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O'Neal v. State Appellant's Brief Dckt. 46239

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JIMMIE O'NEAL,	)	
	)	**NO. 46239-2018**
Petitioner-Appellant,	)	
	)	**GOODING COUNTY NO. CV24-18-216**
v.	)	
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE ERIC WILDMAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jimmie O'Neal filed a timely petition for post-conviction relief asserting, *inter alia*, that his trial counsel was ineffective in failing to request a pre-sentence neuropsychological examination and an MRI. Mr. O'Neal asserts that the district court erred in failing to grant his motion for appointment of counsel and erred by summarily dismissing all of his claims, as there is a genuine issue of material fact as to whether his counsel's failure to request a neuropsychological evaluation and an MRI constituted deficient performance. Mr. O'Neal contends that he asserted and showed prejudice, as a neuropsychological evaluation and an MRI would likely have shown cognitive deficits or impairments such that the district court would not have found Mr. O'Neal's decision-making on the date of the incident was an aggravating factor, justifying a sentence in excess of what the parties recommended. Mr. O'Neal contends that these errors necessitate a remand of his case to the district court for appointment of counsel and an evidentiary hearing on his claims.

Statement of the Facts and Course of Proceedings

In 2017, Mr. O'Neal was charged with second degree murder after he shot his son-in-law during an argument. (R., pp.37, 69-70.) Mr. O'Neal pled guilty to voluntary manslaughter pursuant to a plea agreement. (R., p.138.) In exchange for his guilty plea, the State agreed to recommend a sentence of ten years, with three years fixed. (R., p.8.) However, the district court sentenced Mr. O'Neal to twelve years, with six years fixed. (R., pp.9, 72.)

Mr. O'Neal timely appealed from the Judgment of Conviction. (R., p.83.) On appeal, Mr. O'Neal asserted that the district court had imposed an excessive sentence. (R., p.83.) Mr. O'Neal's sentence was affirmed by the Idaho Court of Appeals in *State v. O'Neal*, Dkt. No.

45172, 2018 Unpublished Opinion No. 324, Idaho Court of Appeals, Jan. 17, 2018, and a remittitur was filed on February 12, 2018. (R., p.83.)

On April 20, 2018, Mr. O'Neal filed a petition for post-conviction relief alleging, *inter alia*, that his trial counsel was ineffective for failing to further investigate and present to the court a complete picture of Mr. O'Neal's mental health issues. (R., pp.10-11.) In his petition, Mr. O'Neal asserted that his counsel was deficient where he failed to investigate Mr. O'Neal's mental health conditions, including obtaining an MRI, such that the district court was aware at sentencing only of Mr. O'Neal's heart problems. (R., p.10.) Mr. O'Neal also asserted that he was not told by his counsel that he did not have to speak with the PSI investigator or fill out the PSI worksheet.[1] (R., p.12.) Mr. O'Neal asserted that the district court should grant his motion to redact his PSI and his motion for a neuropsychological/MRI examination[2] so the court could have considered these results "to include the effects [ ] [ ] a heart attack would have on the brain in stressful and other situations" prior to pronouncing the sentence. (R., pp.10-11, 13.) Further, Mr. O'Neal asserted that these tests/evaluations, had they been performed and available to the court at sentencing, could have altered the sentencing phase of his case. (R., p.14.) Mr. O'Neal asserted that, because these facts were not before the court at sentencing, the court was unable to consider all relevant information prior to pronouncing its sentence. (R., p.13.) Mr. O'Neal indicated that his [increased] sentence, as compared to the original, agreed-upon sentence of ten

[1] Mr. O'Neal has not raised this issue on appeal where the record indicates that the district court told Mr. O'Neal that he maintained his right to silence even after a guilty plea. (R., pp.85-86.)
[2] Contemporaneously with the filing of his Petition, Mr. O'Neal also filed a motion to redact the presentence investigation report and a motion for a neuropsychological/MRI examination. (R., pp.23-77.) The district court denied Mr. O'Neal's motion to redact the presentence report and motion for a neuropsychological examination. (R., p.88.)

years, with three years fixed, could be due to the lack of a new PSI, a neuropsychological evaluation, and an MRI. (R., pp.14-15.)

