12-8-2014

Johnson v. State Respondent's Brief Dckt. 42935

IN THE SUPREME COURT OF THE STATE OF IDAHO

NICHOLAS DAVID JOHNSON AKA MEEKS,	)	**No. 42935**
Petitioner-Appellant,	)	**Canyon Co. Case No. CV-2013-12087**
vs.	)	
STATE OF IDAHO,	)	
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature Of The Case

Nicholas David Johnson, a.k.a. Meeks, appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The Idaho Court of Appeals offered the following factual background in the underlying criminal case:

> Johnson was charged with murder in the second degree for the stabbing death of Jarmey McCane at the home of Bill and Stacy Kron on June 25, 2011. The stabbing occurred at the end of a party where alcohol had been consumed by the persons present. At trial, testimony of the witnesses to the event showed that McCane, along with his sister and brother-in-law, Stacy and Raymond Lopez, arrived while the party was in progress at the Krons's house. When McCane arrived, Bill Kron introduced him to Johnson as a "good dude," to which Johnson responded, "Nah." Stacy Kron testified that she could feel tension immediately when McCane was introduced to Johnson. Off and on through the evening, Johnson continued to say things to McCane, and McCane would just try to "blow it off" by saying, "Whatever, dude." At one point, Kron moved between Johnson and McCane and held Johnson back from a confrontation with McCane. Johnson continued to engage in this behavior and display animosity toward McCane despite being asked by Kron to stop and "show some respect" to Kron's guests. Around 1:30 a.m., Kron decided he was "done with the situation," so he went to his room, "grabbed a bat," and "told everybody the party ... was over." Stacy Kron took the bat from him, put it in the garage, and everyone went outside. They were standing in the street in front of the house, except for Johnson who had stayed on the front porch. Kron apologized to the Lopezes and to McCane and McCane apologized to Kron for disrespecting Kron and his home.
>
> While Kron was in the street apologizing to his friends, Johnson went back inside the Krons's house and picked up a large kitchen knife with an eight-inch long blade, which he concealed in his pocket. Johnson

returned to the porch and yelled something in a "cocky" tone to which McCane responded, "What?" and started walking toward Johnson. As soon as McCane reached Johnson, Johnson stabbed McCane in the upper chest. McCane grabbed his neck and said, "I think I just got stabbed." He collapsed in the Krons's front yard and died. After the stabbing, Johnson fled to his truck. McCane's brother-in-law, Raymond Lopez, pursued Johnson on foot and punched out the driver's side window of Johnson's vehicle, but Johnson sped away. Johnson fled to his girlfriend's house, changed his bloody shirt, and approximately twenty minutes later, called 911 to report the stabbing. Unbeknownst to him, Raymond Lopez had already called 911. When Johnson called 911, he reported he just stabbed someone, claiming "two people came at [him] and tried to jump [him]" so he "grabbed a knife and stuck one." When asked for his name, Johnson identified himself as "George Hernandez," and when asked where he was, Johnson hung up. The dispatcher then called back, but Johnson did not answer his phone and the dispatcher got Johnson's voicemail, which said, "Hey this is Nick." The dispatcher called back a second time and Johnson answered. When the dispatcher asked, "Is this George?" Johnson calmly said, "Yes," and he repeated his story that he "stuck" a guy when two men tried to jump him. Johnson also denied knowing the victim, said he was not sure whether the homeowner knew the victim, and said he did not plan to go to jail. When the dispatcher asked whether Johnson was planning to harm himself, he said "hold on" and hung up.

Law enforcement eventually located Johnson in his truck and initiated a traffic stop. The officers observed that Johnson's driver's side window was shattered, there was blood spatter in his truck, and the bloody knife was on the front seat mostly covered by a piece of paper. Johnson was taken into custody at which time it was noted he had no visible injuries and he declined an offer to be examined by paramedics. When interviewed, Johnson again claimed he had been attacked by two guys and said he had the knife because he felt threatened.

The State charged Johnson with second degree murder. Prior to trial, the State filed a motion in limine seeking the admission of photographs taken concerning the crime scene, the victim, and the autopsy. Johnson objected to several of the photographs on the basis that the probative value of the photographs was outweighed by prejudicial effect. The district court explained that its decision on the admissibility of

> the items was a discretionary call and ruled that one of the photos was admissible but that the court would reserve ruling on the admissibility of the others to see "how the facts of the case are going to tie in." During trial, the court held a hearing outside the presence of the jury at which the forensic pathologist who performed the autopsy testified regarding the relevance of five photographs identified as Exhibits 36, 37, 38, 39, and 40. Johnson objected to these exhibits, arguing the photographs had significant prejudicial effect and had no probative value, in light of the fact that the defense was willing to stipulate to whatever facts the State wanted to put in the record about McCane's autopsy. The court sustained Johnson's objection to Exhibit 36, but allowed the admission of Exhibits 37, 38, 39, and 40.
>
> The jury found Johnson guilty of second degree murder. The district court imposed a unified life sentence, with fifteen years fixed. Johnson filed a Rule 35 motion, which the district court denied. Johnson filed a timely notice of appeal from the judgment of conviction and the order denying his Rule 35 motion.

State v. Johnson, Docket No. 39573, 2013 Unpublished Op. No. 737, pp.2-4 (Idaho App., November 1, 2013). The Court of Appeals affirmed both Johnson's conviction and the order denying his Rule 35 motion. Id. at 12.

On December 17, 2013, Johnson filed two complementary motions for a new trial (R., pp.5-13) that, based on the content of the pleadings, the district court treated like a single petition for post-conviction relief (R., p.14). The state filed a motion for summary dismissal of the petition on the grounds that it was not supported with evidence and was not verified. (R., pp.27-30.) With the assistance of counsel, Johnson filed an amended petition (R., pp.49-69), to which the state responded with an amended motion for summary dismissal (R., pp.422-39).

The district court ultimately granted the state's motion for summary dismissal (R., pp.475-500), and Johnson filed a timely notice of appeal (R., pp.502-04).

