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Ciccone v. State Appellant's Reply Brief Dckt. 43075

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALBERT A. CICCONE, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court No. 43075 Elmore County District Court Case No. CV-2014-0059

REPLY BRIEF OF APPELLANT

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

HONORABLE LYNN G. NORTON
District Judge

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A. The District Court Erred In Denying Relief on Mr. Ciccone's Petition

Mr. Ciccone and the State agree as to the standard of review, the burden of proof, and the applicability of the *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), deficient performance and resulting prejudice test for ineffective assistance of counsel. The parties disagree as to whether trial counsel determined not to present Dr. Beaver's opinion to the district court as mitigation in sentencing based on errors of fact and law and on whether, if counsel was deficient, the deficiency was prejudicial. While the State has made its arguments, the record and the law, as discussed below, support relief in this case.

B. Mr. Ciccone Established by a Preponderance of the Evidence that Trial Counsel Acted on the Basis of Factual and Legal Errors

To prevail in post-conviction, Mr. Ciccone was required to establish by a preponderance of the evidence that trial counsel was deficient and that the deficiency was prejudicial. *Heilman v. State,* 158 Idaho 139, 144, 344 P.3d 919, 924 (Ct.App. 2015).

Mr. Ciccone carried this burden. He established that trial counsel was deficient in acting upon the basis of mistakes of fact and law in determining not to present Dr. Beaver's evaluation to the court as mitigation in sentencing. *McKay v. State,* 148 Idaho 567, 226 P.3d 700 (2009). And, he established by a preponderance of the evidence a reasonable probability of a different outcome had counsel not been deficient.

The State disputes this conclusion asserting first that trial counsel was factually correct in concluding that Dr. Beaver's diagnosis of borderline personality disorder meant that Mr. Ciccone was abusive and controlling. Respondent's Brief pp. 14-15. To support this argument,

the State looks to Exhibit 13, pp. 3-8, which is a document trial counsel relied upon. The State readily admits that the research does not use the words "controlling" and "abusive." Respondent's Brief p. 14. However, the State maintains that the fact that the document "clearly states that individuals with borderline personality disorder often exhibit" a list of various characteristics not described with the words "abusive" or "controlling," establishes that trial counsel was correct in concluding that Mr. Ciccone was controlling and abusive. *Id.*[1] However, what is relevant is not what characteristics others "often exhibit," but rather what Dr. Beaver had to say about Mr. Ciccone. Dr. Beaver may have told trial counsel that Mr. Ciccone had borderline personality disorder like counsel's first wife did, but it was counsel, not Dr. Beaver, who concluded that this meant that Mr. Ciccone was controlling and abusive. Counsel testified, "And [my first wife] was a borderline personality disorder. So it really hit home to me, and that's why I put 'controlling and abusive.' Tr. 12/12/14 p. 63, ln. 16-19. This was a logical leap that is no more supportable than it would be to say that because one person known to counsel with depression committed suicide all people with depression are always suicidal. Moreover, counsel's conclusion was inconsistent with Dr. Beaver's affidavit, which does not state that Mr. Ciccone is controlling and abusive but does state that there was a significant mental health component surrounding the deaths of Mr. Ciccone's wife and unborn child and that had he

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[1] The list of characteristics also includes a statement that some with borderline personality disorder may not feel like they know who they are and may try to be what they think others want them to be, may have an unusually high degree of interpersonal sensitivity, insight and empathy, and are often bright, witty, funny, and the life of the party. Exhibit 13, pp. 6-8. However, the State does not argue that these characteristics mean that Mr. Ciccone is a person who strives to please others even at the expense of his own personality, who is a man of great empathy, intelligence and insight, and who is someone people want to be with. Respondent's Brief.

prepared a written report for the court it would have assisted in sentencing and very well could have led to a sentence less than a life sentence. Plaintiff's Ex. B, pp. 2-3.

The State also argues that trial counsel's decision to forego a written report was based on Dr. Beaver's opinion that Mr. Ciccone was in deep denial of his culpability. Respondent's Brief p. 15. However, again, that conclusion is not supported by Dr. Beaver's affidavit, which does not state that Mr. Ciccone was afflicted by a deep denial of culpability. Plaintiff's Ex. B. Dr. Beaver's affidavit does establish by a preponderance of the evidence that counsel acted on the basis of mistakes of fact.

