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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46802-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR-FE-2015-520**
v.	)	
	)	
JAMES DARNELL BLACK,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

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 CHERI C. COPSEY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This is the third time this case has been appealed, and all three appeals are rooted in the same problem – the district court refuses to consider Mr. Black's mental health issues as a significant factor in mitigation in its sentencing decision.[1] This time, the district court's abuse of discretion is evident from the fact that it repeatedly downplayed the significance of Mr. Black's intellectual disability and the reasons it gave for doing so run directly contrary to the applicable legal principles set forth by the United States Supreme Court, which are based on the protections embodied in the Eighth Amendment.

Moreover, the district court's analysis is contrary to the advice and recommendations from the psychological evaluations which, as the Court of Appeals held in the first appeal, were necessary in this case. Additionally, the district court's abuse of discretion is evident from its reliance on a wholly-improper recommendation from an updated presentence report (PSI) to impose the same five-year term it had before, and its likely usurping of the parole board's authority. For all those reasons, for the third time, the district court has abused its discretion by imposing Mr. Black's sentence, as it did so in a manner that was not consistent with the applicable legal standards or reached in an exercise of reason.

Statement of the Facts and Course of Proceedings

On February 19, 2016, pursuant to a plea agreement Mr. Black pled guilty to one count of criminal possession of a financial transaction card. (44191 R., pp.185-86.)[2] In exchange the

[1] This case was assigned to a new district court judge after the second appeal.
[2] This case has been appealed several times, and the Supreme Court ordered the record in this case to be augmented with the records and transcripts prepared in each of those prior appeals. (46802 R., p.2.) Therefore, to avoid confusion, citations to the record or the confidential exhibits

State dismissed several other charges and a persistent violator enhancement. (*See* 44191 R., pp.185-86.) Prior to sentencing, Mr. Black requested the district court order a psychological evaluation. (44191 R., p.204.) The district court denied that motion because it did not believe his mental condition would be a significant issue at sentencing. (44191 R., p.206).

At the ensuing sentencing hearing, the prosecution requested a five year sentence, with four years fixed. (44191 Tr. (4/29/16), p.29, Ls.6-10.) Defense counsel recommended a sentence of five years, with zero years fixed. (44191 Tr. (4/29/16), p.43, Ls.5-8.) The district exceeded both recommendations and imposed the maximum sentence possible – five years, all fixed – without any further explanation. (44191 Tr. (4/29/16), p.52, L.19 - p.53, L.21.) In denying a subsequent motion for leniency, however, the district court explained that it had focused on Mr. Black's extensive criminal history, including charges pending in two other states, the underlying role his cocaine addiction played in triggering his crimes, and thus, the risk that he would present if released back into the community. (44191 R., pp.258-59.)

The Court of Appeals vacated that sentence, holding the district court had erred by denying Mr. Black's motion for a psychological evaluation. *State v. Black* (*Black I*), 161 Idaho 867 (Ct. App. 2017). It explained an evaluation was necessary because there had been reason to believe Mr. Black's mental condition would be a significant issue at sentencing, given the GAIN evaluation's recommendation for such an evaluation and the evidence that Mr. Black had a longstanding history of serious mental illnesses, including formal diagnoses and intermittent mental health treatment. *Id.* at 870-72.

("Conf. Exhs.") will indicate in which case the cited volume was prepared. Additionally, because some of the transcripts within a particular appellate record were prepared in independently bound and paginated volumes, citations to the transcripts will also include the date of the hearing being referred to.

On remand, Dr. Chad Sombke was appointed to conduct the necessary psychological evaluation. He diagnosed Mr. Black with four conditions – stimulant use disorder, mild intellectual disability, other specified personality disorder with antisocial or paranoid traits, and an unspecified depressive disorder. (45316 Conf, Exhs., p.6.) Dr. Sombke explained that Mr. Black's intellectual disability created functional impairment which was only "moderate because he has learned how to cope and manage with his intellectual disabilities." (45316 Conf. Exhs., p.7.) However, Dr. Sombke explained that Mr. Black's drug use may be related to an attempt to self-medicate his other symptoms. (45316 Conf. Exhs., p.8.) For example, using drugs was the "coping mechanism" he had developed to deal with stress. (45316 Conf. Exhs., p.6.) Mr. Black also has moderate functional impairment from his depression and personality disorder, and he has severe functional impairment related to his drug use. (45316 Conf. Exhs., pp.6-7.) Dr. Sombke also explained that Mr. Black had a composite score of 48 in regard to general intellectual functioning, which put him in the .1 percentile range. (45316 Conf. Exhs., p.5)

Dr. Sombke concluded that, while Mr. Black had a high risk to commit future crimes in order "to support his drug addiction," that risk could be reduced if he were able to stabilize his life and remain drug free. (45316 Conf. Exhs., p.8.) He explained that goal could be pursued by providing treatment which was, for the most part, equally available in the community or in the prison. (45316 Conf. Exhs., p.7.) However, he identified two exceptions in that regard. First, Dr. Sombke explained that Mr. Black would need counselling to treat his depression, but that the appropriate counselling "would be much less available in an incarcerated setting than it would be in the community." (45316 Conf. Exhs., p.7.) Second, he explained there was not really any "treatment" for Mr. Black's intellectual disability; rather, that condition needed to be addressed

by providing special accommodations to help Mr. Black cope properly with his disability. (45316 Conf. Exhs., p.8.)