ISSUES

Johnson states the issues on appeal as:

> Did the district court err when it dismissed the petition for post[-]conviction relief without granting to the appellant an evidentiary hearing where he would have been able to produce evidence to support his claims of ineffective assistance of counsel?
>
> Did the district court err when it did not follow clear precedent from the United States Supreme Court as to the claim of ineffective assistance of counsel for failure of counsel to inform the appellant that a plea agreement had been offered?
>
> Did the district court improperly dismiss the petition?
>
> Has the petitioner been denied the constructive assistance of counsel during the direct appeal process?

(Appellant's brief, p.I (capitalization standardized).)

The state consolidates and rephrases the issue as:

Has Johnson failed to show error in the district court's summary dismissal of his petition for post-conviction relief?

ARGUMENT

Johnson Has Failed To Show Error In The District Court's Summary Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

In his post-conviction petition, Johnson raised several interrelated claims of ineffective assistance of counsel. (R., pp.49-69.) The state filed a motion for summary dismissal on the grounds that Johnson failed to present admissible evidence showing either deficient performance or prejudice in regards to any of his claims. (R., pp.422-39.) The district court granted the state's motion. (R., pp.475-98.) On appeal, Johnson argues that the district court erred by dismissing his petition for post-conviction relief. (Appellant's brief, pp.2-15.) Application of the correct legal standards to the facts of this case, however, shows that summary dismissal was appropriate.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file …." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Correctly Dismissed Johnson's Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802;

State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the "application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1)." Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that "specifically set[s] forth the grounds upon which the application is based." Id. (citing I.C. § 19-4903). "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief on the trial court's own initiative or in response to a party's motion. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's

mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

Where the petitioner alleges entitlement to relief based on ineffective assistance of counsel, he must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To establish deficient performance, the petitioner must overcome the strong presumption that counsel's performance was adequate and "show that his attorney's conduct fell below an objective standard of reasonableness." Baldwin v. State, 145 Idaho 148, 154, 177 P.3d 362, 368 (2008) (citations omitted). "[S]trategic or tactical decisions 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." Id. To establish prejudice, the petitioner must show "a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different." Id.

Articulating and applying relevant legal standards, in a very thorough order, the district court properly addressed and correctly dismissed each of Johnson's post-

conviction claims. (See R., pp.475-98.) The state adopts as part of its argument on appeal the district court's detailed legal analysis found at pages 7-24 of its Order Granting Motion for Summary Dismissal, a copy of which is attached as "Appendix A."

In addition to asserting that the district court erred by dismissing his post-conviction petition, Johnson claims on appeal that the district court's notice of intent to dismiss failed to adequately inform him of defects in his petition, which prevented him from correcting those defects. (See Appellant's brief, pp.12-15.) Johnson's argument fails, primarily, because the district court never filed a notice of intent to dismiss in this case. As noted above, under Idaho Code § 19-4906, a district court may summarily dismiss a post-conviction petition—not only on its own initiative—but also in response to a party's motion for summary dismissal. See I.C. § 19-4906(c). In this case, the district court did not dismiss Johnson's petition on its own motion, which would have required the notice and 20 days to reply, see I.C. § 19-4906(b); instead, it granted the state's motion to dismiss. (See R., p.481.)

Where the district court grants a party's motion for summary dismissal under subsection (c), there is no 20-day notice requirement because the motion itself serves as the notice. Workman, 144 Idaho 518, 524, 164 P.3d 798, 804 (citing Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995)). So long as the district court grants summary disposition on the same grounds asserted in the state's motion, there is no additional notice requirement. Saykhamchone, 127 Idaho at 322, 900 P.2d at 798. Though offering a more detailed analysis, the district court's grounds for dismissal of Johnson's petition were the same as those argued by the state. (Compare R., pp.422-39 with R., pp.475-98.) Johnson was not entitled to additional notice.

Johnson also contends that the "Court did not inform the Appellant about the 'prongs' of Strickland, Supra." (Appellant's brief, p.14 (emphasis omitted).) Contrary to Johnson's assertion, the district court did cite the Strickland standard. (R., p.482.) More importantly, because this is ultimately an issue of sufficient notice, the *state* cited the Strickland standard throughout its amended motion for summary dismissal. (See R., pp.422-39.) Johnson therefore had notice that he needed to present admissible evidence showing a material issue of fact regarding both deficient performance and resultant prejudice, in accordance with Strickland, to survive summary dismissal.

Finally, Johnson complains that he was denied the "constructive assistance of counsel" during his direct appeal, because it is the policy of the State Appellate Public Defender to defer claims of ineffective assistance of counsel to post-conviction proceedings. (Appellant's brief, pp.15-16.) Johnson never presented this claim to the district court in his petition for post-conviction relief. He therefore failed to preserve this claim and it should not be addressed on appeal. See Hoover v. Hunter, 150 Idaho 658, 663-64, 249 P.3d 851, 856-57 (2011).

Even had Johnson properly preserved this claim, it would still fail. The SAPD's policy is not without merit. As the Court of Appeals has noted, "[a] claim of ineffective assistance of counsel is an issue rarely appropriate on direct appeal from a judgment of conviction; rather it is usually reserved for post-conviction relief proceedings, where a more complete evidentiary record can be developed." State v. Doe, 136 Idaho 427, 433, 34 P.3d 1110, 1116 (Ct. App. 2001). First, the record is rarely adequate for review of such claims, which generally involve complex factual determinations of competency. See State v. Saxton, 133 Idaho 546, 549-50, 989 P.2d 288, 291-92 (Ct. App. 1999).

Second, an adverse decision after a review on the merits would become *res judicata,* thereby barring the claim in a subsequent post-conviction action. State v. Mitchell, 124 Idaho 374, 375-76, 859 P.2d 972, 973-74 (Ct. App. 1993). In fact, "appellate counsel may do their clients a disservice by attempting to present such claims in an appeal from the criminal judgment, where the claims cannot be sustained on the existing record." Saxton, 133 Idaho at 550, 989 P.2d at 292. Even with the opportunity in post-conviction to develop the facts underlying his ineffective assistance of counsel claim, Johnson was still unable to sustain that claim; the prudent policy of the SAPD did not deprive him of the "constructive assistance of counsel" on appeal.

