courts are to obtain and consider evidence of the defendant's mental condition, we are unable to find that the failure to do so in this case is harmless error." *Id*. at 325.

Due to his counsel's deficient performance in failing to request the district court to order a § 19-2522 evaluation, Mr. Mendenhall was deprived his right to have the information contained therein considered by the district court. As such, he asserts that his sentencing hearing

was presumptively unreliable and the district court erred in finding he had failed to show that he was prejudiced by his counsel's ineffective assistance.

Even if his sentencing hearing was not presumptively unreliable, Mr. Mendenhall asserts the district court abused its discretion by summarily dismissing this claim, as there was a genuine issue of material fact as to whether he was prejudiced by his counsel's failure to obtain a § 19-2522 evaluation. In *Richman v. State*, 138 Idaho 190 (Ct. App. 2002), the Idaho Court of Appeals recognized that it had previously found the district court's summary dismissal of the petitioner's "claim that his mental illness constituted a mitigating circumstance that trial counsel should have raised at sentencing was improper." *Id.* at 192 (citing *Richman v. State*, 136 Idaho 457 (Ct. App. 2001) (unpublished opinion)). The *Richman* Court held, "the purpose of this Court's remand after Richman's first appeal from the denial of his application for post-conviction relief was to afford Richman an opportunity to present evidence in support of his position that the district court should reconsider the sentences original imposed." *Id.* at 194. The Court ultimately held that Richman did not demonstrate that he was prejudiced, due to the district court's finding that the sentence would not have been different had all of the information about Richman's mental condition been submitted prior to sentencing. *Id.*

Mr. Mendenhall maintains that his sentencing hearing was presumptively unreliable and he has thus demonstrated prejudice, due to his counsel's failure to request a § 19-2522 evaluation. However, to the extent the *Richman* opinion accurately states Idaho law, Mr. Mendenhall asserts there was a genuine issue of material fact as to whether he was prejudiced by his counsel's failure, and the district court erred in granting the State's motion for summary dismissal.

CONCLUSION

Mr. Mendenhall respectfully requests that this Court vacate the district court's order and judgment summarily dismissing his post-conviction petition, and remand his case to the district court for further proceedings.

DATED this 23rd day of May, 2018.

_____/s/_____
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of May, 2018, 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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ADA COUNTY PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
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JCP/eas»