In addition to Dr. Sombke's report, Mr. Black also submitted other medical records, including an attestation from a psychiatrist who had treated Mr. Black in 2000. (Aug. Conf. Exhs., p.220.)[3] At that time, Mr. Black had been diagnosed with Psychosis not otherwise specified, mixed substance abuse, and "mild mental retardation."[4] (Aug. Conf. Exhs., p.220.) The attestation noted that Mr. Black's psychosocial stressors were severe, and that he had a global assessment of functioning score of 70. (Aug. Conf. Exhs., p.220.) The rest of that psychiatrists' notes have apparently been destroyed. (*See* 46802 (Tr. (2/21/19), p.12, L.16 - p.13, L.1.)

At the new sentencing hearing, the prosecutor continued to recommend a five-year sentence with four years fixed. (45316 Tr. (7/24/17), p.6, Ls.16-20.) Defense counsel noted Mr. Black had already served some two and one-half years at that point.[5] (45316 Tr. (7/24/17), p.12, Ls.4-7.) He also confirmed that Oregon had placed a detainer on Mr. Black, and that Ohio also had pending charges against Mr. Black, so he would still have to go to both those states and deal with his charges there.[6] (45316 Tr. (7/24/17), p.13, Ls.4-9.) Trial counsel added that

[3] The Supreme Court granted Mr. Black's motion to augment the record in this case with those records as a confidential exhibit. (Order Granting Motion to Augment as a Confidential Exhibit (dated 9/17/19).)

[4] As the Court of Appeals has explained, the term "retarded" is now seen as an archaic term of art, and its use is now disfavored. *State v. Hamlin*, 156 Idaho 307, 309 n.1 (Ct. App. 2014) (citing I.C. § 73-114A). Rather, the term "intellectual disability" is preferred, as it is considered more accurate and respectful. *Id.*

[5] The district court subsequently determined that Mr. Black was also entitled to credit an additional two months of time he was held under an Idaho detainer in this case while he was incarcerated in Colorado. (46802 R., pp.43-47; *see generally* 45943 R.)

[6] The district court noted the warrant issued in Ohio was only executable within the state's borders. (46802 Tr. (2/21/19), p.20, L.21 - p.21, L.3.)

Mr. Black's family was exploring the possibility he might be eligible for a program like mental health court in the Ohio case. (45316 Tr. (7/24/17), p.13, Ls.10-15.) As such, defense counsel recommended the district court simply order credit for time served in this case. (45316 Tr. (7/24/17), p.13, Ls.2-5.)

The district court, however, exceeded both recommendations and again insisted on imposing the five-year sentence, all fixed. (45316 Tr. (7/24/17), p.27, Ls.21-24.) It explained it appreciated that Mr. Black's intellectual disability was a factor which mitigated against using that sentence to promote the goal of retribution. (45316 Tr. (7/24/17), p.26, Ls.9-14.) However, the district court explained, it was only focused on the goal of protecting society. (45316 Tr. (7/24/17), p.26, Ls.15-17.) The district court explained that nothing in Dr. Sombke's report changed its evaluation in that regard, and so, Mr. Black's intellectual disability "is not a significant factor at sentencing." (45316 Tr. (7/24/17), p.26, Ls.1-4, p.27, Ls.15-18.) Rather, focusing on Mr. Black's criminal history and Dr. Sombke's conclusion that Mr. Black would remain a risk to commit new crimes, the district court decided the maximum possible sentence was the only way to protect society. (45316 Tr. (7/24/17), p.27, Ls.7-10.)

Again, the Court of Appeals vacated that sentence. *State v. Black* (*Black II*), 2018 WL 4940310 (Ct. App. 2018), *unpublished*. It found that the district court had done more than simply weigh Mr. Black's intellectual disability against the protection of society and found the protection of society to be more important, as the State had argued on appeal. *Id*. at *3. Rather, it found the district court had determined Mr. Black's intellectual disability was not a significant factor to be weighed in the first place. *Id*. at *4. It explained that was erroneous because, while other factors might ultimately outweigh that factor, the significance of Mr. Black's intellectual disability could not be ignored. *See id*. Therefore, the Court of Appeals concluded that, by

finding Mr. Black's intellectual disability "is not a significant factor at sentencing" in light of his criminal history and the need to protect society, the district court had failed to properly consider Mr. Black's intellectual disability as a significant factor in its own right. *Id.* at *4. Based on the procedural history of the case, the Court of Appeals ordered the case be assigned to a new district court judge on remand. *Id.* at *5.

On remand, the new district court judge ordered a second psychological evaluation specifically to get an assessment of Mr. Black's IQ.[7] (46802 R., p.67; 46802 Tr. (2/21/19), p.6, Ls.12-21.) Dr. Melinda Jorgensen conducted the new evaluation, and she concluded that Mr. Black made appropriate efforts to complete the evaluation and that he was not feigning or exaggerating his symptoms. (46802 Conf. Exhs., pp.7-8.) In light of that conclusion, she noted his performance regarding "impulse responding and errors" was "somewhat lower than expected." (46802 Conf. Exhs., p.7.) She concluded Mr. Black had an IQ of only 67, which put him in the 1st percentile. (46802 Conf. Exhs., p.7.) She explained that score meant Mr. Black was in the borderline range in regard to his mental control abilities, his attention management, and his speed of processing. (46802 Conf. Exhs., p.7.) Moreover, she explained, Mr. Black "has been unable to live independently due to limited adaptive functioning skills." (46802 Conf. Exhs., p.8.)