Johnson has failed to show error in the district court's order summarily dismissing his petition for post-conviction relief. The district court's order should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Johnson's petition for post-conviction relief.

DATED this 1st day of July, 2016.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of July, 2016, caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

NICHOLAS DAVID JOHNSON AKA MEEKS
INMATE #102304
I.S.C.I. – UNIT 9
P. O. BOX 14
BOISE, ID 83707

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd

APPENDIX A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

NICHOLAS DAVID JOHNSON **Petitioner,** **vs.** **STATE OF IDAHO,** **Defendants.**	**CASE NO. CV-13-12087** **ORDER GRANTING MOTION FOR SUMMARY DISMISSAL**

Petitioner was convicted of second degree murder following a trial and sentenced to a unified life sentence, with 15 years fixed in *State v. Nicholas David Johnson, aka Nicholas David Meeks*, Canyon County case CR-2011-17691. He filed an appeal challenging whether the district court erred in admitting several autopsy photographs, erred in imposing an excessive sentence, and in denying an Idaho Criminal Rule (Rule 35) motion. The conviction, sentence, and order denying the Rule 35 motion were affirmed on appeal in *State v. Johnson*, 2013 WL 5915000.

The facts of the case are set forth in that Opinion and copied herein:

> Johnson was charged with murder in the second degree for the stabbing death of Jarmey McCane at the home of Bill and Stacy Kron on June 25, 2011. The stabbing occurred at the end of a party where alcohol had been consumed by the persons present. At trial, testimony of the witnesses to the event showed that McCane, along with his sister and brother-in-law, Stacy and Raymond Lopez, arrived while the party was in

progress at the Krons's house. When McCane arrived, Bill Kron introduced him to Johnson as a "good dude," to which Johnson responded, "Nah." Stacy Kron testified that she could feel tension immediately when McCane was introduced to Johnson. Off and on through the evening, Johnson continued to say things to McCane, and McCane would just try to "blow it off" by saying, "Whatever, dude." At one point, Kron moved between Johnson and McCane and held Johnson back from a confrontation with McCane. Johnson continued to engage in this behavior and display animosity toward McCane despite being asked by Kron to stop and "show some respect" to Kron's guests. Around 1:30 a.m., Kron decided he was "done with the situation," so he went to his room, "grabbed a bat," and "told everybody the party ... was over." Stacy Kron took the bat from him, put it in the garage, and everyone went outside. They were standing in the street in front of the house, except for Johnson who had stayed on the front porch. Kron apologized to the Lopezes and to McCane and McCane apologized to Kron for disrespecting Kron and his home.

While Kron was in the street apologizing to his friends, Johnson went back inside the Krons's house and picked up a large kitchen knife with an eight-inch long blade, which he concealed in his pocket. Johnson returned to the porch and yelled something in a "cocky" tone to which McCane responded, "What?" and started walking toward Johnson. As soon as McCane reached Johnson, Johnson stabbed McCane in the upper chest. McCane grabbed his neck and said, "I think I just got stabbed." He collapsed in the Krons's front yard and died. After the stabbing, Johnson fled to his truck. McCane's brother-in-law, Raymond Lopez, pursued Johnson on foot and punched out the driver's side window of Johnson's vehicle, but Johnson sped away. Johnson fled to his girlfriend's house, changed his bloody shirt, and approximately twenty minutes later, called 911 to report the stabbing. Unbeknownst to him, Raymond Lopez had already called 911. When Johnson called 911, he reported he just stabbed someone, claiming "two people came at [him] and tried to jump [him]" so he "grabbed a knife and stuck one." When asked for his name, Johnson identified himself as "George Hernandez," and when asked where he was, Johnson hung up. The dispatcher then called back, but Johnson did not answer his phone and the dispatcher got Johnson's voicemail, which said, "Hey this is Nick." The dispatcher called back a second time and Johnson answered. When the dispatcher asked, "Is this George?" Johnson calmly said, "Yes," and he repeated his story that he "stuck" a guy when two men tried to jump him. Johnson also denied knowing the victim, said he was not sure whether the homeowner knew the victim, and said he did not plan to go to jail. When the dispatcher asked whether Johnson was planning to harm himself, he said "hold on" and hung up.

> Law enforcement eventually located Johnson in his truck and initiated a traffic stop. The officers observed that Johnson's driver's side window was shattered, there was blood spatter in his truck, and the bloody knife was on the front seat mostly covered by a piece of paper. Johnson was taken into custody at which time it was noted he had no visible injuries and he declined an offer to be examined by paramedics. When interviewed, Johnson again claimed he had been attacked by two guys and said he had the knife because he felt threatened.

State v. Johnson, No. 39573, 2013 WL 5915000, at *1-2 (Idaho Ct. App. Nov. 1, 2013).

Petitioner timely filed a motion in the criminal case, entitled "Amended Motion for New Trial Based on New Evidence." Based on the content of that motion, the Court treated it like a petition for post-conviction relief, appointed counsel and gave Petitioner time to amend the petition. Petitioner retained private counsel on January 23, 2014, and after the time for amending the petition had passed, the State filed an Answer and a Motion for Summary Dismissal. Counsel for Petitioner then filed a motion asking for an additional 90 days to amend the Petition. The Court granted the request in part, giving counsel an additional 60 days to amend the Petition. At the expiration of that 60 days, counsel again requested an additional 60 days for the petition, alleging it had taken more than 30 days to get a copy of the trial transcript from the Office of the State Appellate Public Defender, and because he had recently hired a private investigator to work on the case. The Court granted an additional 30 days to get the petition amended. Counsel requested a hearing on the Court's decision and the Court granted an additional extension, with the Amended Petition, signed by counsel, filed August 26, 2014. A verification was filed September 12, 2014.

Attached to the Amended Petition were three (3) affidavits. The first was from Kevin Kelley, a neighbor, who testified that the statement he made to the police accurately

represents what he told the officers. The police report indicates that Kevin Kelley told the officers he heard raised voices the night of the stabbing. The second affidavit is from Lori Kelley, Kevin Kelley's wife, who testified that the statement she made to the police accurately represents what she told the officers. In her statement, she told the officers she heard a loud disturbance at about 2:00 in the morning the night of the stabbing. The third affidavit was from Stephanie O'Donnell, the Petitioner's girlfriend, who testified that the Petitioner showed up at her apartment after the stabbing covered in blood, that she told him to call the police, and that the text on his phone that was sent prior to the stabbing from him to her, that said, "Eff no, I'm fighting right now," referred not to his fight with the victim before the stabbing, but instead, was a reference to an on-going disagreement between Stephanie and the Petitioner.