Further, Mr. Ciccone has established that counsel acted on the basis of mistakes of law. The first mistake of law was that any written report would have to contain a diagnosis. The State does not dispute that the statute, I.C. § 19-2522(3)(b), requires a diagnosis, evaluation or prognosis, not all three. Respondent's Brief p. 15. However, it argues that any written report that did not include the words "borderline personality disorder" would be incomplete, misleading, and possibly unethical, requiring Dr. Beaver to "conspire" in wrongdoing. Respondent's Brief p. 16. But, that argument is just wrong. Dr. Beaver could have written a report that gave an evaluation of Mr. Ciccone's condition and his prognosis and fully explained all relevant information in an honest, straightforward, and complete way without using a diagnostic term which might have invoked prejudice and wrong conclusions from the court, just as it did from trial counsel.

Mr. Ciccone also established that trial counsel acted on a second mistake of law – that had he obtained a written evaluation of Mr. Ciccone he would have exposed his client to the risk of an evaluation with Dr. Estess. The State cites part of I.C. § 18-207 to argue that had trial

counsel obtained a written evaluation, he could not have avoided an evaluation by Dr. Estess if the court had so ordered. Respondent's Brief pp. 16-18. However, even though I.C. § 18-207(4)(c) does authorize access of state's experts to conduct an examination in preparation for any legal proceeding at which the defendant's mental condition may be at issue, the statue also acknowledges that the defendant may nonetheless refuse to cooperate with that examination. I.C. § 18-207(4)(e). Insofar as trial counsel believed that obtaining a report carried any risk that Mr. Ciccone could be forced to participate in an evaluation by Dr. Estess, counsel was simply mistaken.

Contrary to the State's arguments, Mr. Ciccone did establish by a preponderance of the evidence that trial counsel was deficient insofar as he decided not to obtain a written evaluation and submit it as mitigation in sentencing based upon mistakes of fact and law.

C. Mr. Ciccone Established by a Preponderance of the Evidence that Trial Counsel's Deficient Performance was Prejudicial

To establish prejudice, Mr. Ciccone had to establish a reasonable probability that but for counsel's deficiency the outcome of the proceedings would have been different. *Strickland v. Washington, supra.* To carry this burden Mr. Ciccone offered Dr. Beaver's affidavit which noted the significant mental illness component related to the events surrounding the deaths and which averred that a written opinion "may very well have led the Court to a sentence other than fixed-life." Petitioner's Ex. B, pp. 2-3. The State presented no evidence to rebut this. Rather, it now argues on appeal that any written report "would have contained extremely damaging information" and thus Mr. Ciccone has not shown prejudice.

The State's speculation as to what would have been in a written report is without support

in the record. But, equally importantly, the State's argument ignores the applicable law. A fixed life sentence is not to be imposed except when there is "certainty that the nature of the crime demands incarceration until the perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released." *State v. Jackson,* 130 Idaho 293, 294-95, 939 P.2d 1372, 1373-74 (1997), quoting *State v. Eubank,* 114 Idaho 635, 638, 750 P.2d 926, 929 (Ct. App. 1988).

Mr. Ciccone did establish a reasonable probability that had the sentencing court been aware of the role of mental illness in the offense, it would not have sentenced him to a fixed life term. An offense in which the existence of mental illness played a significant role is not an offense that a court can say with certainty by its nature demands incarceration for the rest of the defendant's life. *See State v. McFarland,* 125 Idaho 876, 876 P.2d 158 (Ct. App. 1994), vacating a life sentence with a minimum fixed term of ten years in a brutal stabbing death case wherein the district court failed to obtain a psychological evaluation despite evidence that McFarland had some sort of mental disability. *See also, State v. French,* 95 Idaho 853, 522 P.2d 61 (1974), vacating a 25-year sentence for rape, holding that "the omission of [a psychological evaluation] in this case deprived the district court of pertinent information essential to pronouncing an appropriate judgment." *Id.,* at 855, 522 P.2d at 63.

Likewise, there is a reasonable probability that had the court received a written report from Dr. Beaver, which as the doctor averred may have altered the sentence, the court would have concluded that it could not be certain that Mr. Ciccone can never at any time in his life be safely released from prison. It is reasonably probable that had the court understood the nature of Mr. Ciccone's mental illness it would have concluded that a lesser sentence which allowed

release from prison, if and when Mr. Ciccone's mental illness either abates or is successfully treated, is sufficient to meet the *Toohill*[2] standards for reasonability – protection of society, deterrence, rehabilitation, and retribution.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Ciccone asks this Court to reverse the order denying post-conviction relief and remand with instructions to grant relief.

Respectfully submitted this 4th day of January, 2016.

Deborah Whipple
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[2] *State v. Toohill,* 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

CERTIFICATE OF SERVICE

I CERTIFY that on January 4, 2016, I caused two true and correct copies of the foregoing document to be:

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