Dr. Jorgensen diagnosed Mr. Black with mild intellectual disability, stimulant use disorder, major depressive disorder, and generalized anxiety disorder. (46802 Conf. Exhs., p.8.) She explained that these conditions were intertwined – that Mr. Black struggled due to his

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[7] The Court of Appeals had noted there was some question about whether the Shipley-2 evaluation which Dr. Sombke had used to evaluate Mr. Black's general intellectual functioning actually measured his IQ. *Black II*, 2018 WL 4940310 *4 n.2. The new district court judge concluded it did not, and therefore, that an additional evaluation was necessary. (*See* 46802 Tr. (12/6/18) p.11, Ls.7-18; *accord* 46802 Tr. (2/21/19), p.38, L.10 - p.39, p.17.)

intellectual disability, and that would get worse when his depression flared up, and he would turn to cocaine in an effort to deal with those symptoms, and then would commit crimes to support his drug abuse. (46802 Conf. Exhs., p.9.) She specifically described his behavior within this cycle as being "impulsive": that, during periods of his stress, "he is unable to manage triggers and impulses." (46802 Conf. Exhs., p.10.) She also explained:

> Mr. Black's relationships with family members becomes strained when he is depressed, as he tends to withdrawal [sic] and avoid contact with others. *He is also impulsive* and flees the area and engages in poor decision making by stealing credit cards to support his drug addiction and avoid feeling negative emotions.

(46802 Conf. Exhs., p.9 (emphasis added).)

Like Dr. Sombke, Dr. Jorgensen gave several specific recommendations for treating Mr. Black's conditions, and she specifically noted that "[i]ncarceration is not a supportive environment, and long-term incarceration often has negative cognitive and psychological effects on those incarcerated." (46802 Conf. Exhs., p.10.) As such, she explained Mr. Black would need intensive and long term counselling during any period of incarceration to avoid those effects. (46802 Conf. Exhs., p.10.) In addition, she recommended he receive cognitive programs and drug treatment. (46802 Conf. Exhs., p.10.) Like Dr. Sombke, she concluded that providing all this treatment could help reduce Mr. Black's risk to reoffend, which was, at that point, in the moderate to high range. (46802 Conf. Exhs., p.12.)

In addition to Dr. Jorgensen's evaluation, the district court also ordered an update to the presentence report. (46802 Tr. (12/6/18), p.9, L.8 - p.10, L.8.) The author of that update concluded: "The results of the psychological evaluation likewise do not seem to justify deviation from the Court's original sentence." (46802 Conf. Exhs. p.2.) At the sentencing hearing, the district court described this as a specific recommendation that Mr. Black "serve the full five years." (46802 Tr. (2/21/19), p.61, Ls.18-19.)

Mr. Black submitted a sentencing memorandum in which he asked the district court to impose a sentence of four years fixed, noting that he had already served three years, eleven months. (46802 R., p.72; *see, e.g.,* 46802 Tr. (2/21/19), p.17, Ls.12-14 (asking for a sentence for time served as an alternative).) Mr. Black argued that imposing a five-year fixed sentence would be improper because it would not give the necessary, significant consideration to his intellectual disability. (46802 R., pp.73-75.) Specifically, he explained that various United States Supreme Court decisions made it clear that mental impairments like his were inherently mitigating under Eighth Amendment principles because they reduced his overall moral culpability. (46802 R., pp.73-75; *accord* 46802 Tr., (2/21/19), p.10, L.24 - p.11, L.8.) The prosecutor continued to recommend a five-year sentence with four years fixed. (46802 Tr. (2/21/19), p.7, Ls.18-20.)

The district court explained it had not read the prior sentencing transcripts in the effort to not be tainted by the previous judge's comments. (46802 Tr. (2/21/19), p.18, Ls.21-23.) It had, however, read everything else in the record. (46802 Tr. (2/21/19), p.64, Ls.19-25; *see* 46802 Tr. (12/6/18), p.5, Ls.8-9 (the district court indicating it had read the appellate decisions as well).) It also stated it would be considering his intellectual disability as a significant issue. (46802 Tr. (2/21/19), p.40, Ls.9-15.)

Despite that, it proceeded to downplay the significance of Mr. Black's intellectual disability as a factor at sentencing. For example, it distinguished Mr. Black's case from one of the cases he cited[8] because that it felt the defendant in that case was "profoundly, intellectually

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[8] *United States v. Larson*, 558 F.Supp.2d 1103 (D.Mont. 2008), *aff'd in part, vacated in part by United States v. Larson*, 346 Fed.Appx. 166 (9th Cir. 2009). For clarification, the federal district court in *Larson* found the defendant guilty of receipt and possession of child pornography, and proceeded to explain why the mandatory minimum sentence for receipt would not be appropriate under the Eighth Amendment because of the defendant's intellectual disability. *Larson*, 558 F.Supp.2d 1103. That analysis was not addressed on appeal. *See generally Larson*, 346 Fed.Appx. 166. Rather, it appears the receipt charge was subsequently dismissed without

disabled. Profoundly. And I say that, unlike Mr. Black, who is mildly intellectually disabled." (46802 (2/21/19) Tr., p.36, Ls.3-9). In fact, it "emphasize[d] mild, this is not a profoundly disable[d] individual." (46802 Tr. (2/21/19), p.50, Ls. 7-8; *accord* 46802 Tr. (2/21/19), p.48, L.9 - p.49, L.3.) It also emphasized the fact that it felt the underlying criminal conduct "deliberate," not "impulsive." (*See* 46802 Tr. (2/21/19), p.45, Ls.14-21 ("I really do not think these crimes are impulsive. Impulsive is kind of crimes of opportunity, and according to Mr. Black's own words, you're going to see that these are well thought-out crimes, and he expresses that, not impulsive."); *accord* 46802 Tr. (2/21/19), p.53, L.5 - p.54 L.10.) The district court did not mention Dr. Jorgensen's discussion of Mr. Black's impulsive behaviors. (*See generally* 46802 Tr. (2/21/19); *compare* 46802 Conf. Exhs., pp.7-10.)