The Petition contained the following causes of action:

1. The Cumulative Deficient Performance Of Trial Counsel Prejudiced The Petitioner And Deprived Him Of Effective Assistance Of Counsel

2. The Cumulative Effect of the Deficient Performance Deprived Petitioner of the Effective Assistance of Counsel

3. The Petition Should Be Granted Due To The Existence Of Material Facts Not Previously Presented Or Heard

The Petitioner also alleges the following, without distinguishing to which Claim the particular allegation applies:

a. Trial counsel failed to convey a plea offer to the Petitioner;
b. Trial counsel waived the preliminary hearing without the consent of Petitioner;
c. Trial counsel failed to investigate Stephanie O'Donnell as a witness, who would substantiate his testimony that he went to her apartment and the two of them discussed calling the police because the victim would need help. O'Donnell would also have provided testimony confirming that the Petitioner had requested that she come pick him up from the party and would have testified

regarding the context for the text message sent by the Petitioner in the minutes preceding the stabbing;

d. Trial counsel did not give Petitioner a copy of the discovery, which limited Petitioner's ability to prepare a defense;
e. Trial counsel spent four (4) hours with the Petitioner preparing for the trial despite requests by the Petitioner to meet;
f. Trial counsel did not investigate the facts and did not call any witnesses except the defendant. Had he investigated, he would have been able to call Kevin and Lori Kelley, in addition to Stephanie O'Donnell;
g. Trial counsel did not conduct effective voir dire, only asking 3 questions, resulting in a selected juror coming forward during the trial to disclose the juror's father had been killed in a robbery approximately 42 years before the trial in this case;
h. Trial counsel failed to object to the following statements in opening argument:
    i. "This is a case about winning at all costs, even if it means using a 13-inch kitchen knife and striking an ambush. On June 25th, 2011 at 2:10 in the morning, the defendant invited Jarmey McCane to his death;"
    ii. "Ladies and gentlemen of the jury, when the defendant went back into that house, when he picked up that knife, he was giving himself an advantage to win a fight;"
i. Trial counsel failed to object to the testimony of Melinda Chynoweth, the 9-1-1 dispatch operator as hearsay evidence, when Chynoweth testified that there was a hang-up 9-1-1 call, with the person on the other end identifying himself as "Mr. Hernandez," and indicating that he had stabbed someone;
j. Trial counsel failed to object to the testimony of Vickie DeGuess, the coroner, who testified about photographs of the victim in a body bag and identified the person in the body bag as the victim, without any foundation about the victim's identity or DeGuess' knowledge of the identity, thus resulting in inadmissible hearsay;
k. Trial counsel failed to object to statements made by Officer Patrick Lewis, where Lewis testified that Stacy Lopez, the victim's sister, stated,
    i. "Help him. He is my little brother. He only has two kids," as irrelevant and unduly prejudicial;
    ii. "...it was his [Kron's] fault his friend stabbed her brother" as no foundation had been laid that there was a stabbing and it was up to the jury to determine whether a stabbing occurred;
l. Trial counsel, by failing to object, failed to preserve any issues for appellate review;
m. Trial counsel failed to object to the testimony of Officer Richard Pelkey, where Pelkey presented "hearsay" testimony when Pelkey

testified that Raymond Lopez was yelling at William Kron, "...about how his friend had stabbed Jarmey;"

n. Trial counsel failed to object to the testimony of Officer Richard Pelkey, where Pelkey presented "hearsay" testimony when Pelkey testified that Stacy Lopez was yelling at Bill that "...his friend had done this;"
o. Failed to object when Pelkey testified that Stacy Kron told him she was missing a knife from her butcher block;
p. Trial counsel failed to cross examine Officer Pelkey;
q. Trial counsel failed to object to the admission of Exhibits 14 and 15, which were photos of the butcher block and knife set;
r. Failed to object to testimony from Officer Michael Clinger that when the Petitioner was stopped by the police after the stabbing, the officers treated it as a "high risk stop," as that statement was not relevant and was highly prejudicial, as it implied the defendant was violent, armed, and a danger to the officers;
s. Trial counsel failed to object to the district court improperly assisting the state in admitting exhibits;
t. The district court improperly assisted the state in admitting exhibits;
u. Trial counsel failed to object to the testimony of Paul Weremecki about Weremecki's conversations with the Petitioner prior to the stabbing, wherein the Petitioner was bragging about his ability to beat people up, as this was irrelevant;
v. Trial counsel failed to object to the state's leading questions to Bill Kron, after Kron had already testified he didn't really remember what had happened;
w. Trial counsel failed to object to Ray Lopez' testimony that the Petitioner stabbed the victim, when all Lopez saw was the Petitioner swing his arm and didn't see a weapon because the stabbing was a "legal" conclusion the jury should have made;
x. Trial counsel failed to object to State's questioning of Stacy Lopez, when after she became emotional, the State asked, "Is it hard to be in the same room with the person who killed your brother?" This was irrelevant and unduly prejudicial.

The State filed a Motion for Summary Dismissal asserting that as to each claim, the Petitioner failed to support each prong of the *Strickland* test with admissible evidence. The State also generally alleged that Petitioner failed to raise genuine issues of material fact, failed to provide admissible evidence for each claim, failed to establish either deficient performance or prejudice, and that "most" claims failed as Petitioner had

not established the act was the result of deficient performance as opposed to trial strategy. The State also argued that the claim for newly discovered evidence did not meet the legal standard. The State also addresses some claims specifically.

Based on the Amended Petition, the affidavits, the items of which the Court took judicial notice and the State's Motion for Summary Dismissal, the Court hereby GRANTS the State's Motion for Summary.