Mr. O'Neal asked for counsel to be appointed to assist him in his post-conviction claims. (R., pp.19-22.) The district court set forth the legal standards for appointment of post-conviction counsel, but denied the motion for counsel, finding the claims were frivolous. (R., pp.87-88.) Thereafter, the district court filed a Notice of Intent to Dismiss in which it analyzed Mr. O'Neal's claims.[3] (R., pp.82-89.) As for Mr. O'Neal's claim that his counsel was ineffective for failing to advise him of his right to remain silent at the entry to his guilty plea and the advice he received regarding the presentencing process, the district court held that the record did not support Mr. O'Neal's claims. (R., pp.83-84.) As for Mr. O'Neal's claim of error for failing to obtain a neuropsychological examination or an MRI test, the district court found that "Petitioner does not assert this claim in the context of ineffective assistance of counsel." (R., p.84.) The district court also found, as to all claims of ineffective assistance, Mr. O'Neal did not show how he was prejudiced and how the outcome would have been different. (R., pp.85-86.) The district court took judicial notice of the entire underlying criminal file.[4] (R., p.83.)

In response, Mr. O'Neal filed a memorandum responding to the district court's basis for its notice of intent to dismiss. (R., pp.90-99.) Mr. O'Neal acknowledged that the district court used Mr. O'Neal's lack of a criminal history for sixty years and his familiarity with guns as

[3] The Certificate of Service indicates that the Prosecutor's office was served with a copy of Mr. O'Neal's Petition and supporting documents on April 17, 2018; however, the State failed to comply with its statutory responsibility to file an answer or respond by motion. *See* I.C. § 19–4906(a). (R., pp.2-3, 22.)

[4] The State did not file an Answer to Mr. O'Neal's Petition or seek judicial notice of any portions of the record. *See Saykhamchone v. State*, 127 Idaho 319, 323 (1995) (holding that, pursuant to I.C. § 19-4906, "[c]ourts reviewing applications for post-conviction relief should have pertinent portions of the trial record ready for review. If the petitioner fails to submit an adequate record, the state must do so.")

aggravating facts—finding that Mr. O'Neal should have known not to take a firearm to his daughter's house under such circumstances. (R., pp.92-93.) Mr. O'Neal asserted that an MRI would have counteracted the district court's belief that he had shown extraordinarily poor judgment; that an MRI would have shown why Mr. O'Neal's cognitive abilities were not functioning properly, and he was susceptible to impulsivity and an inability to control his behavior at the time of the crime. (R., p.95.) Mr. O'Neal asserted that an MRI would have provided information to the court about the negative affect his heart attack had on Mr. O'Neal's ability to engage in critical thinking, which would have supported his argument for the sentence bargained for and recommended by the State—ten years, with three years fixed. (R., p.95.)

Thereafter, the district court issued a written decision in which it dismissed Mr. O'Neal's post-conviction petition for the reasons stated in its Notice of Intent to Dismiss.[5] (R., pp.82-89, 100-101.)

Thereafter, the district court entered a final judgment. (R., pp.102-103.)

Mr. O'Neal filed a timely Notice of Appeal from the district court's dismissal of the petition. (R., pp.104-107.)

[5] The district court did not analyze anew its bases for dismissal of the claims, but relied upon its prior reasoning set forth in the Notice of Intent to Dismiss. (R., p.100.) Therein, the district court considered both the underlying criminal case as well as the criminal appeal. (R., pp.82-89.) For ease of reference, Mr. O'Neal shall refer to the clerk's record from the appeal as "R.45172."

ISSUES

I. Did the district court err in denying Mr. O'Neal's motion for appointment of post-conviction counsel?

II. Did the district court err in summarily dismissing Mr. O'Neal's Petition for Post-Conviction Relief?

ARGUMENT

I.

The District Court Erred In Denying Mr. O'Neal's Motion For Appointment Of Counsel

A. Introduction

Mr. O'Neal contends that his Petition and supporting materials satisfies the standard for appointment of counsel, *i.e.*, it raises the possibility of a valid claim. Therefore, Mr. O'Neal requests that, assuming his case is remanded for the reasons set forth in Part II, this Court also order the district court to appoint counsel.

B. Standard Of Review

"A request for appointment of counsel in a post conviction proceeding is governed by Idaho Code § 19-4904, which provides that in proceedings under the UPCPA [Uniform Post-Conviction Procedures Act], a court-appointed attorney 'may be made available' to an applicant who is unable to pay the costs of representation. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court." *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004).

In applying the abuse of discretion standard, the reviewing court examines whether the trial court:

> (1) Correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863-64 (2018). Prior to determining whether the district court's error in failing to appoint counsel requires the case to be remanded, the reviewing

court first examines whether the possibility of a valid claim exists. *Melton v. State*, 148 Idaho 339, 342 (2009).