The district court then explained (as the prior district court had), its focus was on Mr. Black's extensive history of stealing and thus, on the protection of society. (46802 Tr. (2/21/19), p.40, Ls.2-4.) The district court concluded, "the one thing I do know is if he's incarcerated, he's not going to be creating new victims on the outside." (46802 Tr. (2/21/19), p.62, Ls.7-13.) It also explained that a long fixed sentence was not inconsistent with the goal of rehabilitation because it "during that time in his best interest he will be able to further stabilize his mental health, he will be able to have further sobriety." (46802 Tr. (2/21/19), p.63, Ls.18-22.) It did not discuss Dr. Jorgensen's explanation of why an extended term of incarceration would not promote rehabilitation, particularly if Mr. Black did not get counselling during that time, nor did it discuss Dr. Sombke's concern that the necessary counselling was less

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prejudice, and the defendant appealed that decision. *See id.* at 168. The Ninth Circuit explained that issue was not ripe (the receipt charge had apparently not been refiled) and that any attempt to refile that charge would be barred by the Double Jeopardy Clause. *Larson*, 346 Fed.Appx. at 168. As a result, it "vacate[d] the district court's decision on the merits of Larson's challenge to the receipt statute and its mandatory minimum provision." *Id.*

available in prison. (*See generally* 46802 Tr. (2/21/19); *compare* Conf. Exh. 46802, p.10; Conf. Exh. 45316, p.7.)

The district court also explained that a sentence which allowed for the possibility of parole did not make sense because of the detainers on Mr. Black from other states. (46802 Tr. (2/21/19), p.64, Ls.2-13.) As such, as the PSI author recommended, the district court imposed, for the third time, a five-year sentence, all of which was fixed.[9] (46802 Tr. (2/21/19), p.65, Ls.1-5.) Mr. Black filed a notice of appeal timely from the resulting judgment of conviction. (46802 R., pp.78, 82.)

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[9] Mr. Black filed a motion for reduction of sentence under I.C.R. 35. (46802 R., p.158.) The district court denied that motion primarily because it found there was no new or additional information presented about the case, just additional legal arguments. (46802 R., pp.165-67.)

ISSUE

Whether the district court abused its discretion by not acting consistently with the applicable legal standards, which are rooted in the Eighth Amendment, when it imposed Mr. Black's sentence.

ARGUMENT

The District Court Abused Its Discretion By Not Acting Consistently With The Applicable Legal Standards, Which Are Rooted In The Eighth Amendment, When It Imposed Mr. Black's Sentence

A. Standard Of Review

Sentencing decisions are committed to the district court's discretion. *State v. Reinke*, 103 Idaho 771, 771 (Ct. App. 1982). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018). In this case, as it has twice before, the district court's sentencing decision failed under the third and fourth prongs of that test.

B. The Legal Standards Applicable To The Consideration Of A Defendant's Intellectual Disability At Sentencing Are Rooted In The Protections Embodied In The Eighth Amendment

"The Eighth Amendment proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002)). This protection "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (alterations from *Kennedy*). This consideration "must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Therefore, one of the guiding principles of the Eighth Amendment is that "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 318.

To that point, cognitive and behavioral impairments make a person less morally culpable than a person without those impairments. *Id.* at 320. Therefore, the United States Supreme Court has repeatedly reaffirmed, cognitive and behavioral impairments are "inherently mitigating" under the Eighth Amendment. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (citing *Atkins*, 536 U.S. at 316). Thus, to give a person's intellectual disability the significant consideration, the sentencing court should consider the fact that the person with the intellectual disability was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," so as to consider whether he "was less morally culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 322-23 (1989) (internal quotation omitted), *abrogated on other grounds by Atkins*, 536 U.S. 304.

While these considerations often arise in the context of capital cases, the United States Supreme Court has applied these principles in the non-capital context. *See, e.g., Graham v. Florida*, 560 U.S. 48, 61 (2010) (applying them to a fixed-life sentence). As a result, the failure to properly consider evidence in this regard is more than a simple abuse of discretion – it raises constitutional concerns. *See, e.g., Atkins*, 536 U.S. at 311 (quoting *Robinson v. California*, 370 U.S. 660, 666-67 (1962)) (explaining that a 90-day sentence, though not excessive as a matter of law, was still impermissibly excessive under the Eighth Amendment when it was imposed "as a penalty for the 'status' of narcotic addiction," and applying that rationale in the context of cognitive impairments). Of course, the requirement that intellectual disability be considered as a significant factor does not mean that it must be considered the overriding factor or that it be given the most weight in the ultimate sentencing decision. *See, e.g., Black II*, 2018 WL 4940310, *5. But it must still be considered as a significant factor within that weighing. *Id.* at **3-4.

