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Mendenhall v. State Appellant's Reply Brief Dckt. 45526

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SAMUEL WALTER MENDENHALL,	)	
	)	**NO. 45526**
Petitioner-Appellant,	)	
v.	)	**ADA COUNTY NO. CV-PC-2016-14045**
	)	
STATE OF IDAHO,	)	**APPELLANT'S**
	)	**REPLY BRIEF**
Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE RICHARD D. GREENWOOD
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. In his Appellant's Brief, Mr. Mendenhall asserted 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 an I.C. § 19-2522 evaluation was a tactical decision. Mr. Mendenhall further asserted that if his counsel's failure to obtain an I.C. § 19-2522 evaluation is found not to be a tactical decision, Mr. Mendenhall has shown prejudice, as the absence of an I.C. § 19-2522 evaluation rendered his sentencing hearing presumptively unreliable.

This Reply Brief addresses various factually and legally erroneous assertions made by the State in its Respondent's Brief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Mendenhall's Appellant's Brief and they are repeated in this Reply Brief only where necessary to address the State's arguments.

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

The State first argues that the district court correctly found Mr. Mendenhall's claim is foreclosed, because his trial counsel initially asked the district court to order an I.C. § 19-2522 evaluation at the conclusion of the entry of plea hearing. (Respondent's Brief, pp.6-7.) The State reasons that because the district court denied his request, Mr. Mendenhall's trial counsel could not have performed deficiently. (Respondent's Brief, p.7.) The State makes this argument without acknowledging what actually occurred during the entry of plea hearing. (Respondent's Brief, pp.6-7.)

As noted in the Appellant's Brief (pp.12-14), 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.)[1] The exchange shows, clearly and unequivocally, that Mr. Mendenhall's counsel acquiesced to the district court's stated preference to order an I.C. § 19-2524 evaluation prior to sentencing then "take it up from there," with counsel describing the idea as "wonderful." *Id.*

[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.

"'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 (2013)) (further citations omitted). Without acknowledging that the invited error doctrine precludes a party on appeal from claiming error in rulings consented to, acquiesced in, or invited, the State argues Mr. Mendenhall should have raised the district court's failure to order an I.C. § 19-2522 evaluation on appeal. (Respondent's Brief, p.7.) The State's argument is both factually and legally erroneous.

Next, the State argues Mr. Mendenhall is precluded from arguing his counsel was ineffective in acquiescing to the district court's desire for an I.C. § 19-2524 evaluation, because he did not preserve that issue by raising it in the district court during post-conviction proceedings. (Respondent's Brief, p.7 (citing R., pp.5-8, 96-98).) Oddly, in making this claim, the State fails to acknowledge the argument Mr. Mendenhall's trial counsel made on this subject during the hearing on the State's motion for summary dismissal. (Respondent's Brief, p.7.) During that hearing, the district court raised the question of whether Mr. Mendenhall's counsel could be ineffective if the district court denied his motion for an I.C. § 19-2522 evaluation – Mr. Mendenhall's post-conviction counsel responded by arguing that trial counsel "withdrew his request for a 19-2522," noting that trial counsel stated, "'I would defer to the Court.'" (Tr., p.13, L.16 – p.23, L.20.) In fact, Mr. Mendenhall's counsel repeatedly argued that it was deficient performance for trial counsel to withdraw his request for an I.C. § 19-2522 evaluation, and instead acquiesce in the district court's desire for an I.C. § 19-2524 evaluation. (Tr., p.13, L.16 – p.23, L.20.) The State's argument that this issue is not preserved for appeal is both factually and legally erroneous.

The State's ensuing argument is that it "appears" Mr. Mendenhall could have raised the issue of the district court's failure to order a § 19-2522 evaluation on direct appeal, "irrespective of trial counsel's insistence or acquiescence." (Respondent's Brief, p.8.) The State bases its argument upon a false description of the procedural history in *State v. Black*, 161 Idaho 867 (Ct. App. 2007). The State argues,

> In that case, though trial counsel withdrew his motion for a psychological evaluation under Idaho Code § 19-2522 and elected (after consulting with Black) not to file any motions to reconsider, the Court of Appeals still considered on direct appeal Black's claim that the district court erred by failing to order the evaluation.

(Respondent's Brief, p.8.) Curiously, the State does not provide a citation to the *Black* opinion to support its description of the factual background of that case. *Id.* The *Black* Court itself, on the other hand, described the relevant factual background as follows:

> Before sentencing, *Black filed a pro se motion for a psychological evaluation pursuant to I.C. § 19-2522*. In support of his motion, Black argued that his mental condition would be a significant factor at sentencing because he suffers from mild mental retardation, depression, bipolar disorder, paranoia, and anxiety. *Black's counsel subsequently filed a motion for a psychological evaluation*, stating: "Defendant alleges his mental health will be a significant factor at sentencing. An issue to be addressed is to what extent if any the Defendant has the ability to control his impulses." *The district court acknowledged only the motion filed by counsel and denied the request*, stating: "The Court has no reason to believe that the Defendant's mental condition will be a significant factor at sentencing. In addition, good cause has not been shown."

