12-11-2015

Ciccone v. State Respondent's Brief Dckt. 43075

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALBERT A. CICCONE,	)	
	)	No. 43075
Petitioner-Appellant,	)	
	)	Elmore Co. Case No.
vs.	)	CV-2014-59
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Albert A. Ciccone appeals from the judgment dismissing his petition for post-conviction relief following an evidentiary hearing. On appeal, Ciccone argues the district court erred in denying relief on his claim that trial counsel was ineffective for not obtaining and submitting a written report of his psychological evaluation as mitigation evidence at sentencing.

Statement of Facts and Course of Proceedings

"Ciccone struck his pregnant wife with his car, killing her and the unborn fetus." State v. Ciccone, 154 Idaho 330, 334, 297 P.3d 1147, 1151 (Ct. App. 2012). A jury found him guilty of the first degree murder of his wife and the second degree murder of the unborn child. Id. The district court imposed a determinate life sentence for the first degree murder conviction and a concurrent determinate 15-year sentence for the second degree murder conviction. Id. Ciccone filed an appeal, but the Idaho Supreme Court dismissed the appeal as untimely. Id.; State v. Ciccone, 150 Idaho 305, 246 P.3d 958 (2010).

Ciccone filed a timely petition for post-conviction relief, alleging trial counsel was ineffective for failing to timely file a notice of appeal from the judgment in the underlying criminal case. (R., p.19.) Pursuant to a stipulation of the parties, the district court granted post-conviction relief and reentered the judgment of conviction to allow Ciccone to perfect a timely appeal. Ciccone, 154 Idaho at 334, 297 P.3d at 1151. Ciccone timely appealed from the reentered

judgment, and the Idaho Court of Appeals affirmed Ciccone's conviction and sentence. Id.

Ciccone timely filed a successive petition for post-conviction relief alleging, *inter alia*, that trial counsel was ineffective for not obtaining a written report of a psychological evaluation conducted by Dr. Craig Beaver (who was appointed to evaluate Ciccone at defense counsel's request) and not submitting that report as mitigation evidence at sentencing. (R., pp.17-29.) The district court appointed counsel and granted Ciccone an evidentiary hearing. (R., pp.30-31, 36-37, 108-09; see generally 12/12/14 Tr. (hereinafter "Tr.").) Following the hearing, the district court entered an order dismissing Ciccone's petition in its entirety. (R., pp.160-80.) Ciccone timely appealed from the judgment. (R., pp.181-86.)

ISSUE

Ciccone states the issues on appeal as:

> Did the District Court err in denying relief given that Mr. Ciccone established that trial counsel was ineffective in failing to present Dr. Beaver's evaluation to the Court for sentencing purposes?

(Appellant's brief, p.2.)

The state rephrases the issue as:

Has Ciccone failed to show error in the district court's finding that Ciccone failed to prove his claim that counsel was ineffective for not obtaining a written report of Dr. Beaver's psychological evaluation and presenting it as mitigation evidence at sentencing?

ARGUMENT

Ciccone Has Failed To Show Error In the District Court's Finding That Ciccone Failed To Prove His Ineffective Assistance Of Counsel Claim

A. Introduction

Ciccone argues the district court erred in denying post-conviction relief on his claim that trial counsel was ineffective for not obtaining a written report of a psychological evaluation conducted by Dr. Craig Beaver and presenting it as mitigation at sentencing. (Appellant's brief, pp.3-9.) Ciccone's argument fails. Application of the law to the facts supports the district court's determination that Ciccone failed to carry his burden of proof with respect to either the deficient performance or prejudice prongs of his ineffective assistance of counsel claim.

B. Standard Of Review

"Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)).

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). A trial court's decision that a post-

conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Legal Standards Applicable To Ineffective Assistance Of Counsel Claims

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has articulated the defendant's burden under Strickland as follows:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted). "This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Arellano v. State, 158

Idaho 708, ___, 351 P.3d 636, 638 (Idaho App. 2015) (citing Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994)).

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 131 S.Ct. at 787. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citations and quotations omitted).