C. The District Court Consistently Downplayed The Significance Of Mr. Black's Intellectual Disability For Reasons Inconsistent With The Applicable Legal Standards Or In Ways Contrary To The Facts Of This Case

Though the district court asserted it would be considering Mr. Black's intellectual disability as a significant factor (*see* 46802 Tr. (2/21/19), p.40, Ls.9-15), its subsequent explanations of the sentence demonstrate it was not actually doing so. *See State v. Quintana*, 155 Idaho 124, 129 (Ct. App. 2013) (explaining that, for a sentencing decision to be held within the district court's discretion, "the record must show the court adequately considered the substance of the factors when it imposed the sentence"); *compare Tennard*, 542 U.S. at 283 ("Despite paying lipservice to the principles guiding issuance of a [certificate of appealability], the Fifth Circuit's analysis proceeded along a distinctly different track.") (internal citation omitted); *State v. Van Komen*, 160 Idaho 534, 540 (2016) (explaining that, while there was a way by which the district court could have properly made the sentencing decision it did, its "own words" revealed that its actual reasoning was contrary to the Fifth Amendment's protections and, therefore, its decision had to be vacated).

What the record actually shows is that the district court repeatedly downplayed the significance of Mr. Black's intellectual disability as a mitigating factor. As such, the district courts actual words demonstrate it did exactly the same thing that the previous judge erroneously did at the second sentencing hearing, just in a less express manner. *Compare Black II*, 2018 WL 4940310 **3-4. Therefore, it abused its discretion for the same reasons as before.

Even more troubling, the reasons the district court gave for why Mr. Black's intellectual disability was not, in its opinion, a significant factor have been rejected by the United States Supreme Court as being contrary to the applicable Eighth Amendment principles or are otherwise contrary to the recognized legal standards. As such, even if the district court was

giving Mr. Black's intellectual disability "significant" consideration, it did not do so in a way that was consistent with the applicable legal standards, and so, still abused its discretion.

1. <u>The district court improperly concluded Mr. Black's intellectual disability was not mitigating because it was "mild," rather than "profound"</u>

The district court repeatedly and expressly focused on the severity of Mr. Black's condition as a reason his intellectual disability was not significant. (46802 (2/21/19) Tr., p.36, Ls.3-9, p.48, L.9 - p.49, L.3, p.50, Ls.7-8.). The United States Supreme Court has, however, held that the distinction between "mild" and "severe" impairments is not an appropriate basis upon which to disregard the impact of such a condition on the defendant's culpability. *Tennard*, 542 U.S. at 286-87. Specifically, the *Tennard* Court explained: "We have never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability," but, the Court made clear, "to say that only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency is incorrect." *Id.*; *accord Black II*, 2018 WL 4940310 (explaining that, while a defendant's intellectual disability does not have to be given the most weight among the relevant factors, it still must be considered significant within that evaluation).

The *Tennard* Court then looked specifically at intellectual disabilities and explained they are not trivial features of a defendant's character: "impaired intellectual functioning is *inherently* mitigating." *Id.* at 287 (citing *Atkins*, 536 U.S. at 316) (emphasis added). As such, even a "mild" intellectual disability, by its very nature, decreases the defendant's culpability when compared to an uninhibited adult. *See id.*; *accord Black II*, 2018 WL 4940310. Therefore, it is

improper to downplay the significance of an intellectual disability just because it is mild when compared to other intellectual disabilities. *See Tennard*, 542 U.S. at 286-87.

That is, however, precisely what the district court did by "emphasize[ing] mild, this is not a profoundly disable[d] individual." (46802 Tr. (2/21/19), p.50, Ls.7-8.) That error was on particular display in the way the district court addressed Mr. Black's arguments under *Larson*: "Mr. Larson was profoundly, intellectually disabled. Profoundly. And I say that, unlike Mr. Black, who is mildly intellectually disabled." (46802 Tr. (2/21/19), p.36, Ls.3-9.) What the district court was saying was that Mr. Larson's intellectual disability was mitigating because it was severe, whereas Mr. Black's was not mitigating because it was only mild, and that is improper under *Tennard*. Thus, by considering Mr. Black's intellectual disability as not mitigating because it was not severe, the district court failed to give it the significant consideration required by the applicable legal standards.

Moreover, the abuse of the district court's discretion in this regard is revealed by the fact that its basis for distinguishing *Larson* was actually directly contrary to the information in the two psychological evaluations of Mr. Black. The district court determined Mr. Larson was far more intellectually disabled than Mr. Black because Mr. Larson's disability affected his day-to-day functioning. (46802 Tr. (2/21/19), p.36, Ls.12-21.) Mr. Larson was, for example, unable to tie his shoes or keep his living area clean, though his thinking abilities were equivalent to a nine-year old's, and he was capable of reading at a third-grade level. *Larson*, 558 F.Supp.2d at 1111-12 (also noting his parents also appeared to have their own adaptive and social-functioning problems, which likely exacerbated Mr. Larson's issues).