C. The District Court Abused Its Discretion By Denying Mr. O'Neal's Motion For Appointment Of Counsel Because Mr. O'Neal's Petition Raised The Possibility Of A Valid Claim

Mr. O'Neal asserts that the district court abused its discretion in denying his motion to appoint counsel where he raised the possibility of a valid claim.

In *Swader v. State*, 143 Idaho 651 (2007), the Idaho Supreme Court addressed the standard for appointment of counsel in post-conviction cases, reaffirming the *Charboneau* standard:

> In deciding whether the *pro se* petition raises the possibility of a valid claim, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims. Although "the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims," the court should appoint counsel if the facts alleged raise the possibility of a valid claim.

Swader, 143 Idaho at 654 (internal citation omitted). The *Swader* Court also made it clear that this standard is much lower than the standard for deciding petitions for post-conviction relief on their merits because, as had also been recognized in *Charboneau*, pro se petitioners generally cannot investigate or properly present their claims (regardless of whether those claims will ultimately be successful) without the assistance of counsel. *Id*. at 654-655. The *Swader* Court concluded:

> Therefore, the trial court should appoint counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim. The investigation by counsel may not produce evidence sufficient to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.

Swader, 143 Idaho at 655.

In *Charboneau*, the Supreme Court held that a post-conviction petitioner is entitled to the appointment of counsel "unless the trial court determines that the post-conviction proceeding is frivolous." *Charboneau*, 140 Idaho at 792 (quoting *Brown v. State*, 135 Idaho 676, 679 (2001)). In determining whether counsel should be appointed, "every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." *Charboneau*, 140 Idaho at 794. The proceeding is not frivolous and, thus, counsel must be appointed, if the petitioner "alleges facts to raise the *possibility* of a valid claim . . . ." *Id.* at 793 (emphasis added).

The *Charboneau* Court recognized that *pro se* petitioners "cannot be expected to know how to properly allege the necessary facts," and, thus, should be given a meaningful opportunity to correct any defects in their petition—with the assistance of counsel—prior to any dismissal decision. *Id*. While *Charboneau* does not require that counsel be appointed in every post-conviction case, it does stand for the proposition that "[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition . . . ." *Id*. at 794.

The district court erred by adopting a strict reading of Mr. O'Neal's Petition, after refusing to appoint counsel to assist Mr. O'Neal and ensure all of the *prima facie* elements of the post-conviction claim were clearly spelled out, as "all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *See Vavold v. State*, 148 Idaho 44, 45 (2009). Like *Charboneau*, "It is unlikely that [the petitioner] could properly raise such a claim and determine how to procure admissible evidence establishing all the elements of such a claim without the assistance of counsel." *Charboneau*, 140 Idaho at 793. Because Mr. O'Neal could not "be expected to know how to properly allege the necessary facts," and would have

greatly benefited from the assistance of counsel, the district court should have at least "carefully consider[ed]" his motion for appointment of counsel before dismissing his petition on its merits. *See Charboneau v. State*, 140 Idaho 789, 793-94 (2004) (vacating the dismissal of petitioner's Petition so that if, on remand, the district court decides to appoint counsel, that counsel may file an amended petition or affidavits alleging facts sufficient to avoid summary dismissal).

In the present case, Mr. O'Neal contends that he has, at the very least, raised the possibility of a valid claim. The district court abused its discretion in denying his motion for appointment of counsel where it failed to act consistently with the legal standards applicable to the specific choices available to it, and it failed to reach its decision by the exercise of reason. *See Lunneborg*, 163 Idaho at 863. As is set forth in Part II, below, he asserts that, even without the assistance of counsel, his Petition was adequate to raise genuine issues of material fact warranting an evidentiary hearing. But, even if his latter contention is incorrect and this Court finds that he has not yet raised genuine issues of material fact warranting an evidentiary hearing, it should conclude that he has raised the *possibility* of a valid claim by offering evidence that his counsel should have requested a neuropsychological examination and an MRI which would have divulged whether Mr. O'Neal's brain functioning was impaired.

II.

The District Court Erred In Summarily Dismissing Mr. O'Neal's Petition For Post-Conviction Relief

A. Introduction

The district court summarily dismissed Mr. O'Neal's petition after it concluded that his claims lacked a proper assertion of prejudice, and that he had failed to particularly claim his counsel was ineffective for failing to request a neuropsychological examination and an MRI.