D. Ciccone Failed To Meet His Burden Of Proving Counsel Was Ineffective For Not Obtaining And Submitting A Written Report Of Dr. Beaver's Psychological Evaluation For Use At Sentencing

Before Ciccone was sentenced in the underlying criminal case, the parties stipulated that Dr. Craig Beaver be appointed to evaluate Ciccone's mental condition. (Tr., p.55, Ls.1-10; Respondent's Exhibit 13, pp.9-10 (Order Re: Evaluation).) Dr. Beaver conducted a psychological evaluation, but Ciccone did not submit a written report of that evaluation for the district court's consideration at sentencing. (Respondent's Exhibit 4 (Sentencing Tr., p.1880, L.12 – p.1881, L.14).) When the district court asked trial counsel why a report of the psychological evaluation it had authorized was not among the sentencing materials, counsel explained:

> Judge, an evaluation was conducted. But after due consideration and conference with the evaluator and my client, it was elected not to have the report prepared for sentencing.
>
> The order does not require us to prepare a report or to bring forth the evaluator for purposes of testimony. Essentially that order was for purposes of securing the evaluation at county expense, but I was not required, under Rule 702 or otherwise, to disclose the

> contents or the findings of that evaluation, and no written report has been prepared.

(Id.) The trial court noted for the record the defense's choice "not to make use of the evaluation" (Respondent's Exhibit 4 (Sentencing Tr., p.1881, L.19 – p.1882, L.1)), and it ultimately sentenced Ciccone after considering all of the information provided to it, which included both general information about Ciccone's personal and family mental health history and medical records documenting the state of Ciccone's mental health very near the time he committed the murders (Respondent's Exhibit 4 (Sentencing Tr., p.1944, L.19 – p.1945, L.9); see also Respondent's Exhibits 2 (victim impact letters), 3 (character letters), 14 (military records), 15 (records of inpatient treatment at Intermountain Hospital)).

In his post-conviction petition, Ciccone alleged trial counsel was ineffective for not obtaining a written report of the psychological evaluation conducted by Dr. Beaver and submitting that report as mitigation evidence at sentencing. (R., pp.23-26.) The district court dismissed this claim after an evidentiary hearing, finding Ciccone failed to carry his burden of proving trial counsel's decision to not obtain and present a written report of Dr. Beaver's psychological evaluation was the result of any objective shortcoming or that Ciccone was prejudiced by the alleged deficiency. (R., pp.175-79.) Contrary to Ciccone's assertions on appeal, a review of the applicable law and the record supports the district court's ruling.

Under Idaho law, a district court must appoint a psychiatrist or psychologist to examine and report on the defendant's mental condition "[i]f there is reason to believe the mental condition of the defendant will be a significant

factor at sentencing and for good cause shown." I.C. § 19-2522(1). However, "the decision of trial counsel whether to investigate or present mitigating evidence [in the form of a psychological evaluation] is assessed for reasonableness, giving deference to counsel's judgment." Richman v. State, 138 Idaho 190, 193, 59 P.3d 995, 998 (Ct. App. 2002) (citing Wallace v. Ward, 191 F.3d 1235, 1247 (10th Cir. 1999)). To establish prejudice, 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. Richman, 138 Idaho at 194, 59 P.3d at 99.

In this case, it is undisputed that trial counsel sought and obtained an order appointing Dr. Beaver to evaluate Ciccone's mental condition. Ciccone testified at the evidentiary hearing that trial counsel indicated a belief that a psychological evaluation might be useful as mitigating evidence at sentencing in light of Ciccone's "mental health history," which included a failed suicide attempt and inpatient treatment at Intermountain Hospital "in September into October of 2003, 11 days prior to [Ciccone's] incarceration" in the underlying criminal case. (Tr., p.23, L.14 – p.24, L.13.) Ciccone testified that, after Dr. Beaver conducted the evaluation, he and his trial counsel had a conversation in which trial counsel advised Ciccone that the "evaluation didn't go well" and that it would not be in Ciccone's best interest to obtain a written report of that evaluation. (Tr., p.24, Ls.14-19, p.29, Ls.13-24.) According to Ciccone, counsel did not elaborate regarding "the problem" a written evaluation would pose; "[h]e just said he felt it

would be unfavorable" and that "he wasn't going to do an official report because, once an official report was made, then the Court would have access to it whether he wanted them to or not." (Tr., p.24, L.20 – p.25, L.16.) Ciccone testified that, at the time, he trusted his trial counsel and believed "he was acting in [Ciccone's] best faith." (Tr., p.25, Ls.6-8, p.30, Ls.2-5.)