However, Dr. Jorgensen expressly concluded that Mr. Black's disability also left him "unable to live independently due to limited adaptive functioning skills." (46802 Conf. Exhs.,

p.8.) The reason Mr. Black appeared more capable than Mr. Larson was, as Dr. Sombke explained, that Mr. Black had been able to develop certain coping mechanisms to deal with his impairments. (45316 Conf. Exhs., pp.6-8.) However, the appropriateness of those mechanisms is debatable since using cocaine was one of the primary ways Mr. Black "copes" with his symptoms. (45316 Conf. Exhs., p.6; *accord* 46802 Conf. Exhs., p.9.) Moreover, Dr. Jorgensen specifically noted that these coping mechanisms are not overly effective, as Mr. Black's performance regarding "impulse responding and errors" is still "somewhat lower than expected," when compared with the way he presents himself generally. (*See* 46802 Conf. Exhs., p.7.) In fact, of the two, *Mr. Larson* had the higher IQ score – he scored 70, *Larson*, 558 F.Supp.2d 1111, whereas Mr. Black's only scored 67. (46802 Conf. Exhs., pp.7-8.) Thus, while Mr. Larson's disability may have presented in more drastic ways than Mr. Black's, the two were not as different as the district court made out in terms of the significance of their conditions or their impact on the person's culpability.

As such, the psychological examination reports make it clear that Mr. Black's intellectual disability, mild though it might be described, still had a significant impact on the way in which he acted when compared with an uninhabited adult – "by definition," his disability affected his ability to conform his conduct to expectations, and thus, reduced his moral culpability. *Atkins*, 536 U.S. at 318. Therefore, his intellectual disability needed to be given significant consideration in mitigation in its own right, lest the resulting sentence be unconstitutionally disproportionate to the severity of his conduct and culpability. *See id.* As a result, the fact that the district court downplayed the significance of Mr. Black's intellectual disability on the improper determination that it was only "mild" demonstrates that it did not act in accordance with the applicable legal standards, and thus, abused its discretion.

2. The district court improperly concluded Mr. Black's intellectual disability was not mitigating because his underlying conduct was "deliberate" rather than "impulsive"

The district court also repeatedly downplayed the significance of Mr. Black's intellectual disability based on its conclusion that his criminal conduct was "deliberate" rather than "impulsive." ((*See* 46802 Tr. (2/21/19), p.45, Ls.14-21 ("I really do not think these crimes are impulsive. Impulsive is kind of crimes of opportunity, and according to Mr. Black's own words, you're going to see that these are well thought-out crimes, and he expresses that, not impulsive."); *accord* 46802 Tr. (2/21/19), p.53, L.5 - p.54 L.10.) Basically, what the district court was saying is that Mr. Black's intellectual disability did not affect his culpability because he was able to act deliberately.

That analysis runs contrary to the Eighth Amendment principles long recognized by United States Supreme Court precedent: "Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." *Tennard*, 542 U.S. at 288. In other words, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Penry*, 492 U.S. at 322. That is because impulsivity often manifests, as in Mr. Black's case, by affecting the person's "attention span, attention focus, and selectivity in the attention process," and those issues can prevent the person from responding appropriately in a given situation. Diane Courselle, Mark Wyatt, & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 Wyo. L. Rev. 1, 22 (2001).

In *Penry*, for example, the defendant had acted "deliberately" in deciding to kill a person so as to avoid detection of other criminal conduct. *Id.* at 322-23. However, that did not mean his intellectual disability was not still mitigating. Rather, the *Penry* Court held his intellectual disability was still significant because the juror who concluded he deliberately killed his victim

"could also conclude that Penry was less morally culpable than defendants who have no such excuse but who acted 'deliberately' as that term is commonly understood" because his intellectual disability made him less able "to control his impulses or to evaluate the consequences of his conduct." *Id.* Therefore, even if the intellectually disabled person acts deliberately, the district court must still give significant consideration to the impact their disability had on their moral culpability for engaging in that deliberate conduct. *See id.*; *see also Tennard*, 542 U.S. at 288.

The psychological evaluations actually demonstrate that is the case with Mr. Black. In fact, Dr. Jorgensen's conclusions directly contradict the district court's assertions that Mr. Black's conduct was not impulsive. Specifically, Dr. Jorgensen explained that Mr. Black struggles with adaptive functioning skills because of his intellectual disability. (46802 Conf. Exhs., p.8.) These struggles become worse during depressive episodes. (46802 Conf. Exhs., p.9.) During these periods of increased stress, "he is unable to manage triggers *and impulses*," and so, begins using cocaine. (46802 Conf. Exhs., p.10 (emphasis added).) The stress continues to increase as his conduct puts strain on the relationships with his family. (46802 Conf. Exhs., p.9.) As a result, "[*h*]*e is also impulsive* and flees the area and engages in poor decision making by stealing credit cards to support his drug addiction and avoid feeling negative emotions." (46802 Conf. Exhs., p.9 (emphasis added).) Thus, the reason he engaged in this deliberate is that he is acting on impulse.

As such, in Mr. Black's case, his conduct is properly described as *both* "deliberate" *and* "impulsive," not one or the other. Therefore, the district court abused its discretion by downplaying the significance of Mr. Black's intellectual disability based on the idea that those

two concepts are mutually exclusive. In doing so, it failed to act consistent with the applicable legal standards and with the facts of this case.