(R., pp.82-89.) The district court strictly read the pro se petition and found it lacking—that Mr. O'Neal did not sufficiently allege prejudice, or, how the result may have been different absent the deficient performance. (R., p.86.) However, Mr. O'Neal established issues of material fact regarding whether his counsel's failure to obtain a neuropsychological evaluation and an MRI constituted deficient performance, and he demonstrated prejudice by asserting that the district court would have sentenced him differently had the examinations been performed. There is a reasonable probability that tests indicating his brain functioning was impaired after his heart attack would have impacted the district court's sentencing decisions, where the court sentenced Mr. O'Neal in excess of the State's recommendation in light of Mr. O'Neal's age, lack of a criminal history, familiarity with firearms, and poor decision-making which caused the incident.

Mr. O'Neal asserted he was "prejudiced" "during the sentencing phase" as the court did not have a "complete interpretation of his mental status" "beyond a mere comprehension of [his] heart problems." (R., p.10.) Mr. O'Neal pled that the court should have had the results of an MRI test and neuropsychological evaluation prior to pronouncing sentence so it could "include the effects [ ] [ ] a heart attack would have on the brain in stressful and other situations." (R., p.13.) Therefore, the district court erred by failing to hold an evidentiary hearing on the claim where there was a genuine issue of material fact, and erred in summarily dismissing the post-conviction petition in its entirety.

B. Post-Conviction Jurisprudence

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act

(*hereinafter*, UPCPA) (I.C. §§ 19-4901 to 4911), and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Charboneau v. State*, 144 Idaho 900, 903 (2007). However, the petition initiating post-conviction proceedings differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim;" it "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached." *Id.*; I.C. § 19-4903.

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Murray v. State*, 121 Idaho 918, 924-25 (Ct. App. 1992). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel's performance was constitutionally deficient—that the attorney's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760 (1988). The appellate court presumes that trial counsel was competent "and that trial tactics were based on sound legal strategy." *State v. Porter*, 130 Idaho 772, 792 (1997). Trial counsel's tactical decisions cannot justify relief "unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." *State v. Payne*, 146 Idaho 548, 561 (2008). After 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 proceedings would have been different." *Strickland*, at 694; *Aragon*, at 760. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c). In analyzing a post-conviction petition under this standard, the district court need not "accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Martinez v. State*, 126 Idaho 813, 816-17 (Ct. App. 1995). Additionally, the district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Cootz v. State*, 129 Idaho 360, 368 (Ct. App. 1996). However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner's allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646 (1968). This is so even if the allegations appear incredible on their face. *Id.* The district court is required to accept the petitioner's unrebutted allegations as true, but is not required to accept the petitioner's conclusion. *Charboneau*, 144 Idaho at 903. In considering the evidence, the district court must liberally construe the facts and draw reasonable inferences in favor of the petitioner. *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998) (discussing the standard for summary disposition under section 19-4906 *generally* as being whether a genuine issue of material fact has been presented).

If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002). The United

States Supreme Court has defined the standard for whether there exists a genuine issue of material fact as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved in favor of either party" *Id*. at 250. If a genuine factual issue is presented, an evidentiary hearing must be conducted. *State v. Yakovac*, 145 Idaho 437, 444 (2008).

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).

Evaluation of a motion for summary disposition does not involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court will review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03 (2006).

C. The District Court Erred In Summarily Dismissing The Claim Of Ineffective Assistance Of Counsel For Failing To Request A Neuropsychological Evaluation And An MRI

Mr. O'Neal asserts that he presented *prima facie* evidence of ineffective assistance of counsel on his post-conviction claims. Mr. O'Neal asserted, *inter alia*, that his trial counsel was deficient because counsel failed to request a neuropsychological evaluation and an MRI. Mr. O'Neal asserts these tests would have confirmed that Mr. O'Neal's heart condition negatively impacted his mental health; specifically, his cognitive abilities/reasoning, and that his

counsel's deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686. That is, it is Mr. O'Neal's contention that the district court would not have considered Mr. O'Neal's poor decisions on the day of the crime so aggravating had the court been aware that Mr. O'Neal's medical conditions had caused deterioration or impairment of his cognitive abilities.

1. Mr. O'Neal Raised A Genuine Issue Of Material Fact As To Counsel's Deficient Performance For Failing To Request The Neuropsychological Evaluation And An MRI

Mr. O'Neal 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 neuropsychological evaluation and an MRI.