Aside from his own testimony, the only other evidence Ciccone presented in relation to this claim was the affidavit of Dr. Craig Beaver. (See Plaintiff's Exhibit B.) Dr. Beaver recalled that he and his staff conducted the testing and interviews necessary to create a written evaluation of Ciccone's mental condition but noted that "[n]o formal final written evaluation was created." (Id., ¶¶ 3-7.) Dr. Beaver had "no independent recollection of the reasons underlying the decision to not create a formal evaluation" but stated his "practice would have been to create one unless [trial counsel] requested [he] do otherwise." (Id., ¶ 8.) According to Dr. Beaver, had a formal evaluation been created, it would have contained the following opinions and conclusions:

a. Mr. Ciccone's MMPI testing results showed a markedly elevated profile indicating significant emotional and/or psychiatric issues;

b. Mr. Ciccone's psychiatric history revealed significant mood instability;

c. Mr. Ciccone's family history revealed a significant history of bipolar disorders;

d. There was a significant mental-health component related to the events surrounding the death of Mr. Ciccone's wife and unborn child[.]

(Id., ¶ 9.) Dr. Beaver had "no independent recollection of informing [trial counsel] of the opinions and conclusions described above" but stated it would have been his practice at the time "to inform trial counsel of these opinions and conclusions." (Id., ¶ 10.) Finally, as it relates to the claim that trial counsel was ineffective for not obtaining and presenting a written report of Dr. Beaver's psychological evaluation for use at sentencing, Dr. Beaver opined that such report, had it been created, "would have assisted the Court in determining Mr. Ciccone's sentence and, in fact, may very well have led the Court to a sentence other than fixed-life." (Id., ¶ 11.)

After Ciccone rested, the state called trial counsel, who testified regarding his reasons for not obtaining and submitting a written report of Dr. Beaver's psychological evaluation for use at sentencing. (Tr., p.55, L.1 – p.67, L.24.) Trial counsel testified he received a "verbal report" from Dr. Beaver, during which trial counsel took notes and after which trial counsel conducted his own research regarding one of Dr. Beaver's diagnoses. (Tr., p.57, L.18 – p.59, L.12; Respondent's Exhibit 13 (trial counsel's notes and research).) Following their discussion, trial counsel directed Dr. Beaver not to produce a formal written report because counsel did not believe such report would be in Ciccone's best interest. (Tr., p.59, Ls.13-22.) When asked why that was so, trial counsel, referring to his notes, explained:

> The discussions I had with Dr. Beaver were over the phone; they were not in-person as my notes reflect. Mr. Ciccone did suffer from major depression; it was recurrent. But Dr. Beaver also diagnosed Mr. Ciccone with borderline personality disorder. And if you see him – in reference to line 4, it says "first wife." Dr. Beaver had done the home study in my divorce from my ex-wife, and his

> comment to me was, "Terry, he's just like your first wife, remember?" And that's why I wrote "first wife." And she was a borderline personality disorder. So it really hit home to me, and that's why I put "controlling and abusive."
>
> He also indicated, line 5, that Mr. Ciccone was in deep denial of his culpability. Line 6 I talked about – because I was using him for sentencing, if you look at page 1 of the order re: Evaluation, the last line says that the sentencing evaluation be done prior to sentencing. So what we were concerned about, and given the factors the Court has to consider as to the safety of the community, I asked Dr. Beaver if he would kill again. And Dr. Beaver's response was, "I don't know. It's context specific. And by the time they get to their 40s, they're usually more mature and less violent."
>
> So with that [in] mind, that information, I didn't want Dr. Beaver's report for the sentencing judge to hear that.

(Tr., p.63, L.6 – p.64, L.10.) Trial counsel testified he was also concerned that, if he obtained a written report of Dr. Beaver's psychological evaluation, the state could request that Ciccone be evaluated by its own expert who, at the time, the defense bar referred to as "Dr. Death because nothing he said as a psychologist or mental doctor assisted our clients in any way."[1] (Tr., p.64, L.15 – p.66, L.5.)