A petition for post-conviction relief must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).'" *State v. Payne,* 146 Idaho 548, 560, 199 P.3d 123, 135 (2008). "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Id.* at 561, 199 P.3d at 136 (citing I.C. § 19–4903). Idaho Code § 19–4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the trial court's own initiative. The standard for analyzing the motion for summary dismissal is "whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file." *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010).

> "[I]f the petitioner's alleged facts are uncontroverted by the State ... [they] must be regarded as true." However, summary dismissal may be appropriate even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law.

Ridgley v. State, 148 Idaho 671, 674-75, 227 P.3d 925, 928-29 (2010) (internal citations omitted.

To prevail on a claim of ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984),

> the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency." *Id.* "To prove deficient performance, the appellant 'must show the attorney's representation fell below an objective standard of reasonableness.' " *State v. Dunlap*, 155 Idaho 345, __, 313 P.3d 1, 39 (2013) (quoting *Dunlap v. State*, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004)).
>
> "To demonstrate prejudice, the appellant 'must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different.' " *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cullen v. Pinholster*, 563 U.S. __, __, 131 S.Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 694). To undermine confidence in the outcome "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id.* (quoting *Harrington v. Richter*, 562 U.S. __, __, 131 S.Ct. 770, 791 (2011))....
>
> Under the *Strickland* standard, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Murray v. State, 2014 Opinion No. 31, p.6 (March 19, 2014).

> Further:
>
> When evaluating an ineffective assistance of counsel claim, strategic and tactical decisions will not be second-guessed or serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Pratt v. State,* 134 Idaho 581, 584, 6 P.3d 831, 834 (2000).

Estrada v. State, 143 Idaho 558, 561, 149 P.3d 833, 836 (2006).

Finally,

> Effective legal representation does not require that an attorney object to admissible evidence. Indeed, if evidence is arguably admissible, and the trial court could have properly allowed the evidence even if counsel had objected, the counsel's performance generally will not be objectively deficient. Thus, the standard for deficient performance when dealing with

> a failure to object is not whether the testimony could have been excluded, but whether the testimony could have been properly admitted. Failing to object to arguably inadmissible testimony will generally be insufficient to overcome the presumption that the decision was based on sound legal strategy. If the testimony could not have been properly admitted, then it can be reasonably inferred, absent evidence to the contrary, that the attorney's failure to object was the product of ignorance of the relevant law governing admissibility of the testimony. Accordingly, in order to determine if counsel's failure to object fell below an objectively reasonable standard of performance, we must first determine whether the testimony could have properly been admitted without error by the trial court.

Cook v. State, No. 41449, 2014 WL 4290413, at *3 (Idaho Ct. App. Sept. 2, 2014) (internal citations omitted.)

Petitioner Has Not Established Ineffective Assistance of Counsel

The Petitioner is required to set forth facts that either allege or establish prejudice resulting from counsel's alleged deficient performance. *See Murillo v. State*, 144 Idaho 449, 455, 163 P.3d 238, 244 (Ct. App. 2007). In the underlying criminal case, defense counsel's strategy was to raise a claim of self-defense. (Tr, 10/25/11, p.10, Ls. 1-9; Tr. P. 392, Ls. 14-18). "A claim of self-defense may be either justifiable or excusable, either of which entitles defendant to acquittal. 'Justifiable' homicide in self-defense occurs when a defendant, without provoking the confrontation, kills another under a reasonable apprehension of death or great bodily harm to the defendant." 40 Am. Jur. 2d Homicide § 138. In this case, defendant was not challenging that he caused the death of Jarmey McCane by acting with malice aforethought; instead, he was asserting that the death was legally justified or excused based on his claim of self-defense. Any error relating to the identity of the victim, the method or manner of death or whether Petitioner was the one who caused the death of the victim were all elements of second degree murder that Petitioner necessarily admitted in order to assert the claim of self-

defense. That this was trial counsel's strategy is reflected in the transcripts and in the jury instructions (Final Jury Instruction Nos. 15 and 23).

In the assertions above, assertions c, i, j, k, m, n, o, p, q, v, and w are all claims that fail to establish deficient performance because each of those claims go to the identity of the Petitioner as the killer, the manner or method of death or the identity of the victim. Failing to challenge these statements was consistent with trial counsel's theory of defense – that Petitioner had caused the death of the victim with malice aforethought but that the killing was done in self-defense. Failing to cross-examine or challenge the elements of the underlying crime was consistent with the strategy of trial counsel and therefore, that strategy will not be second-guessed on post-conviction where there is no evidence of inadequate preparation or ignorance of the relevant law. As such, there is no deficient performance nor is there any prejudice to the defendant and the State's Motion is GRANTED as to these claims[1].

Plaintiff Has Failed To Support His Claims With Admissible Evidence

In assertion a, Plaintiff alleges his attorney failed to convey a plea offer. While failing to convey a plea offer may constitute deficient performance, see *Missouri v. Frye*, 132 S.Ct. 1399, 182 L.Ed. 379 (2012), in order to establish ineffective assistance of counsel, the Petitioner must show both that a plea offer was extended by the State, and that Petitioner would have accepted the plea offer. *Id.* at 1409. Here, Petitioner fails to

[1] "Where the dismissal is based upon the grounds offered by the State, additional notice is unnecessary. When a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements [of I.C. § 19-4906(b))." *Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) (internal citation omitted.)

provide any admissible evidence about the contents of the plea offer, when it was made or that he would have accepted it. As such, because he has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

In assertion b, although Petitioner claims the preliminary hearing was waived without his consent; that claim is belied by the record where Petitioner, himself, waives the preliminary hearing. He has not alleged, by admissible evidence, that the waiver was invalid. Additionally, he has not established any prejudice resulting from the waiver because any claims of proof deficiencies in the preliminary hearing are waived by exercising the right to have a trial, (see *State v. Streeper*, 113 Idaho 662, 665, 747 P.2d 71, 75 (1987) ("Judgment will not be overturned for defects in proof at preliminary hearing where, at a fair trial, accused is found guilty upon sufficient evidence to sustain a verdict."), which Petitioner had. He has not alleged which, if any, witness testimony was different from the preliminary hearing or the trial. It appears the only witness who deviated from a previous statement was Raymond Lopez, and trial counsel cross-examined Lopez about the difference or change in his testimony as compared to his previous statement. Finally, Petitioner has not established how his trial strategy - a claim of self-defense – was prejudiced by the waiver of the preliminary hearing. As such, because Petitioner has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