A claim that trial counsel provided ineffective assistance by failing to investigate a defendant's mental condition and request a psychological evaluation for use at sentencing, can be raised under the UCPA. *See Richman v. State*, 138 Idaho 190 (Ct. App. 2002). However, "the decision of trial counsel whether to investigate or present mitigating evidence [in the form of a psychological examination] is assessed for reasonableness, giving deference to counsel's judgment." *Id*. 138 Idaho at 193. Trial counsel's failure to investigate and present evidence concerning a defendant's mental condition at sentencing will only be deemed deficient performance if the information in trial counsel's possession should have alerted it to the need for further investigation of the defendant's mental condition. *Id*. at 193-94 (holding that trial counsel's performance was deficient where psychologist opined that, despite no mention of psychological issues in the PSI, evidence concerning petitioner's psychological state and a psychological evaluation may have been relevant in fashioning the sentence where petitioner's mental illness and drug intoxication at the time of the offense did affect his behavior in

committing his crimes). In order to establish prejudice in a post-conviction claim, a petitioner claiming ineffective assistance of counsel based on trial counsel's failure to obtain a psychological examination for use at sentencing must establish that, but for the alleged failure, his sentence would have been different. *Id.* at 194.

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. O'Neal established that his attorney's performance was deficient. He asserted that his counsel was, or should have been, aware of a need to more fully investigate Mr. O'Neal's mental/cognitive condition after his 2015 open-heart surgery. (See R., pp.10, 13.) In 2015, Mr. O'Neal underwent triple by-pass surgery, and his medical records reveal he has coronary artery disease and should be on medication. (5/2/17 Tr., p.18, L.19 – p.19, L.24; p.22, Ls.7-8; PSI, pp.12, 15.)[6] Mr. O'Neal suffered a heart attack just one year prior to the incident and his

[6] Mr. O'Neal has requested that this Court take judicial notice of the full the register of actions and content of the file in *State of Idaho v. Jimmie E. O'Neal, Sr.*, Gooding County Case No. CR-

ongoing dizziness and fainting, combined with the fact that Mr. O'Neal could not articulate how Steven was shot (5/2/17 Tr., p.28, L.23 – p.29, L.15; PSI, pp.7, 90, 93), should have alerted defense counsel of the need to further investigate whether his medical condition had caused Mr. O'Neal cognitive difficulties.

The district court, in sentencing Mr. O'Neal, did not consider his mental health, including whether he was cognitively impaired after his recent heart attack in 2015. Mr. O'Neal's behavior should have alerted a competent attorney to a need for further evaluation, and counsel should have objected to a sentencing hearing without such an evaluation before the court.[7]

In notifying Mr. O'Neal that it intended to summarily dismiss his Petition, the district court concluded that, because defense counsel represented at sentencing that he had reviewed the PSI with Mr. O'Neal and "there were no additions, corrections or objection to the content of the report," that Mr. O'Neal's ineffective assistance of counsel claim was frivolous and without merit. (R., p.86.) However, this finding is contrary to precedent. *See Richman*, 138 Idaho at 193 (holding counsel was ineffective for failing to request a mental evaluation because the defendant

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2016-2143, including the PSI and sentencing materials, as well as the transcripts and Clerk's Record prepared for the direct appeal, Dkt. No. 45172, in Mr. O'Neal's criminal case.

[7] Defense counsel asked the district court:

> In terms of evaluations, Judge, if I could request that the Court also order a 19-2524 evaluation and/or an anger management evaluation. I think one of the two. I think anger management specifically might address the more pertinent issue. I'm afraid that the 19-2524 will sort of gloss over it. So for whatever that's worth.

(3/2/17 Tr., p.20, L.19 – p.21, L.1.) The district court agreed, saying "Okay. Then I'll do that." (3/2/17 Tr., p.21, L.2.) Although counsel requested an anger management evaluation or a mental health evaluation at the change of plea hearing, neither a mental health evaluation pursuant to I.C. § 19-2524 nor an anger management evaluation were prepared for sentencing, and counsel allowed the district court to sentence his client without one. (*See* 5/2/17 Tr.; PSI, generally.)

told his counsel he was hearing voices, having nightmares, and had attempted suicide in the past); *see also Vick v. State*, 131 Idaho 121, 126 (Ct. App. 1998) (reversing and remanding after holding petition, supported by documentation, raised 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).

In *Vick*, the petitioner asserted her trial counsel was deficient for failing to present evidence of material facts to the trial judge with respect to her history of mental illness, by failing to object to misleading and inaccurate psychological information contained in the available reports, and in failing to provide the court with a full psychological evaluation. *Vick*, 131 Idaho at 123-24. She claimed that, because of counsel's failure, the trial judge imposed a harsher sentence than he would have imposed had he been given the opportunity to thoroughly review her history of mental illness and amenability to treatment. *Id*. at 124. The Idaho Court of Appeals concluded,

> Vick's ineffective assistance of counsel claim is *inextricably intertwined* with her claim that the psychological information potentially available to counsel and the district court constitutes evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice. I.C. § 19-4901(a)(4); *see Bure v. State*, 126 Idaho 253, 880 P.2d 1241 (Ct.App.1994); *compare State v. McFarland*, 125 Idaho 876, 876 P.2d 158 (Ct.App.1994).