In addition to trial counsel's testimony, the state also presented a number of documentary exhibits, including the victim impact letters submitted at sentencing (Respondent's Exhibit 2); character letters offered by the defense at

[1] Trial counsel also testified he had reviewed Dr. Beaver's affidavit and did not see in that affidavit any reference to or diagnosis of borderline personality disorder. (Tr., p.66, L.10 – p.67, L.18.) Trial counsel explained that his professional relationship with Dr. Beaver had recently deteriorated due to a personal matter and, while counsel did not believe Dr. Beaver's affidavit was in any way influenced by the "falling-out," he did believe Dr. Beaver's interpretation of his own notes was not consistent with the notes trial counsel made contemporaneously with their discussion in 2005. (Tr., p.67, Ls.19-24, p.78, L.20 – p.80, L.2.)

sentencing, many of which referred to Ciccone's personal and family history of mental health issues (Respondent's Exhibit 3); the sentencing hearing transcript (Respondent's Exhibit 4); Ciccone's military records (Respondent's Exhibit 14); and the records of Ciccone's treatment at Intermountain Hospital following his failed suicide attempt in September 2003, in which the examining psychologist diagnosed Ciccone with major depression but opined "at discharge (less than two weeks before the death of Mr. Ciccone's wife) that [Ciccone] 'was not felt to be a threat to himself or others and had no suicidal or homicidal ideation'" (R., p.171 (citing Respondent's Exhibit 15)). The latter two items were appended to the PSI in the underlying criminal case. (Tr., p.84, Ls.8-12; R., p.176.)

Following the evidentiary hearing, the district court applied the relevant legal standards to the evidence before it and correctly concluded Ciccone failed to meet his burden of proving trial counsel's representation fell below an objective standard of reasonableness. (R., pp.175-79.) Specifically, the court found:

> The evidence at hearing has established that Petitioner's counsel made a strategic and tactical decision not to have a written psychological evaluation prepared and submitted at sentencing. At sentencing, in addition to the mental health records indicating that the Petitioner was not a danger to himself or others approximately ten days before the Petitioner ran over his wife, the court also had Petitioner's military records showing above average military performance of the [Petitioner] with exemplary on and off duty conduct as recently as January 20, 2003. (Ex. 14). Defense counsel had presented letters of the family describing a family history of mental illness and many character letters describing the Petitioner's good character. Trial defense counsel testified he was aware of the results of Dr. Beaver's evaluation and had even done research about Dr. Beaver's conclusions. Trial defense counsel described his rationale for his decision, including the strategy of not presenting a new written psychological evaluation to preclude the

> State from requesting an additional evaluation of the Defendant – which counsel, based on his experience and expertise, did not feel would be favorable toward the Defendant.
>
> Dr. Beaver opined nine years later that he felt his diagnosis and findings related to mood instability and a markedly elevated profile indicating significant emotional and/or psychiatric issues would have assisted the Court in determining Mr. Ciccone's sentence, and in fact, may very well have lessened the sentence the court gave. But the trial defense counsel explained his assessment of the evaluation nine years ago, had notes made contemporaneously supporting that assessment, and described a reasonable strategy related to the assessment of why, in his training and experience, Judge Wetherell would have differed from Dr. Beaver's opinion.

(R., pp.177-78; see also R., p.178 (finding, in light of trial counsel's testimony and the favorable mental health evidence that was before the sentencing court, that trial counsel's decision not to produce the report was a "reasonable strategic or tactical decision" and "was not due to inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review").) The court also found Ciccone failed to meet his burden of proving prejudice, reasoning:

> [I]n an objective review of the complete record before the court at sentencing, the attorney's conduct did not prejudice [Ciccone] at sentencing, would not have changed the outcome of the sentence, and in fact, presented a more favorable defense for [Ciccone] even with the risk of a countervailing report by a psychologist for the State.

(R., p.179.)

On appeal, Ciccone contends the district court erred in denying relief as to this claim, arguing the evidence showed that trial counsel's "decision to not submit a report from Dr. Beaver [was] based upon both factual and legal errors," and "the deficiency was prejudicial because there is a reasonable probability that but for counsel's deficiency the outcome of the proceedings would have been

different." (Appellant's brief, p.5 (citation omitted).) Neither of these arguments withstands analysis.