In assertion c, Petitioner alleges that his attorney rendered deficient performance in failing to call Stephanie O'Donnell, and that the failure to call her prejudiced the Petitioner because there was no one to corroborate his statements regarding a text message. The Petitioner testified that no one was fighting when Bill Kron got his

baseball bat and made everyone leave the Kron residence. He testified that he thought he had made a statement to the police officers that no one was fighting. The state then asked him if he sent a text message to Stephanie at 2:03 a.m. saying that he was fighting. Petitioner said that he sent a text message to her saying he was done fighting with her. The state asked him, "On June 25th isn't it true that at 2:03 in the morning you sent a text message to Stephanie that said, quote, "Fuck you, asshole. I'm fighting right now?" The Petitioner testified that he didn't mean to send it, he was intoxicated and maybe he mis-typed or left out some words. (Tr., 11/7-0/11, p.646, Ls.12-15).

Stephanie O'Donnell provided an affidavit indicating that she and the Petitioner had been arguing about whether she would be able to get to the party and that when he texted the term, "fighting," it referred to the verbal argument between the two of them. She also testified that later that morning, the Petitioner showed up at her house wearing a bloody shirt and called the police while the two of them were in his truck. She also testified that no one asked her about the phone or the text messages.

Others testified at trial that there was some tension between the Petitioner and the victim that began as soon as the two were introduced and that throughout the night, the two were trading verbal jabs, characterizing the exchanges as "guy talk." No one saw any physical altercation between the two the entire evening. All the witnesses testified that after Bill Kron kicked everyone out of the house, Petitioner yelled something to the victim, who was standing in the street. The victim walked quickly up the sidewalk to the patio where Petitioner was. The next thing everyone noticed was the victim stepping off the patio with his shirt covered in blood and the Petitioner leaving with the knife.

Even if it was deficient performance not to call Stephanie O'Donnell as a witness, Petitioner has failed to establish by admissible evidence a reasonable probability the outcome of the case would have been different. Stephanie's testimony would have only confirmed what everyone else had testified to – that there was no physical altercation between the two prior to the stabbing. Whether the fighting referred to the "verbal jabs," made to the victim or whether it referred to his argument with his girlfriend, there are no facts as alleged by the Petitioner that support a showing that the outcome of the trial would have been different; as such, the State's motion on this issue is GRANTED.

Assertions d and e allege that because Petitioner wasn't given a copy of the discovery, Petitioner was unable to assist in his own defense. Similarly, he alleges that he only spent four (4) hours with his attorney. Petitioner does not allege that he did not get to review the discovery with his attorney, only that he did not get a copy of it. Taking those facts as true, Petitioner has failed to allege by admissible evidence that having a copy of the discovery would have aided him in assisting his attorney prepare a self-defense, thus he has not established he suffered any prejudice. Further, he does not establish how spending more time with his attorney would have resulted in a different outcome. Because Petitioner has not supported his claims with admissible evidence, the State's motion is GRANTED as to these claims.

In assertion f, Petitioner alleges the attorney failed to investigate potential witnesses because two witnesses, Kevin and Lori Kelley, were not called. The Kelleys' affidavits reflect only that the police reports accurately reflect what the Kelleys told the officers. There is no independent, admissible evidence of the Kelley's testimony because their statements to the officers were not sworn testimony. Even if their

testimony was substantively the same as the police reports, the testimony only establishes that the Kelleys lived across the street from where the stabbing occurred and that at about 2:00 a.m., both could hear raised voices but could not see anyone fighting.

Petitioner believes this would have established that there was a loud "boisterous exchange" that immediately preceded the stabbing instead of leaving unchallenged the State's assertion that there was no such occurrence. This misstates the evidence. The State never argued there was no "boisterous exchange" prior to the stabbing.

The first 9-1-1 call about the stabbing came in at 2:12 a.m. In the 10 minutes before that, there was testimony that the Petitioner called loudly to the victim, who was standing in the street. Additionally the testimony revealed that following the stabbing, there were all kinds of loud noises; for example, Stacey and Raymond Lopez yelling and Stacey Lopez crying hysterically. Thus, because the Kelleys' testimony was consistent with the testimony given by the other witnesses it would not have "challenged" the other evidence.

Like the other witnesses, the Kelleys' saw no physical altercation between the two or between anyone else, and heard loud noises either immediately preceding or immediately following the stabbing. Moreover, Petitioner has not established that had the Kelley's testimony been presented, there is a reasonable probability the outcome of the trial would have been different.

Alternatively, Petitioner has not established that trial counsel did not interview the Kelley's or simply chose not to call either the Kelleys or O'Donell as witnesses; a trial strategy that will not be second-guessed in this case. In light of the nature of their

testimony, trial counsel's decision not to call the Kelleys or O'Donnell does not appear to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. As such, because he has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

Assertion g alleges that because trial counsel did not conduct a more extensive voir dire, a juror failed to disclose the juror's father was the victim of a robbery approximately 42 years before the trial in this case. Plaintiff fails to establish any factual basis that there was deficient performance or that he was prejudiced by this circumstance. After extensive questioning by the court and the State, if the juror had not remembered this event, there is no evidence in the record to establish the defense attorney's questioning would have triggered a response. Moreover, after the juror's disclosure, he was individually questioned by the Court with the attorneys present. The juror indicated that he believed he could be fair and impartial and thus, there was no basis to strike the juror for cause. See, *State v. Moses*, 156 Idaho 855, 332 P.3d 767, 775 (2014). Where trial counsel would not have been successful in his motion to strike for cause, there can be no deficient performance.[2] Because Petitioner has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

Claim h alleges trial counsel failed to object to certain statements in opening argument. The statements relate to the fact that the Petitioner was the person who caused the death of the victim. As noted above, given Petitioner's trial strategy,

[2] Petitioner does not allege that had the information been available during voir dire his attorney would have used one of his peremptory challenges to remove the potential juror.