Vick, 131 Idaho at 125.

Here, defense counsel failed to request a neuropsychological evaluation or an MRI prior to sentencing. Where Mr. O'Neal was a 62-year-old man, with no history of violence, and no criminal history whatsoever, who could not articulate how he had shot a man, counsel should have been alerted that Mr. O'Neal may have mental issues. As of August of 2016, Mr. O'Neal

had 15 active prescriptions. (PSI, p.39.) "He also reports he had not been feeling real well prior to this event taking place and had a stress test scheduled with [a physician] tomorrow." (PSI, p.44.) It is well-documented that Mr. O'Neal always felt dizzy and lightheaded since his three-way coronary bypass surgery in 2015. (PSI, pp.53-54, 57-58; 5/2/17 Tr., p.19, Ls.4-19.) Although the PSI file contained documentation that something physical may have been affecting Mr. O'Neal's mental health, no mental health evaluation was performed prior to sentencing.[8]

The facts of the crime indicate further investigation and evaluation of Mr. O'Neal's cognitive functioning were necessary. Mr. O'Neal and his wife of forty-four years lived two blocks from their youngest daughter and her husband, Steven, and their three children. (PSI, p.11.) Mr. O'Neal had a very good relationship with Steven and thought of him as a son. (5/2/17 Tr., p.34, Ls.4-6.)

[8] The court went ahead and sentenced Mr. O'Neal absent a mental health evaluation with an anger management component, and it failed to address Mr. O'Neal's mental health at sentencing. (*See* 5/2/17 Tr.) The only type of mental health evaluation Mr. O'Neal received was by a Licensed Clinical Social Worker, who read the GAIN substance abuse evaluation to determine if Mr. O'Neal needed mental health treatment. (PSI, pp.31-32.) Regarding the district court's order that an "anger management component" be addressed in the 19-2524 review, the LSCW provided the following statements:

> I did not specifically address 'anger management' in the review as I did not have that information available. He is currently receiving treatment-medications for mild mental health issues. Addressing the anger management as a mental health issues may not address the issues in its entirety. Anger management is a broad subject and if it was a component of mental health, I believe the GAIN would have a more severe rating on the emotional conditions and behavioral conditions scale. It appears in the GAIN that the anti-depressant was recently started. It might require continued use to get to a therapeutic dosage, but that would be for a Physician or Psychiatrist to determine. The suds service will assist to work on his cognitions which is usually a large piece in issues around anger management.

(PSI, pp.17-18, 31-32.) Ultimately, no review was done that complied with the requirements of I.C. § 19-2524 and the mental health social worker simply said she "did not have that information available." (PSI, p.18.)

On the day of the shooting, Mr. O'Neal's daughter visited her parents and told them that, during an argument, Steven had thrown her to the ground. (PSI, p.5.) Mr. O'Neal told law enforcement that he went over to their house to confront Steven and "beat his ass," so that Steven would learn what it was like to be abused. (PSI, p.7; 5/2/17 Tr., p.35, L.2.) Mr. O'Neal's handgun was still in his sweater pocket when he headed to his daughter's house. (5/2/17 Tr., p.33, L.14 – p.34, L.3; PSI, pp.5, 7.) When he arrived at his daughter's house, Steven had barricaded himself in the upstairs bedroom, with a chair blocking the door. (PSI, pp.5, 7.) The two men argued and yelled from either side of the door. (PSI, p.7.) Mr. O'Neal pushed his way through the door, and saw Steven standing with a gun held between two hands, pointed at him.[9] (5/2/17 Tr., p.39, Ls.14-15.) Mr. O'Neal stepped back and pulled out his own gun, showing that he had one, too. (PSI, p.7.) Steven was shot[10] and fell back onto the bed, but then he got up and went downstairs. (5/2/17 Tr., p.29, L.10 – p.30, L.11; PSI, p.7.) Mr. O'Neal followed him and applied a cloth to Steven's wound to try to stop the bleeding, he sent for help, and he called 911. (PSI, p.6; 5/2/17 Tr., p.29, L.19 – p.31, L.17; PSI, p.7.) Steven died that day from the gunshot wound and Mr. O'Neal was charged with second-degree murder.[11] (PSI, p.8; R.45172, p.7.)