Ciccone claims that, in making his decision to not obtain and submit a written report of Dr. Beaver's psychological evaluation, trial counsel mistakenly believed that "a diagnosis of borderline personality disorder meant that Mr. Ciccone is controlling and abusive." (Appellant's brief, p.6.) As evidence that counsel was mistaken, Ciccone points to counsel's research on borderline personality disorder (submitted at the evidentiary hearing as part of Respondent's Exhibit 13), which, he claims, "does not reference controlling or abusive behavior." (Appellant's brief, p.6.) Even a cursory review of counsel's research shows, however, that it is Ciccone who is mistaken. While the research article counsel relied upon does not explicitly use the words "controlling" and "abusive," it clearly states that individuals with borderline personality disorder often exhibit "low anxiety tolerance," "poor impulse control," "chaotic" and "extreme relationships with others," "frequent expressions of anger," "stormy relationships," "manipulativeness," "masochism/sadism," "demandingness," "entitlement," and "[a]nger that is inappropriate, intense or uncontrollable." (Respondent's Exhibit 13, pp.3-8 (article entitled "Borderline Personality Disorder").) All of these traits are consistent with counsel's notes, made during his discussion with Dr. Beaver, that Ciccone specifically is or that individuals with borderline personality disorder generally are "controlling" and "abusive." (Id., p.1.) Even if not equivalent to "controlling" and "abusive," the diagnosis is at the very least unfavorable. Ciccone failed to prove it was objectively unreasonable

for counsel, after discussing Ciccone's diagnosis with Dr. Beaver and conducting his own research that showed individuals with borderline personality disorder exhibit a number of unflattering traits, to forego obtaining a written report that would have reflected negatively on Ciccone's character.[2] This is especially true in light of the fact that it is clear from trial counsel's testimony and written notes that his decision to not obtain and submit a written evaluation rested not only on the fact that Dr. Beaver had diagnosed Ciccone with borderline personality disorder, but also on that fact that Dr. Beaver opined Ciccone was "in deep denial of his culpability." (Tr., p.63, Ls.20-21; Respondent's Exhibit 13, p.1.)

Ciccone also claims trial counsel's decision to forego a written evaluation was objectively unreasonable because it was based on two mistakes of law. The first mistake, Ciccone argues, "was that any written report would even have to include a diagnosis." (Appellant's brief, p.7.) Ciccone posits that, because I.C. § 19-2522(3)(b) requires "[a] diagnosis, evaluation *or* prognosis of the mental condition of the defendant" (emphasis added), counsel could have asked Dr. Beaver to produce a written "evaluation of Mr. Ciccone's mental health situation and his prognosis without including the term 'borderline personality disorder'" (Appellant's brief, pp.7-8). Ciccone apparently believes that, to be effective,

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[2] In a further attempt to demonstrate that trial counsel was mistaken in his belief that individuals with borderline personality disorder are "controlling" and "abusive," Ciccone relies on the "National Institute of Mental Health's webpage discussing this disorder." (Appellant's brief, pp.6-7 (footnote omitted).) Ciccone did not proffer this webpage as evidence below, however. His attempt on appeal to prove the deficient performance prong of his ineffective assistance of counsel claim by presenting evidence that was never offered or considered below is improper, and the new evidence he cites must be disregarded. Nelson v. Nelson, 144 Idaho 710, 714, 170 P.3d 375, 379 (2007).

counsel was required to obtain and submit to the sentencing court a written psychological evaluation that was, at best, incomplete and, at worst, misleading. Unsurprisingly, Ciccone cites no authority for the proposition that it is objectively unreasonable for trial counsel to forego a written report rather than present a report full of half-truths and incomplete information. Nor does he cite any evidence indicating Dr. Beaver would have conspired to present a misleading or incomplete report. Even assuming trial counsel had the option of ethically employing the latter strategy and could have secured Dr. Beaver's cooperation, a decision to not do so would not have been objectively unreasonable; as explained by defense counsel at the evidentiary hearing (Tr., p.65, Ls.12-24.), the state, after reviewing the written report, could have sought its own expert to evaluate and report on Ciccone's mental condition, thereby exposing any flaws and/or omissions in the report prepared by Dr. Beaver.

Ciccone argues otherwise, contending the second mistake of law trial counsel made was believing "that any presentation of a written report would result in the District Court authorizing a second evaluation from" the state's expert. (Appellant's brief, p.8.) This argument fails for two reasons. First, it is based on a faulty premise. Trial counsel did not testify that producing a written report "would result in" the authorization of a second evaluation. Rather, he testified only that the prosecutor "could have moved to have Mr. Ciccone evaluated by his own expert" (Tr., p.65, Ls.14-15), a proposition of law with which Ciccone agrees on appeal (see Appellant's brief, p.8). Second, and more importantly, Ciccone's assertion that "there is no statutory provision allowing a

second evaluation simply because the state wishes to dispute the original court appointed expert's conclusions" is false. Idaho Code § 18-207(4)(c) expressly provides that evidence of a defendant's mental condition is "subject to the adversarial process" and that:

> Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental condition may be in issue.