State v. Black, 161 Idaho 867, 869 (Ct. App. 2017) (emphasis added). The *Black* Court did not suggest, as the State argues in this appeal, that a defendant can raise the district court's failure to order a § 19-2522 evaluation "on direct appeal, irrespective of trial counsel's insistence or acquiescence." (Respondent's Brief, p.8.) On the contrary, the *Black* Court recognized that Black asserted on appeal that the district court erred in denying Black's motion for a psychological evaluation pursuant to I.C. § 19-2522. *Black*, 161 Idaho at 869-70 ("We first

address Black's argument that the district court erred in denying Black's motion for a psychological evaluation pursuant to I.C. § 19-2522").

Furthermore, the State fails to acknowledge Idaho Supreme Court precedent holding that "trial counsel's insistence or acquiescence" in a district court's decision does, in fact, preclude a defendant from raising an issue on appeal, under the invited error doctrine. *See State v. Lankford*, 162 Idaho 477, 484–85 (2017). The State also fails to acknowledge that the Idaho Supreme Court has specifically held that a defendant may not claim on appeal that the district court erred in failing to *sua sponte* order a § 19-2522 evaluation. *See State v. Carter*, 155 Idaho 170, 173 (2013). The State's suggestion that Mr. Mendenhall could have raised the district court's failure to order an I.C. § 19-2522 evaluation as an issue on direct appeal, is contrary to well-established Idaho law.

Next, in arguing Mr. Mendenhall failed to present a *prima facie* claim of prejudice, the State presents a misleading interpretation of the Court of Appeals' holding in *Richman v. State*, 138 Idaho 190 (Ct. App. 2002).[2] The State claims,

> The Court of Appeals has previously held that, to show prejudice on a claim that his attorney was ineffective for failing to present to the sentencing court a psychological evaluation under Idaho Code § 19-2522, a petitioner must present evidence that an additional report would have affected his ultimate sentence.

(Respondent's Brief, pp.8-9 (citing *Richman*, 138 Idaho at 194).) What the State fails to address (though it was addressed in Mr. Mendenhall's Appellant's Brief (p.25)), is that the Court of Appeals had previously found the district court's "summary dismissal of Richman's claim that his mental illness constituted a mitigating circumstance that trial counsel should have raised at sentencing was improper," and noted it had remanded the case "to afford Richman an

[2] Notably, the State fails to address Mr. Mendenhall's argument that the lack of an I.C. § 19-2522 evaluation rendered his sentencing hearing presumptively unreliable. (Appellant's Brief, pp.22-25.)

opportunity to present evidence in support of his position that the district court should reconsider the sentences originally impose." *Richman*, 138 Idaho at 192-94. Assuming, but not conceding, that a post-conviction petitioner must prove that having an I.C. § 19-2522 evaluation would have resulted in a lesser sentence in order to prove prejudice,[3] the *Richman* opinion supports Mr. Mendenhall's argument that he should be afforded the opportunity to meet this burden during an evidentiary hearing, and that summary dismissal was inappropriate.

Finally, the State claims, without providing any analysis, that "the several reports contained as an addendum to [Mr.] Mendenhall's PSI, taken together with his assessment under Idaho Code § 19-2524," met the requirements of I.C. § 19-2522(3). (Respondent's Brief, pp.9-10 (citing R., pp.5-30, 73-83).) The "several reports" the State refers to were hospital records from the four times Mr. Mendenhall was hospitalized for mental health issues, in 1993, 1994, 1996, and 2008, and a GAIN-I Recommendation and Referral Summary, that concluded "Given current involvement, treatment should be coordinated with: Mental health treatment; Legal system involvement." (PSI, pp.5-30, 73-82.) The hospital records show that Mr. Mendenhall has a history of mental illness, and the GAIN assessment shows that Mr. Mendenhall has a history of drug use. These records, some of which were over two decades old when Mr. Mendenhall was sentenced, do not provide what I.C. § 19-2522(3) requires:

> (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;

[3] For the reasons stated at pages 22-25 of his Appellant's Brief, Mr. Mendenhall maintains that the lack of an I.C. §19-2522 evaluation in this case rendered the sentencing hearing presumptively unreliable, and that he need not prove his sentence would have been lesser in order to make a successful claim of ineffective assistance of counsel. The State has chosen not to address this argument. (*See* Respondent's Brief, *generally*.)

(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). The State's blanket assertion, unsupported by analysis, is both factually and legally erroneous.

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 18th day of September, 2018.

/s/ Jason C. Pintler
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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