At the summary dismissal stage, Mr. O'Neal needed to show there existed a genuine issue of material fact as to whether his counsel's conduct was deficient. He sufficiently established that he was entitled to a hearing where he substantiated his allegations that his counsel was ineffective for failing to request a neuropsychological examination and an MRI with

[9] Steven did have a gun on him that day, but it was located in his right side pants pocket. (PSI, p.108.) There was also a rifle on the nightstand in the room where the incident occurred. (PSI, p.108.)

[10] Mr. O'Neal is adamant that he never meant for the gun to fire, and he is not quite sure how it happened. (5/2/17 Tr., p.28, L.20 – p.29, L.6; PSI, p.5.)

[11] Steven was shot through the left arm, which exited near the elbow and traveled to his lung. (PSI, pp.109, 115.)

admissible evidence. Mr. O'Neal established that a genuine issue of material fact existed as to whether his counsel was deficient and there was a reasonable probability that, but for the deficient conduct, the result of the sentencing hearing would have been different. Thus, the district court's dismissal of all of Mr. O'Neal's claims was error.

2. Mr. O'Neal Demonstrated A Reasonable Probability That, But For The Deficient Performance, The Result Of His Sentencing Proceeding Would Have Been Different

The petition was summarily dismissed by the district court after it concluded that Mr. O'Neal's claims lacked a proper assertion of prejudice. (R., p.86.) The district court strictly read the pro se petition and found it lacking in its assertion of prejudice resulting from counsel's deficient performance. (R., p.86.) It concluded that Mr. O'Neal did not sufficiently allege prejudice and how the result may have been different absent the deficient performance. (R., p.86.) However, Mr. O'Neal *did* assert in his Petition that the results of his sentencing would have been different had the sentencing court known that his brain functioning was impaired after the heart attack. (R., pp.10-15.) Mr. O'Neal asserted that the district court should have granted his motion for a new PSI and to have an MRI so the court could have considered these results "to include the effects [ ] [ ] a heart attack would have on the brain in stressful and other situations" prior to pronouncing the sentence. (R., pp.10-11, 13.) Further, Mr. O'Neal asserted that these tests/evaluations, had they been performed and available to the court at sentencing, could have altered the sentencing phase of his case. (R., p.14.) Mr. O'Neal asserted that, because these facts were not before the court at sentencing, the court was unable to consider all relevant information prior to pronouncing its sentence. (R., p.13.) Mr. O'Neal indicated that his increased sentence, as compared to the original, agreed-upon sentence of ten years with three

years fixed, could be due to the lack of a new PSI, a neuropsychological evaluation, and an MRI. (R., pp.14-15.)

Mr. O'Neal also fleshed out his claims in his pleading responding to the district court's notice of intent to dismiss. (R., pp.90-99.) The district court did not address Mr. O'Neal's assertion in his opposition to the notice of intent to dismiss that, since his heart attack, he has "lost some of the ability to engage in critical issues relating to consequences of conflicts." (R., p.95.) In his opposition, Mr. O'Neal contended that his ability to control his impulsivity had changed after his heart attack, and again asserted that an MRI would show the physical changes to his brain. (R., p.95.)

At the sentencing hearing in the underlying criminal case, the State recommended that Mr. O'Neal be sentenced to prison for no more than ten years, with three years fixed. (R.45172, p.49; 5/2/17 Tr. p.50, Ls.4-7.) Mr. O'Neal asked the district court to grant probation; alternatively, he asked the court to retain jurisdiction, or to impose a fixed term of no more than six months incarceration. (5/2/17 Tr., p.71, L.19 – p.72, L.12.) After the district court stated the four goals of sentencing and what documents it reviewed to prepare for the sentencing hearing, it then said:

> And before I get into this, I will make a couple of statements that struck me as odd right out of the gates. I see this case a little differently than probably both counsel here, and I'll start a little bit with mitigating facts. I understand that you have no criminal record, no prior criminal record. I also understand that you have significant medical issues. I understand the impact that that's going to have -- if you were incarcerated is going to have on your wife, and I also understand that the risk of you re-offending is somewhat low; however, in my mind, that doesn't get you a get-out-of-jail-free card. I think in this case you crossed a significant threshold, and I'm going to talk about that.
>
> Now getting back to what I thought was somewhat odd. Here we're dealing with a man 63 years old, does not have any prior criminal record, and when defense counsel asks him, "What would you have done differently?" you would have said -- your reply was, "When the door was barricaded, I should have left." The

> answer I was somewhat expecting is "I wouldn't have brought my firearm with me under those circumstances."
>
> You know, we heard from counsel that your family -- and I'm going through the police reports in here -- or through the PSI -- is involved in firearms, and your counsel indicates that you know safety and responsibility with a firearm. I disagree. I would think at 63 years old and you have a problem with how your son-in-law is treating your daughter that you would have enough wisdom, at that point, to know how to handle it appropriately.