Petitioner was not contesting the fact that he killed the victim; thus, Petitioner has not established deficient performance of trial counsel. Moreover, the jury was instructed that opening and closing statements were not evidence and should not be considered evidence for their determination. Petitioner has not provided any evidence that the jury disregarded the instructions and considered those statements during their deliberation; therefore, he has not established any prejudice as a result of the failure to object. Because he has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

As to assertion k and i, to the extent it was not part of trial counsel's strategy, Petitioner has failed to establish how that one line of testimony constituted prejudice such that, had that particular statement been excluded from the trial, the outcome would have been different. There was overwhelming evidence that Petitioner stabbed Jarmey McCane and that McCane died as a result of the wounds. There was also overwhelming evidence that McCane was not carrying a weapon and was stabbed before any aggressive physical gestures were made by McCane towards the Petitioner. As such, there is not a reasonable probablility the outcome would have been different had trial counsel objected and the objection were sustained. Because Petitioner has not supported his claim with admissible evidence, the State's motion is GRANTED as to these claims.

Although Petitioner claims in allegation l that his attorney failed to preserve issues for appeal, he fails to identify what issues should have been preserved and the likelihood of success of those claims in order to establish prejudice. As such, he has

failed to support his claim with admissible evidence and the State's motion on this claim is GRANTED.

As to assertion r, Petitioner's claim is that testifying that this was a "high risk stop" was unduly prejudicial because it "implied the defendant was violent, armed, and a danger to the officers." Idaho Rule of Evidence 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence is unduly prejudicial if "it tends to suggest decision on an improper basis." *State v. Carlson*, 134 Idaho 389, 397-98, 3 P.3d 67, 75-76 (Ct. App. 2000).

While the type of stop was arguably not relevant and so an objection might have been sustained, Petitioner has not established any prejudice as a result of trial counsel's failure to object. Petitioner has not included any admissible evidence that three sentences (Tr., p.319, Ls. 19, 21, 23) resulted in jurors believing that he was armed, dangerous and violent at the time of the stop. There was no testimony at trial about when there is a high risk stop, the kind of crime or information that would give rise to the crime. The officers testified that when there is a high risk stop, they have the driver turn off the car and have the people in the car get out of the car one at a time. (Tr., p.319, L.18 – p.20, L.11).

Moreover, this testimony was not unduly prejudicial. The defendant was identified to the officers as having committed a stabbing and was seen leaving with the murder weapon. The jurors already had heard and were going to hear from other witnesses that the Petitioner was armed at the time of the stabbing, that he was violent

and could reasonably infer that he was dangerous. While the statement was prejudicial, it was not unduly prejudicial in the context of the trial and even had an objection been sustained, the erroneous admission of those three sentences does not lead to a conclusion there was a reasonable probability the outcome would have been different. Therefore, the State's motion is GRANTED as to this claim.

For claims s and t, the Petitioner's claims are not supported by the record. The Court did not assist the State in admitting evidence. At the relevant time in the trial, Dr. Deters, who performed the autopsy, was going to be called as a State's witness. There were some photographs of the autopsy the State was seeking to admit. These were also the photographs addressed in the pre-trial conference. The photo at issue was a depiction of the victim's chest, where the ribcage had either been removed or pulled apart and the Court ruled that it would allow that photograph only to show the depth of the wound. What the Court said is as follows:

> The Court: Just as a heads up, you may want to have an – I mean, that one photo, when I – you know, where the chest is pulled open and it shows it, I mean, if the only point's going to be the depth, I'll let you lay the foundation. Make sure you have a backup, like, okay something else can show the length or whatever."

(Tr., 11/7-10/2011, p.366, Ls. 1-7). This is not assisting the State in admitting an exhibit. Rather, the Court was explaining to the State, much like a motion in limine, that should the appropriate foundation be established, the Court found the exhibit to be relevant and the probative value outweighed the prejudicial effect of the exhibit. Because the Court was not assisting the State in admitting the evidence, that could not be a basis for trial counsel to object, and so there is no deficient performance or

prejudice established. Because the claims are not supported by admissible evidence, the State's motion is GRANTED as to these claims.

As to claim u, Petitioner's state of mind at the time of the stabbing and preceding the stabbing was relevant. Self-defense includes both an objective component (would a reasonable person have believed he was in imminent danger of death or great bodily harm) and a subjective belief (the defendant believed he was in imminent danger of death or great bodily harm). Petitioner was 5'10" and testified he weighed 160 pounds[3]; the victim was 6'2" and just under 250 pounds. Weremecki, another attendee at the party, had fought professionally.[4] The testimony revealed Petitioner had spent time in the gym trying to build bigger muscles, was pleased with how "big" he had gotten and was bragging to Weremecki about Petitioner's own ability to fight, and win, against other people who had bested Weremecki in his professional career. (Tr., 11/7-10/11, P.446, L. 20-p.448, L.8.) State's Exhibits 30, 32 and 33, which were admitted at trial, and of which the Court has taken judicial notice, are photographs of the Petitioner and depict him as a fit and muscular individual at the time of the stabbing. Thus, Petitioner's behavior or comments bragging about how tough he was or how he could beat people up, would be relevant to establishing whether Petitioner believed he was in imminent danger when McCane walked towards him immediately preceding the stabbing. As such, the testimony was relevant and because it was relevant and not unduly prejudicial, there would have been no grounds to object to the testimony and thus, Petitioner has failed to establish deficient performance for failing to

[3] It is not clear whether that was his weight at the time of trial or at the time of the killing.
[4] It is not entirely clear from the transcript what kind of professional fighter Weremecki was, but it appears it was Mixed Martial Arts.

object to the testimony. Petitioner has failed to support his claim with admissible evidence and the State's motion is GRANTED as to this claim.

In claim x, Petitioner alleges that his attorney failed to object to the State's questioning of Stacy Lopez, when during her testimony, she became emotional and the State then asked, "Is it hard to be in the same room with the person who killed your brother?" The Court finds that this was deficient performance, as the question was not relevant. However, the Petitioner has not established by admissible evidence any prejudice resulting from this question in light of the other testimony presented at trial. At trial, at least one witness testified that Stacy Lopez was holding her brother in her arms when he died, that she was hysterical, she was trying to lay over his dead body and was very difficult to remove so that first responders and officers could perform their respective duties. Thus, the jury was already presented with the testimony that the death had been very hard on Stacey Lopez and that the Petitioner was the killer.

While the question was irrelevant and perhaps prejudicial, the Court cannot find the statement is unduly prejudicial or that the outcome of the trial would have been different had the statement been excluded; as such, the Court grants the State's Motion on this claim.

As to Petitioner's-entitled First Cause of Action, this Court is only able to find two potential errors by counsel as alleged by Petitioner– failing to object to the term "high risk" as it related to the stop, and failing to object to the question, ""Is it hard to be in the same room with the person who killed your brother?" as alleged in claim x.

> "Under the cumulative errors doctrine, an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant's right to due process." *State v. Martinez,* 125 Idaho 445, 453, 872 P.2d 708, 716

(1994). For the cumulative error doctrine to apply there must have been more than one error. *State v. Hawkins,* 131 Idaho 396, 407, 958 P.2d 22, 33 (Ct.App.1998).

State v. Severson, 147 Idaho 694, 723, 215 P.3d 414, 443 (2009).

Although Petitioner has established two potential errors, unless Petitioner can establish prejudice resulting from the errors, he cannot establish cumulative error. In this case, because the Court has found two instances of deficient performance, the Court must look at those two errors together to determine whether the result of the two errors deprived the Petitioner of a fair trial.

As noted above, neither of the claims individually establish any prejudice. Similarly, the Petitioner has provided no argument or evidence establishing prejudice in light of aggregation of those two errors. Given the lack of argument or evidence, the Court cannot find that those errors deprived Petitioner of a fair trial given the context of the trial as a whole, the trial strategy and the nature and amount of testimony. As such, the Petitioner has failed to support his First Cause of Action by admissible evidence and the State's Motion is therefore, GRANTED as to this claim.

Similarly, in Cause of Action Two, Petitioner fails to identify or establish the deficient performance. In this case, there was overwhelming evidence that Petitioner engaged in conduct, with malice aforethought that caused the death of the victim. The jury rejected his claim of self-defense. At the hearing on the summary judgment motion, Petitioner's counsel argued that because there was no way Petitioner could establish the outcome of the trial would be different, he should be relieved from that requirement. Unfortunately, the law is clear – the Petitioner has the burden of establishing both the deficient performance and the resulting prejudice by admissible evidence. Without

providing evidence or argument regarding how the outcome would have been different, Petitioner has failed to establish any claim of ineffective assistance of counsel. As such, because he has not supported his claim with admissible evidence, the State's motion is GRANTED as to this claim.

Finally, in his third cause of action the Petitioner alleges that there exists material facts not heard or presented which should result in a new trial being granted. The standard for evaluating a request for a new trial based on newly discovered evidence in post-conviction proceedings is the same as the standard for evaluating the request in a criminal proceeding.

> Before a new trial can be granted, and irrespective of the form of the request, new evidence must satisfy the four-part test set forth in *State v. Drapeau,* 97 Idaho 685, 551 P.2d 972 (1976):
>
> A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due in no part to lack of diligence on the part of the defendant.

Whiteley v. State, 131 Idaho 323, 326, 955 P.2d 1102, 1105 (1998), citing State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976).

Here, the Petitioner does not articulate what the new and material facts are and the Court is not required to search the record to find the factual support for Petitioner's claims. As noted, there are only three affidavits attached to the Amended Petition – those of Kevin Kelley, Lori Kelley, and Stephanie O'Donnell. There is no evidence in the record that establishes those witnesses, or their testimony, was unknown to the defendant at the time of trial.

The second element requires that the evidence be material and not cumulative or impeaching. A material fact is one that existed "at the time of [the trial] that would have been relevant to the [trial] process and that indicate[s] the information available to the parties or the trial court at the time of [trial] was false, incomplete, or otherwise materially misleading. *Knutsen v. State*, 144 Idaho 433, 440, 163 P.3d 222, 229 (Ct. App. 2007). Here, the Petitioner alleges that the testimony of the Kelleys would establish there was some kind of loud noises, indicative of a verbal altercation, immediately preceding the stabbing. As previously discussed, this was cumulative – other witnesses testified to the same thing. Additionally, Stephanie O'Donnell's testimony was simply corroborative of the Petitioner's testimony. Although Petitioner alleges that Stephanie O'Donnell's testimony would establish there was no "fight" of any kind with the victim immediately preceding the stabbing, Petitioner has not established by admissible evidence how that would be material when that only corroborates the testimony presented at trial – all the witnesses testified there was no physical fighting before the stabbing and that immediately before the stabbing, the Petitioner yelled something at the victim, who walked rapidly up the sidewalk to the Petitioner. This is not evidence that existed that was not presented to the jury. The only possible component of Stephanie O'Donnell's affidavit that might be considered a material fact[5] that was not presented to the jury was the explanation of the term "fight" in the text message. Even assuming O'Donnell testified that Petitioner did not mean he was "fighting" with the victim before the stabbing, Petitioner cannot establish the third element – that piece of evidence would likely have produced an acquittal. Nor is there

[5] The Court notes that paragraphs 8 (after the first sentence), 9, and 11 of O'Donnell's affidavit are not material as they are irrelevant to the claims in the petition.

any evidence to establish the fourth element of the test. Thus, Petitioner has alleged no facts to support his claim that this was newly discovered evidence that warranted a new trial and the State's motion as to this claim is GRANTED.

Additionally, Petitioner has not alleged any prejudice because he cannot establish that the statements of the Kelleys or the testimony of O'Donnell would have reasonably changed the outcome of the trial, particularly in light of the other testimony presented. Because he has failed to establish prejudice by admissible evidence, this is an alternative basis to dismiss the claim and the State's motion as to this claim is GRANTED.

Conclusion

Based on the above, the Court hereby GRANTS the State's Motion for Summary Dismissal and DISMISSES the Petition with prejudice.

Dated this 8th day of December, 2014.

Molly J. Huskey
District Judge