3. The district court's improper focus on incapacitating Mr. Black demonstrated it was not giving his intellectual disability the required significant consideration

The district court also demonstrated it was not giving significant consideration to Mr. Black's intellectual disability as a mitigating factor when it asserted the only way it felt it could protect society was to incapacitate Mr. Black by keeping him out of society for as long as possible. (46802 Tr. (2/21/19), p.62, Ls.11-13 ("The one thing I do know is if he's incarcerated, he's not going to be creating new victims on the outside.").) Again, its analysis flies in the face of United States Supreme Court precedent under the Eighth Amendment: "Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73. The Idaho Supreme Court has also addressed this point, explaining that focusing on one factor (such as incapacitation) regardless of what the mitigating factors show means the district court has not given those other factors the significant consideration required. *See State v. Knighton*, 143 Idaho 318, 320 (2006) (explaining that abuses of discretion had been found in various cases because the district court had failed to give significant consideration to mitigating factors by improperly focusing on one goal of sentencing to the exclusion of others).

The district court's only attempted justification of its incapacitation analysis was the idea that incapacitating Mr. Black for as long as possible would promote his rehabilitation by forcing a longer period of sobriety and treatment on him. (46802 Tr. (2/21/19), p.63, Ls.18-22.) That attempted justification does not reflect an exercise of reason. In fact, it is so irrational that Congress has passed legislation instructing the federal courts to not use it, and the United States

Supreme Court has recognized that restriction as valid: "Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation." *Tapia v. United States*, 564 U.S. 319, 328-29 (2011) (addressing 18 U.S.C.A. § 3582(a)).

The *Tapia* Court explained the reason that it is unreasonable for sentencing courts to consider elongating a period of confinement to promote rehabilitation is that sentencing courts do not actually have the power to ensure the defendant will receive the rehabilitative opportunities during the ensuing period of incarceration. *Id.* at 331; *cf. State v. Le Veque*, 164 Idaho 110, 117 (2018) (explaining that, while the district court had recommended the defendant receive sex offender treatment, IDOC decided to put him in substance abuse treatment instead, and that the district court could not relinquish jurisdiction based, in any part, on the fact that the defendant did not get the particular treatment it had recommended).

Moreover, the district court's conclusion in this regard is contradicted by the psychological evaluations. In fact, Dr. Jorgensen actually explained that long term incarceration would *not* promote Mr. Black's rehabilitation: "Incarceration is not a supportive environment, and long term incarceration often has negative cognitive and psychological effects on those incarcerated." (46802 Conf. Exhs., p.10.) Rather, both Dr. Jorgensen and Dr. Sombke explained Mr. Black would also need to be provided treatment and accommodations to help him maintain his sobriety and medication regimen upon his eventual release. (46802 Conf. Exhs., pp.7-10; 45316 Conf. Exhs., pp.7-8.) This is because Mr. Black's intellectual deficiency limits his adaptive functioning skills and decreases his ability to control his impulses. (46802 Conf. Exhs., pp.7-8.) Mr. Black currently deals with that stress by using cocaine, and then commits crimes to support his cocaine use. (46802 Conf. Exhs., pp.7-9.) Mr. Black explained that this default to known patterns in times of stress is called "intellectual rigidity." (46802 Tr. (2/21/19), p.34,

Ls.1-20.) Therefore, he needs access to programming during that period of incarceration to help him learn how to deal with his issues, how to break the pattern of rigidity to promote *meaningful* rehabilitation. Simply warehousing him in a sober environment is not enough, according to the psychological evaluations. Since the district court cannot ensure such programming even if it did recommend it, it was not reasonable to conclude that an increased term of incarceration would actually serve the goal of rehabilitation.

The bigger problem in this regard is that, as Dr. Sombke noted, Mr. Black was significantly less likely to receive the sort of counselling he needs in that regard while he is incarcerated. (45316 Conf. Exhs., p.7 ("Treatment for depression usually includes psychotropic medications and counselling. He could receive medication in an incarcerated setting and in the community, but counselling would be much less available in an incarcerated setting than in the community.") Thus, the two psychological evaluations reveal that a longer period of incarceration would actually *not* promote Mr. Black's rehabilitation despite the forced sobriety.

As such, the district court's attempt to justify the longer term of incarceration on the basis represents a failure to exercise reason and consider all the relevant facts in the record. Rather, the district court's analysis about using this sentence to incapacitate Mr. Black regardless of other considerations does precisely what *Graham* said is not permitted by the Eighth Amendment's protection against disproportionate sentences. As such, it abused its discretion by imposing the five-year, all-fixed, sentence.

4. The district court improperly relied on the PSI's specific recommendation to not deviate from the original, tainted sentence

The conclusion that the district court was not giving significant consideration to Mr. Black's intellectual disability is also demonstrated by the fact that it relied on the updated

presentence report's recommendation that "he serve the full five years," that the district court not use the psychological evaluations to justify "deviation from the Court's original sentence." (46802 Tr. (2/21/19), p.61, Ls.18-19; 46802 Conf. Exhs., p.2.) It is clearly improper for the district court to have relied on such a recommendation because the Idaho Supreme Court has made it clear the PSI authors are not permitted to give specific recommendations as to the length of the sentence in the first place.[10] I.C.R. 32(c); *cf. State v. Draper*, 151 Idaho 576, 596 (2011) (noting that a statement in a PSI which suggested the author was recommending a sentence of life without parole was "inappropriate," and the only reason that did not create reversible error in the face of the defendant's objection was that, unlike in Mr. Black's case, there was no evidence the district court had actually read that recommendation in that particular manner).