(5/2/17 Tr., p.74, L.19 – p.76, L.1.)

> So, in my mind, whether you tripped and the gun went off when you had it drawn, or you actually thought you saw a gun, or you did see a gun and you fired at him, I think, either way, your behavior is reckless that the consequences of your actions should have come as no surprise.
>
> So I've thought about this case, and taking into account the mitigating factors, your age, your lack of prior criminal record, and your health issues, I am taking that into fashioning my sentence, but I will tell you, I think, based on the threshold that you crossed, the egregiousness of the offense, this is not an appropriate case for probation. And I also think that the State's recommendation is a little too light.

(5/2/17 Tr., p.80, Ls.2-16.) Thereafter, the district imposed a unified sentence of twelve years, with six years fixed, without probation and without retaining jurisdiction. (R.45172, p.57.)

The district court observed that Mr. O'Neal was 63 years old and did not have any criminal history, and, despite having experience with firearms, had exercised very poor judgment and engaged in reckless behavior causing the incident. Physical evidence of Mr. O'Neal's brain deterioration would have clarified why a person such as Mr. O'Neal would act so unwisely in this situation, which would certainly have mollified the district court and likely resulted in a lesser sentence. Evidence of cognitive deterioration and/or impairment of Mr. O'Neal's judgment or ability to function in stressful situations would have been extremely impactful mitigating information at sentencing.

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 Mr. O'Neal did not show prejudice because he failed to allege that he has a mental condition other than what was addressed in the mental health review and his counsel did not object to the contents of the PSI report. (R., p.86.) Mr. O'Neal asserts this is incorrect. *See Vick v. State*, 131 Idaho 121, 123 (Ct. App. 1998) (holding petitioner established prejudice where she alleged that, as a result of counsel's failures, the trial judge imposed a harsher sentence than he would have imposed had he been given the opportunity to thoroughly review her history of mental illness and amenability to treatment).

Further, because this was a pro se inmate petition, and the district court refused to appoint counsel to assist Mr. O'Neal in making these claims, it is unfair for the court to then penalize Mr. O'Neal because it perceived that he did not use the correct legal buzzwords to describe how he was prejudiced. That is, instead of saying "I suffered prejudice in that the district court imposed a harsher sentence", Mr. O'Neal said, the court should have had the results of an MRI test and neuropsychological evaluation prior to pronouncing sentence so it could "include the effects of whether a heart attack would have on the brain in stressful and other situations" in its sentencing considerations. (R., pp.10-13.)

He alleges his cognitive functioning was impaired after his 2015 heart attack and that a neuropsychological examination and an MRI would have proven this claim. Where the district court gave special consideration to Mr. O'Neal's extremely poor judgment on the date of the incident, additional information regarding whether Mr. O'Neal had a physical defect which caused the poor decision making would have served as mitigating information and perhaps the

district court would have sentenced Mr. O'Neal in accordance with the parties' plea agreement instead of doubling the fixed time, presumably for the reasons the court stated on the record—Mr. O'Neal's advanced age, familiarity with firearms, and his poor judgment that day to bring a firearm to confront his son-in-law. (5/2/17 Tr., p.74, L.19 – p.76, L.1.) Where the district court focused on the fact that Mr. O'Neal was 63 years old and without any criminal history, had experience with firearms, but that he had exercised poor judgment and engaged in reckless behavior causing the incident, physical evidence of brain deterioration or affect would certainly have mollified the district court and probably resulted in a lesser sentence. Although the facts alleged do not fully establish the existence of cognitive problems,[12] they do at least raise that possibility—a possibility which is supported by other facts in the record.

Therefore, the district court erred by failing to hold an evidentiary hearing on this claim where there was a genuine issue of material fact, and erred in summarily dismissing the post-conviction petition in its entirety.

[12] The district court denied Mr. O'Neal's motion to redact the presentence report and motion for a neuropsychological examination. (R., p.88.)

CONCLUSION

Mr. O'Neal respectfully requests that this Court vacate the summary dismissal of his post-conviction petition with respect to the issue of whether post-conviction counsel should have been appointed and whether trial counsel was ineffective for failing to request that a neuropsychological examination be performed prior to sentencing, and remand the case to the district court for an evidentiary hearing with appointed counsel.

DATED this 28th day of December, 2018.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 2018, 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

SJC/eas