I.C. § 18-207(4)(c). Because this statute requires a court, upon request, to authorize a second evaluation by the state's expert, it is clearly Ciccone, not trial counsel, who is laboring under a misapprehension of the law.

Ciccone did not demonstrate below, and he has not demonstrated on appeal, any objective shortcoming in trial counsel's strategic decision to forego a written evaluation, in part, to avoid the risk of exposing Ciccone to an evaluation by an expert who, at the time, the defense bar referred to as "Dr. Death." Citing Estrada v. State, 143 Idaho 558, 564, 149 P.3d 833, 839 (2006), Ciccone argues, that "[e]ven assuming trial counsel's worse [sic] fears regarding the appointment of 'Dr. Death' came true, Mr. Ciccone could not have been made to participate in that evaluation. He simply could have refused to speak to [the state's expert] and the doctor would not have been able to conduct a second evaluation." (Appellant's brief, p.8.) This argument is without merit. While Estrada makes clear that a defendant enjoys a Fifth Amendment right to not participate in certain presentence evaluations, nothing in the Estrada opinion

suggests that, once a defendant has waived that right by participating in a psychological evaluation conducted by an expert of the defendant's choosing, he may thereafter invoke it to avoid inquiry by the state on the subject matter of his mental condition. In fact, as discussed above, Idaho law provides exactly the opposite. See I.C. § 18-207(4)(c); see also State v. Payne, 146 Idaho 548, 571, 199 P.3d 123, 146 (2008) (citing Buchanan v. Kentucky, 438 U.S. 402, 423 (1987)) ("[A] defendant who raises mental status as a defense waives his Fifth Amendment privilege against self-incrimination."). Having failed to demonstrate that trial counsel's decision to not obtain and submit a written psychological evaluation for use at sentencing was based on any legal or factual errors, or any other shortcoming capable of objective review, Ciccone has failed to show error in the trial court's determination that he failed to prove the deficient performance prong of his ineffective assistance of counsel claim.

Ciccone has likewise failed to show error in the trial court's determination that he failed to prove prejudice. Ciccone argues that, had the sentencing court been aware of Dr. Beaver's opinion that there was a significant mental health component related to the offenses, there is a reasonable probability that it would have imposed less than the fixed life sentence Ciccone actually received. (Appellant's brief, pp.8-9.) As found by the trial court, however, the sentencing court had before it a number of materials documenting Ciccone's mental condition, including letters from his family members and the records of his admission to Intermountain Hospital for a suicide attempt just weeks before he committed the murders of his wife and unborn child. (R., pp.171, 176-79.)

Although Dr. Beaver indicated that he would have opined in a written evaluation that there was "a significant mental-health component related to the events surrounding the death of Mr. Ciccone's wife and unborn child" (Plaintiff's Exhibit B, ¶ 9.c.), there was also evidence that such a report would have contained extremely damaging information, including that Ciccone suffered from borderline personality disorder and was "in deep denial of his culpability" for his crimes (Tr., p.63, L.6 – p.64, L.7; Respondent's Exhibit 13). In light of this evidence, and in view of all of the other information available to the sentencing court, Ciccone has failed to show error in the district court's conclusion that submitting a written report of Dr. Beaver's psychological evaluation "would not have changed the outcome of the sentence, and in fact," trial counsel's decision not to do so "presented a more favorable defense for the defendant" without exposing him to "the risk of a countervailing report by a psychologist for the State." (R., p.179.)

The district court's finding that Ciccone failed to carry his burden of proving either deficient performance or prejudice is supported by substantial competent evidence and the applicable law. Ciccone has failed to show any basis for reversal of the court's order dismissing his ineffective assistance of counsel claim.

CONCLUSION

The state respectfully requests that this Court affirm the judgment dismissing Ciccone's petition for post-conviction relief.

DATED this 11th day of December, 2015.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of December, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE
NEVIN, BENJAMIN, McKAY & BARTLETT
P.O. BOX 2772
BOISE, ID 83701

LORI A. FLEMING
Deputy Attorney General

LF/dd