The district court's reliance on that recommendation in this case is particularly troubling given the procedural history of this case. The "original sentence," which the PSI author was recommending this district court judge adopt despite the information in the psychological evaluations, was problematic *specifically because* it had not given proper consideration to the information in the psychological evaluations. *See Black II*, 2018 WL 4940310, **3-4. Thus, by relying, even in part, on that improper recommendation, the district court infused its decision

[10] Because neither party objected to the PSI's improper recommendation below, Mr. Black is not claiming that the improper recommendation in the PSI should, itself, result in a new sentencing hearing. *Compare State v. Rollins*, 152 Idaho 160 (Ct. App. 2011) (discussing whether such errors could still be reviewed under I.C.R. 32 for "manifest disregard" for the rule, rather than as "fundamental error"); *see also State v. Clinton*, 155 Idaho 271, 272 n.1 (2013) (explaining that the fundamental error test replaced the manifest disregard test in that context). Rather, he is simply arguing the district court's reliance on that information shows it was not acting consistently with the applicable legal standards or in an exercise of reason when it imposed his sentence.

with the error that permeated the original sentence – that it was imposed without giving the requisite significant consideration to his intellectual disability.[11]

5. The district court's conclusion that a sentence with an indeterminate term was not appropriate in Mr. Black's case was not based on an exercise of reason and impermissibly usurped the authority constitutionally given to the Parole Board

Finally, the district court's failure to exercise reason in imposing Mr. Black's sentence is apparent in its assertion that "I just don't thing that [it] makes sense" to impose the sentence repeatedly recommended by the prosecutor (five years with four fixed) because, in the district court's mind, providing Mr. Black an opportunity for release on parole would be meaningless due to Oregon's detainer on him. (46802 Tr. (2/21/19), p.64, Ls.2-18.) The district court's belief in that regard is unfounded. Idaho law provides for interstate compacts, which allow an inmate to serve time on an Idaho sentence in another state, and that law specifically accounts for the possibility that inmate will be on parole during that time. I.C. § 20-701, Art. IV(c). He would still be serving the Idaho sentence even if he were ultimately incarcerated in that other state. He might even have been able to serve that time in the community, if he were able to post bail during the pretrial proceedings in Oregon, or if Oregon chose to sentence him to a period of supervised release.[12]

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[11] This is not to say that the new district court judge was trying to let the prior sentencing decision influence its decision. (*See* 46802 Tr. (2/21/19), p.18, Ls.19-25 (the new judge explaining she had not read the prior sentencing transcripts to avoid being influenced by the prior judge's comments).) However, she did read the appellate opinions in this case. (46802 Tr. (12/6/18), p.5, Ls.8-9.) As such, she was aware of the nature of the prior judge's error, and that it had tainted the entirety of the "original sentence" imposed in this case. *See Black II*, 2018 WL 4940310, **3-4. As a result, relying on the PSI's recommendation still introduced the taint from the prior judge's analysis into the new judge's decision.

[12] Just because this particular sentencing judge felt a term of incarceration was appropriate, that does not mean other judges were required to reach the same conclusion. *See State v. Findeisen*, 133 Idaho 228 (Ct. App. 1999) (finding an abuse of discretion when the district court decided to

Moreover, that situation could be specifically addressed if Mr. Black's release on parole were conditioned on qualifying for an interstate compact. *Compare State v. Gentry*, 2014 WL 2446544, *4 (Ct. App. 2014) (discussing a case in which the district court had made securing an interstate compact a fundamental condition of probation and provided for an alternative disposition if the compact did not go through).[13] Therefore, the district court's conclusion that imposing a sentence with an indeterminate portion did not "make[] sense" demonstrates a failure to exercise reason.

More concerning, however, is the fact that the district court's analysis in that regard was actually attempting to pre-determine Mr. Black's suitability for release on parole, and that sort of analysis likely usurped the power of the Parole Board. *Compare State v. Chapman*, 121 Idaho 351, 355 (1992) (reversing an order granting leniency under I.C.R. 35 because the delay in granting that motion had resulted in the district court, "although perhaps unintentionally, usurp[ing] the constitutional duties of the parole commission"); *see* I.C. § 20-210A (citing IDAHO CONST. art. IV, § 7). It is the Parole Board that ultimately has discretion to determine whether or not to parole an inmate, and it is required to consider any changes in the person's situation between sentencing and parole eligibility as part of that decision. *See* I.C. § 20-223(5)-(6). Therefore, the district court's refusal to consider a sentence with a period of indeterminate time

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impose a harsher sentence in one case in order to make up for what it felt was an unduly-lenient concurrent sentencing decision by a different district court judge).

[13] Mr. Black recognizes that unpublished decisions do not constitute precedent, and he does not cite *Gentry* as authority for a particular decision in this case. Rather, he merely references it as historical examples of how a learned court has used interstate compacts in a similar situation. *Compare Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant had discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriat[e].' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

based on its misinformed pre-evaluation of whether parole could be effectively employed in this case shows an abuse of its discretion because it was not consistent with the applicable legal standards, nor does it reflect an exercise of reason.

For any or all of these reasons, the district court's failure to act consistently with the applicable legal standards, most of which are derived from the Eighth Amendment, demonstrates it abused its discretion when it insisted on imposing a five-year sentence, all fixed, on Mr. Black. As such, this Court should reverse that decision for the same reasons it vacated that sentence before.

CONCLUSION

Mr. Black respectfully requests this Court reduce his sentence as it deems appropriate or, alternatively, remand this case for another new sentencing hearing.

DATED this 25th day of September, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas