2-14-2018

Anderson v. State Respondent's Brief Dckt. 45047

IN THE SUPREME COURT OF THE STATE OF IDAHO

ARNOLD DEAN ANDERSON,	)	
	)	**No. 45047**
Petitioner-Appellant,	)	
	)	**Twin Falls County Case No.**
v.	)	**CV42-2015-3479**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

Arnold Dean Anderson appeals from the district court's denial of his petition for post-conviction relief, and the denial of his discovery motion for metadata.

Statement Of The Facts And Course Of The Proceedings

Anderson co-owned a car with his daughter Jennifer. (R., pp. 656, 670.) While Jennifer "primarily used the vehicle," Anderson "would take the vehicle when it didn't run and would use the vehicle when it needed to be fixed or worked on." (R., p. 656.) An acquaintance of theirs, Berdine Lavoy, had been interested in buying the car, and for a period of time possessed it and test drove it; however, Lavoy returned it to Jennifer. (R., p. 656.) The car was eventually "dropped off and parked outside of Anderson's house so that he could work on it." (R., p. 657.)

One night, Anderson was driving the car. (R., p. 657.) Lavoy was a passenger. (R., p. 657.) Anderson failed to signal and was pulled over. (Pet.'s Ex. 3, p. 175, Ls. 2-16; R., p. 657.) Law enforcement removed Anderson from the vehicle while Lavoy remained inside of it. (R., p. 657.) The officers later searched the car and found a container with methamphetamine near the driver's side seat. (R., p. 658; Pet.'s Ex. 3, p. 213, L. 11 – p. 215, L. 2.)

Anderson was charged with possession of methamphetamine and a persistent violator enhancement in case number CR-2013-154. (8/12/13 Tr., p. 10, Ls. 6-10.) Anderson met with trial counsel, who "share[d] discovery with Anderson sufficiently to apprise him of the state's claims against him, and of what witnesses should potentially be

called to rebut the same." (R., p. 667.) They discussed: 1) calling Anderson's daughter Jennifer as a witness as trial (R., pp. 659-60); 2) calling Lavoy as a witness (R., pp. 660-61); and 3) testing the container for fingerprints or retesting the drugs (R., p. 658), but ultimately did not pursue any of these strategies at trial (R., pp. 658-61).

The case went to trial, where the state argued, among other things, that Anderson had constructive possession of the methamphetamine. (Pet.'s Ex. 3, p. 243, Ls. 4-15 (arguing in closing "[a] person has possession of something if the person knows of its presence and has the power and the intention to control it"); p. 237, L. 23 – p. 238, L. 1 (jury instruction on constructive possession).) Anderson presented no evidence. (Pet's Ex. 3, p. 231, Ls. 17-24.) The jury found Anderson guilty of possession of methamphetamine (Pet's Ex. 3, p. 255, Ls. 19-24) and he entered a guilty plea to the persistent violator enhancement (Pet's Ex. 3, p. 260, Ls. 1-5).

After trial, Anderson "looked at the PSI a few weeks before his sentencing." (R. p. 663.) The court appointed new counsel for sentencing, apparently on account of Anderson's wishes to file an ineffective assistance of counsel claim against trial counsel. (See 2/2/17 Tr., p. 105, Ls. 4-9.)

Anderson filed the instant petition *pro se* raising four claims for post-conviction relief: 1) that trial counsel was ineffective for failing to present evidence purported to show that Anderson's daughter was the owner of the car, that Lavoy had a potential connection to the vehicle and/or drugs, and that Anderson could have overlooked the container "on a frigid and dark night"; 2) that trial counsel was ineffective for not

challenging Anderson's sentencing enhancement; 3) that "Anderson's right of Faretta[1] self-representation" was "ignored and/or jeopardized" by court inaction and "lack of protection by trial counsel"; and 4) that "trial counsel intentionally withheld discovery to jeopardize and sabotage Anderson's ability to assist in his defense." (R., pp. 20-29.)

The district court appointed post-conviction counsel, who eventually filed an amended petition. (R., pp. 318-20.) The amended petition presented no new claims; it explicitly incorporated the prior petition, and added officer audio transcripts and a photo of a "white substance in a glass container" as an exhibit. (R., p. 319; 11/14/16 Tr., p. 30, L. 24 – p. 32, L. 1.) The state responded by written Answer. (R., pp. 483-486.)

Post-conviction counsel also filed a "Motion for Copies of Verified Court Transcripts, Audio Discs and Metadata of Criminal Proceedings at County Expense." (R. pp. 247-48.) The district court partially granted the motion with respect to the transcripts and audio discs but denied the motion without prejudice with respect to the "metadata." (5/16/16 Tr., p. 10, L. 3 – p. 11, L. 15.) At a subsequent status conference, the district court again denied the motion with respect to metadata. (11/14/16 Tr., p. 23, Ls. 4-8.)

Anderson's post-conviction petition went to evidentiary hearing. (2/2/17 Tr.) Anderson called his daughter Jennifer, his son, his trial counsel, and three on-scene officers as witnesses. (2/2/17 Tr., pp. 17-44, 97-129.) Anderson also testified on his own behalf. (2/2/17 Tr., pp. 44-96.)

The district court denied Anderson's petition in its entirety. (R., pp. 652-82.) Anderson timely appealed. (R., pp. 685-87.)

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[1] Faretta v. California, 422 U.S. 806 (1975).

ISSUES

Anderson states the issues on appeal as:

1. Did the district court err in dismissing Arnold's petition for post-conviction relief because he established that trial counsel provided ineffective assistance of counsel?

2. Did the district court err in denying Arnold's request for a forensic examination of the metadata?

(Appellant's brief, p. 8)

The state rephrases the issues as:

1. Has Anderson failed to show the district court erred in finding there was no ineffective assistance of counsel?

2. Has Anderson failed to show the district court abused its discretion by denying his motion for production of metadata?

ARGUMENT

I.
Anderson Has Failed To Show The District Court Erred In Finding There Was No Ineffective Assistance Of Counsel

A. Introduction

Anderson argues that, as a result of "inadequate preparation," trial counsel failed to "call critical witnesses and present evidence." (Appellant's brief, p. 9 (boldface omitted).) He argues that this was "objectively unreasonable" and prejudicial to him, and as a result, constituted ineffective assistance of counsel. (Appellant's brief, pp. 9-29.)

Anderson's claims fail because they repeatedly rely on "facts" that evidentiary hearing witnesses testified to, as opposed to the district court's stated factual findings. After applying the applicable law to the court's factual findings, Anderson has failed to show any deficient performance or prejudice. Accordingly, Anderson fails to show the district court erred in determining that Anderson failed to show any ineffective assistance of counsel.

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. The District Court Correctly Concluded That Andersen Failed To Show Any Deficient Performance Or Prejudice, And Therefore Failed To Show Ineffective Assistance Of Counsel

A criminal defendant has a constitutional right to counsel and to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that counsel was ineffective, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687–96; State v. Elison, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). A court's "scrutiny of counsel's performance must be highly deferential" on review; therefore, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Accordingly, counsel's tactical and strategic 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." Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

With regard to counsel's judgment calls on investigations, the Supreme Court held that Strickland's standards "require no special amplification":

> As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690–91. In other words, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005). As a result "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he or she did so for tactical reasons rather than through sheer neglect." Suits v. State, 143 Idaho 160, 164, 139 P.3d 762, 766 (Ct. App. 2006) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

Anderson argues, as a general matter, that his trial counsel was inadequately prepared. (See Appellant's brief, pp. 9-29.) He argues, more specifically, that trial counsel's inadequate preparation constituted ineffective assistance of counsel in five separate ways: failure to interview Jennifer Anderson and present her testimony (Appellant's brief, pp. 11-15); failure to call Berdine Lavoy as a witness at trial

(Appellant's brief, pp. 15-16); failure to present evidence that Lavoy was unsupervised (Appellant's brief, pp. 17-19); failure to provide Anderson with complete copies of discovery and review it with him (Appellant's brief, pp. 19-21); and failure "to obtain fingerprint analysis of the container or obtain independent testing of the substance found therein" (Appellant's brief, pp. 22-24 (boldface omitted)). Anderson also argues, as best can be gathered, that trial counsel and/or sentencing counsel failed to give "conflict-free counsel" at sentencing, or deprived Anderson of "the ability to represent himself at sentencing." (Appellant's brief, pp. 24-27.)

These claims all fail. With regard to every claim, Anderson fails to show any deficient performance or prejudice.

1. Failure To Call Jennifer Anderson As A Witness

The district court concluded that trial counsel did not give ineffective assistance by choosing not call Jennifer Anderson as a witness, because the decision was "one of trial strategy" and was not prejudicial to Anderson. (R., pp. 669-71.)

This was correct, because the decision not to call Jennifer was grounded both in trial counsel's preparation and Anderson's own wishes. Trial counsel met with Anderson (R., p. 659), discussed the issue (R., pp. 659-60), and "decided not to call Jennifer as a witness because Anderson did not want to accuse his daughter of possession of a controlled substance" (R., p. 660). The district court therefore found this was a strategic decision, made only after weighing the potential value of Jennifer's testimony against Anderson's specific "desire not to 'point the finger' at his daughter." (R., p. 669.) The district court concluded that "[t]here is no evidence here that [trial counsel's] decision not to call Jennifer was based on lack of preparation, ignorance of relevant law or any other

'shortcoming' capable of objective review." (R., pp. 669-70.) The decision was therefore "one of trial strategy" (R. p. 669), and it is well-settled that strategic 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." Howard, 126 Idaho at 233, 880 P.2d at 263.

With respect to Strickland's second prong, the district court found no prejudice from the decision not to call Jennifer as a witness. Anderson's petition claimed that Jennifer could have helped establish that Anderson was not an owner of the vehicle, and establish that other individuals had access to it. (R., pp. 23-24.) But while Jennifer testified at the post-conviction hearing that she owned the vehicle, she also testified that Anderson's name was *also* on the title (2/2/17 Tr., p. 20, L. 11 – p. 21, L. 4); that the title documents listed Anderson as another "owner" of the vehicle (2/2/17 Tr., p. 23, Ls. 16-18); that Anderson had possession of the vehicle the month of the incident (2/2/17 Tr., p. 32, Ls. 11-13); and that Anderson was driving the car the night of the incident (2/2/17 Tr., p. 33, Ls. 4-8).

Jennifer's testimony thus would have proved too much: it only adduced further evidence supporting the state's theory that Anderson was the owner of the car. Because Anderson failed to show "how the testimony about *why* he was an owner would have changed the outcome" of the underlying proceeding, the district court found he failed to show prejudice. (R., p. 670 (emphasis added).)

On appeal, Anderson argues it was deficient performance not to interview Jennifer and call her as a witness, and that "had trial counsel interviewed Jennifer, he would have known the *purpose* of Jennifer's testimony was not to accuse her of possessing

methamphetamine." (Appellant's brief, p. 12 (emphasis added).) Anderson argues that "trial counsel would have learned that Jennifer would have testified that when she arrived at the scene, [Lavoy] was unsupervised in the vehicle," that the car windows were tinted, that Lavoy had previously possessed the car, and that Anderson was merely the car's mechanic—and that Jennifer could have offered this testimony all "with minimal to no risk of incriminating herself." (Appellant's brief, p. 12.) Anderson also contends, without citing any authority, that "[i]t was objectively unreasonable for counsel to advise there was any realistic risk that Jennifer would be charged with possessing the container found after [Anderson's] arrest." (See Appellant's brief, pp. 12-13.)

This argument fails for several reasons. It fails as a threshold matter because it does not address the district court's factual findings as to *why* trial counsel decided not to call Jennifer as a witness. The district court "concluded as a factual finding that Jennifer was not called *based upon Anderson's discussion with [trial counsel], and Anderson's desire not to 'point the finger' at his daughter*." (R., p. 669 (emphasis added).) The district court concluded, again as fact, that trial counsel "decided not to call Jennifer as a witness *because Anderson did not want to accuse his daughter of possession of a controlled substance*." (R., p. 660 (emphasis added).) The district court also found, as a factual matter, that "the decision not to call Jennifer *was based on Anderson's wishes.*" (R., p. 660 (emphasis added).) While Anderson testified to contrary facts below (see 2/2/17 Tr., p. 59, Ls. 3-10), factual "[f]indings will not be deemed clearly erroneous if they are supported by substantial evidence in the record." State v. Lutton, No. 43257, 2017 WL 192846, at *4 (Ct. App. Jan. 18, 2017) (citing State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App 2006)). The district court's factual findings are supported

by substantial evidence in the record (see 2/2/17 Tr., p. 103, Ls. 4-19), and Anderson does not attempt to argue, much less does he successfully show, that these findings were clearly erroneous.

Applying the law to these factual findings, Anderson therefore cannot show the decision was based on "ignorance of relevant law or any other 'shortcoming' capable of objective review"; in particular, he cites no case law suggesting it would be deficient performance to go *against* a client's wishes and call the client's relatives to the stand to accept ownership of a vehicle in which drugs are found. (See Appellant's brief, pp. 12-13.) Accordingly, Anderson's claim fails to show deficient performance, because it ignores the plain strategic reasons for not calling his daughter, the preparation that led to that decision, and the factual finding that the decision was based on Anderson's *own* wishes.

Furthermore, Anderson does not cite any case law for the proposition that trial counsel was "objectively unreasonable," or otherwise performed deficiently, in advising Anderson that there were risks to Jennifer testifying the car was solely hers. (See Appellant's brief, p. 12.) To the contrary, there were plain risks to Jennifer testifying the vehicle was hers. The state's theory was that Anderson could have constructively possessed the drugs found in the vehicle. (Pet.'s Ex. 3, p. 243, Ls. 4-15.) Proving constructive possession requires both knowledge and control of the items in question. State v. Gomez, 126 Idaho 700, 706, 889 P.2d 729, 735 (Ct. App. 1994). Logically, ownership of a vehicle tends to show both knowledge and control of the items inside it, and the state argued at trial that Anderson's ownership of the vehicle tended to show he had knowledge and control of the drugs. (See Pet's Ex. 3, p. 243, Ls. 13-15.)

By the same logic, calling Jennifer to testify that it was *her* vehicle, would have therefore only tended to show *her* knowledge and control of the drugs inside of it. While Anderson now contends counsel should have "known the *purpose* of Jennifer's testimony was not to accuse her of possessing methamphetamine" (Appellant's brief, p. 12 (emphasis added)), the purpose of calling her would not alter the legal *effect* of her establishing ownership of a vehicle containing drugs. Anderson quite understandably did not wish to "point the finger" at his own daughter by having her build a case that she owned the vehicle, as opposed to him. Based on Anderson's concerns for a family member, the decision not to call Jennifer was eminently reasonable, and entirely strategic, and nowhere near deficient.

Lastly, even assuming Anderson has shown the decision not to call Jennifer was deficient performance, he fails to show prejudice. Anderson argues that Jennifer's testimony could have refuted the state's theory of the case, and "[b]ecause trial counsel failed to explain that [Anderson] was the car's mechanic, the jury assumed that [Anderson] had a primary user's knowledge of the car's content." (Appellant's brief, pp. 14-15.) Anderson argues that it "was critical to [his] defense that the jury understand his limited relationship to the car," and Lavoy's prior access, and that there is "a reasonable probability the jury would have acquitted [Anderson] [absent] counsel's deficient performance." (Appellant's brief, p. 15.)

These arguments fail, because Jennifer's testimony would not have helped Anderson's case. To the contrary, Jennifer's testimony only supported the *state's* theory of the case. The district court made a factual finding that Anderson owned the car. (R., p. 670.) This finding was based on substantial evidence: Anderson and Jennifer both

testified that his name was on the title (2/2/17 Tr., p. 23, L. 13 – p. 24, L. 1; p. 36, Ls. 20-21; p. 48, Ls. 18-20), and as the district court pointed out, "the owner of a vehicle is one who holds legal title to the vehicle" (R., p. 670 (quoting Lathan Motors, Inc. v. Phillips, 123 Idaho 689, 694, 851 P.2d 985, 990 (Ct. App. 1992)). Jennifer also testified that Anderson frequently had possession of it to make repairs. (2/2/17 Tr., p. 36, Ls. 13-19.) The district court further pointed out that the reason *why* Anderson owned the car was "minimally relevant, if relevant at all"—as an owner of the vehicle, for any reason, it made it more likely that he possessed the items inside of it. (See R., p. 670 (emphasis in original).) The fact that Anderson not only owned the car, but frequently possessed it, made it more likely still.

Anderson therefore fails to show that Jennifer's testimony would have helped his case at all, much less that it was prejudicial for the jury not to hear it. Because the decision not to call Jennifer as a witness was neither deficient performance nor prejudicial, it was not ineffective assistance of counsel not to call her as a witness.

2. Failure To Call Berdine Lavoy As A Witness

With regard to counsel's decision not to call Lavoy as a witness, the district court made the following findings:

> 34. After deciding not to call Jennifer, [trial counsel] did focus on Lavoy as a witness.
>
> 35. [Trial counsel] subpoenaed Lavoy to testify at trial.
>
> 36. [Trial counsel] spoke with Lavoy prior to his testimony at trial and Lavoy informed [trial counsel] that he gave the container with methamphetamine to Anderson prior to the traffic stop. Lavoy further indicated that he had found the container/methamphetamine at a construction site, he was in possession of it, *and later gave it to Anderson, thus placing it in Anderson's possession.*

> 37. [Trial counsel], upon learning this information, discussed these facts with Anderson. *Anderson agreed that Lavoy's recitation of the facts was correct.* Therefore. [trial counsel] decided not to call Lavoy to testify. [Trial counsel] felt that if he would have put Lavoy on the stand, Lavoy's complete story would have come out, which would have harmed Anderson's case.
>
> 38. [Trial counsel] determined that the probability of Lavoy testifying that Anderson had methamphetamine and knew it was methamphetamine was high and [trial counsel] felt that calling Lavoy would not effectively represent Anderson.

(R., pp. 660-61 (emphasis added).) On these facts, the district court correctly concluded that trial counsel made the "strategic decision not to call Lavoy" due to the risks Lavoy's testimony posed to his client. (R., p. 671.) The court found "no lack of preparation, no ignorance of the relevant law, nor any other shortcoming" in this decision, and accordingly found no deficient performance. (R., p. 672.)

Anderson argues on appeal that trial counsel "misconstrue[d] the relevance of [Lavoy's] potential testimony" due to a failure to conduct a meaningful investigation, and failed to realize that Lavoy could have testified about a range of issues—including how Lavoy frequently drove the car, and lived very near to the car. (Appellant's brief, pp. 16-17.)

But this argument fails to address the salient findings of fact: trial counsel *did* conduct a meaningful investigation—by subpoenaing Lavoy and interviewing him. (R., p. 671; 2/2/17 Tr., p. 100, Ls. 7-22.) And counsel did not "misconstrue the relevance" of Lavoy's potential testimony, insofar as Lavoy's most relevant statements were that Lavoy found the methamphetamine container and gave it to Anderson—"thus placing it in Anderson's possession." (R., p. 660; 2/2/17 Tr., p. 100, L. 10 – p. 101, L. 20.) Worse yet, Anderson himself *agreed* that Lavoy's statement about the container was correct.

(R., p. 660; 2/2/17 Tr., p. 108, L. 6 – p. 109, L. 7.) On appeal, Anderson does not argue that these factual findings were incorrect, much less does he show that they were clearly erroneous. (See Appellant's brief, pp. 15-16.) And these facts plainly show trial counsel's strategic decision was based both on preparation and knowledge of the law, and could not have been deficient performance.

Anderson summarily muses that if Lavoy *had* been called to testify, a discussion of Lavoy's knowledge of the container "was likely to result in a Fifth Amendment invocation"—implying that a discussion of the container would have been off-limits at trial. (See Appellant's brief, p. 16.) But Anderson gives no citation to the record, or to any case law, explaining why this would be so. (See Appellant's brief, p. 16.) Litigants are required to support their contentions on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Anderson's claim that Lavoy's potential testimony about the container "was likely to result in a Fifth Amendment invocation" is therefore waived, insofar as it lacks any legal authority or argument to support it.

Even if this claim has not been waived, the record below shows as a factual matter that the parties were unsure whether Lavoy even intended on invoking his Fifth Amendment rights. (Pet's Ex. 3, p. 147, L. 21 – p. 149, L. 12.) As the trial persisted the matter remained unresolved. (Pet's Ex. 3, p. 228, Ls. 11-16.) The district court on post-conviction therefore correctly found it was "unclear" whether Lavoy *would have* invoked any Fifth Amendment rights not to testify about the container and the methamphetamine, had he been called to testify. (R., p. 671, n. 8.)

Moreover, case law suggests that even if Lavoy had been called to testify about Anderson's preferred topics, and even if he asserted his right against self-incrimination, he could not have avoided a discussion of the container. While cross-examination inquiry is limited by the privilege against self-incrimination, "the privilege against self-incrimination is waived for *all 'matters raised'* by the defendant's testimony during direct examination." State v. Hairston, 133 Idaho 496, 503, 988 P.2d 1170, 1177 (1999) (emphasis added); see also Brown v. United States, 356 U.S. 148 (1958). To the extent Lavoy's ostensibly favorable testimony was all about the car, Lavoy could not have selectively testified about the car, its location, and his relationship to it—while avoiding cross-examination about the drugs found *within* it. Anderson's theory of Lavoy's value therefore fails because it depends on Lavoy invoking his right to silence—which the record does not indicate he *would* have done—and selectively avoiding questions about the container—which the case law does not support he *could* have done.

Applying the law to the factual findings leaves Anderson with an impossible task: he must show it was deficient performance for his trial counsel not to call a witness whose testimony—which Anderson *agreed* was correct—would have showed that Anderson possessed methamphetamine. Anderson must also show it was prejudicial for the jury *not* to hear testimony showing he possessed methamphetamine. Anderson cites no authority suggesting it would be ineffective assistance to not call witnesses whose testimony would help prove the state's case in chief. (See Appellant's brief, pp. 17-19.) Trial counsel's strategic decision not to call Lavoy was plainly the correct one, and Anderson fails to show ineffective assistance of counsel.

3. Failure To Present Evidence That Lavoy Was Unsupervised

The district court made the following factual findings regarding Officer Applewhite, and Anderson's theory of the case that Lavoy could have left the methamphetamine while he was left in the car:

> 13. After Anderson was pulled over and had exited the vehicle, Anderson contends that Lavoy was left alone in the vehicle for a period of time.
>
> 14. Officer Joel Woodward ("Woodward"), who at the time of the traffic stop and arrest worked for the Twin Falls Police Department ("TFPD"), initiated the stop on Anderson's vehicle and he ultimately removed Anderson from the vehicle. While Woodward's focus was primarily on Anderson, he could see Lavoy in … the passenger seat at the time Anderson was removed.
>
> 15. Anderson testified that he was not able to see Lavoy through the tinted windows once he was out of the vehicle.
>
> 16. Nevertheless, Officer Shawn Applewhite ("Applewhite") of the TFPD arrived at the scene prior to Anderson exiting the vehicle. Applewhite's responsibility was to watch and observe Lavoy as Lavoy remained in the vehicle. *Applewhite testified that he had a clear view of Lavoy during the entire stop; the court accepts Applewhite's testimony in this regard and declines to accept the testimony of Anderson who was being arrested and was in the control of Woodward at the time.*

(R., pp. 657-58 (footnote omitted, emphasis added).)

Anderson notes this finding and argues, for the first time on appeal, that "the question for the district court was not whether [Lavoy] was constantly supervised but, rather, *whether trial counsel was ineffective for failing to present available evidence that established [Lavoy] had the opportunity to leave the container in the car*." (Appellant's brief, p. 18 (emphasis added).) Noting that Officer Applewhite testified that Officer Woodward gave a verbal command to watch Lavoy, Anderson argues, for the first time on appeal, that trial counsel "failed to present available testimony contradicting the

officer or admit Officer Woodward's audio to demonstrate that the verbal command was not reflected on the audio recording"; and that this failure was a result of "inadequate preparation." (Appellant's brief, p. 18.)

This claim fails for several reasons. It fails first because Anderson appears to have never alleged it below. Anderson presented four claims in his petition for post-conviction relief, and he did not claim it was ineffective assistance of counsel not to impeach Officer Applewhite with Officer Woodward's audio. (See R., pp. 21-30.) Nor did Anderson make this claim in his closing argument after the post-conviction evidentiary hearing (2/2/17 Tr., p. 130, L. 18 – p. 132, L. 7), or in his written closing argument (see R., pp. 616-26). From the state's review of the record, Anderson never made a specific claim that failure to impeach Officer Applewhite about the verbal command or failure to admit the audio recording into evidence was deficient performance, nor did he specifically claim this inaction prejudiced him. Because Anderson never raised this theory below, he cannot do so for the first time on appeal. State v. Garcia–Rodriguez, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017) ("Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.").

Second, Anderson's claim fails because Anderson fails to support his allegation of deficient performance with any authority. Anderson simply declares that "[t]here could be no sound strategic strategy for not challenging Officer Applewhite's testimony that he arrived before Officer Woodward removed [Anderson] from the vehicle and constantly surveyed [Lavoy]." (Appellant's brief, p. 18.) But, even assuming this is a correct statement of law, Anderson's next sentence reveals that trial counsel *did* challenge

Officer Applewhite's testimony; as Anderson puts it, trial counsel "attempted to cast doubt on Officer Applewhite's testimony by questioning why the alleged verbal command was not audible on the audio recording" (Appellant's brief, p. 18), to which the officer had an explanation:

> Q [from trial counsel] You're positive that it was a verbal command from Officer Woodward to watch the passenger?
>
> A I remember him instructing me to watch the passenger, yes.
>
> Q If—as a Twin Falls police officer, you do have a recording device, don't you?
>
> A Yes, I do.
>
> Q And so does Officer Woodward?
>
> A Yes, I believe he did.
>
> Q Do you know if he was wearing that?
>
> A I don't recall.
>
> Q Did you listen to his audio?
>
> A No, I did not.
>
> Q So we played the audio, and that command isn't on there in the first ten, 15 minutes.
>
> MR. HATCH: Your Honor, I'm going to object. Is he commenting on evidence not entered?
>
> THE COURT: Sustained.
>
> BY [trial counsel]:
>
> Q Would that statement be on his audio?
>
> A I don't know if it would be or not.
>
> Q Why wouldn't it be?

A Some things are not picked up on audio because of the wind. It was windy and cold. I don't know.

(Pet's Ex. 3, p. 207, L. 14 – p. 208, L. 12.) Thus, the record shows that trial counsel *did* challenge the officer's testimony—to which the officer had an explanation. Anderson cites no authority for the proposition that it is ineffective assistance of counsel to fail to repeatedly challenge testimony in the *exact* way appellate counsel deems sufficient in hindsight. (See Appellant's brief, p. 18.) To the contrary, given the "highly deferential" standard on review, and indulging in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" it was a reasonable strategic choice not to belabor a point that the officer had already convincingly explained. Strickland, 466 U.S. at 689.

Third, even if preserved, and even if this claim shows deficient performance, Anderson cannot show prejudice for failure to admit the audio recording, because the audio itself would neither confirm nor disconfirm whether the officer's testimony was correct. The officer only testified that he did "not know" whether the audio would contain the statement—which the audio *itself* could neither prove nor disprove.

In sum, even assuming deficient performance, Anderson cannot show that the failure to admit the officer's recording into evidence prejudiced him at trial. He fails to show ineffective assistance on this claim.

4. Trial Counsel's Alleged Failure To Provide Complete Discovery

The district court made the following factual findings regarding Anderson's requests to review discovery:

25. Anderson requested that he be able to review all discovery in the case.

> 26. Anderson claimed that discovery was not provided to him.
>
> 27. [Trial counsel] does not remember Anderson making a formal request to review discovery. [Trial counsel] had no notes that Anderson had asked for/requested discovery. However, there was a kite from February 2013 asking for discovery. [Trial counsel] does not remember seeing the kite; *if he had, he asserts he would have given discovery to Anderson*.
>
> 28. *Nevertheless, [trial counsel] testified that he went over discovery with Anderson. In addition, [trial counsel] testified that he either listened to the Officers' audio recordings in the jail with Anderson as it was his practice, or he gave Anderson a copy of the recordings when he was out of custody*.
>
> 29. Anderson *was also put on notice prior to trial that there were audio recordings in his case as they were played at his Motion to Suppress hearing when Anderson was present*.

(R., p. 659 (footnotes omitted, emphasis added).)

Based on these findings, the district court correctly concluded that Anderson failed to show deficient performance from a failure to provide complete discovery, because "[trial counsel] *did* share discovery with Anderson sufficiently to apprise him of the state's claims against him, and of what witnesses should potentially be called to rebut the same." (R., p. 667 (emphasis added).) The court accepted trial counsel's "testimony that he customarily shared audio recordings with his clients, by either playing the recordings in the jail, or by providing copies to defendants"; and that, "[a]s such, Anderson had access to this 'discovery.'" (R., pp. 667-68; 2/2/17 Tr., p. 98, L. 11 – p. 99, L. 25; p. 105, L. 17 – p. 106, L. 12.)

The court also found there was no deficient performance insofar as Anderson was present in the suppression hearing in this case, "where the audio was played as part of the hearing," and thus Anderson was "apprised at that time, if not before, of what the evidence was in such recordings." (R., p. 668; 2/2/17 Tr., p. 88, Ls. 1-17.) Lastly, the

district court correctly found that there was no prejudice, because "Anderson has failed to show: 1) what was in the discovery that would have made a difference in how Anderson provided input to [trial counsel] to assist in his defense; and 2) what difference having such information would have made in the outcome." (R., p. 668.)

On appeal, Anderson fails to show any error. He asserts, with no citation to the record, that he "did not receive complete discovery and was not provided the officers' audio recordings." (See Appellant's Brief, p. 20.) This conclusion is contrary to the district court's findings of fact that Anderson *did* have access to the audio recordings (R., pp. 667-68), and fails for being unsupported. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Anderson argues the district court clearly erred by finding Anderson was "apprised … of what evidence was" in the audio played at the suppression hearing; Anderson points out that only some of the audio in this case, but "[n]o portion following [Anderson's] transport to jail," was played at the suppression hearing. (Appellant's brief, p. 20-21.) However, this fails to address the district court's factual finding that Arnold did have access to the audio recordings, without limitation, because it was trial counsel's practice to share audio with clients. (R., pp. 667-68; 2/2/17 Tr., p. 98, L. 11 – p. 99, L. 25; p. 105, L. 17 – p. 106, L. 12.) Moreover, Anderson fails to challenge, much less show clearly erroneous, the district court's other finding that Anderson was apprised of the state's claims and the witnesses he would need to call to rebut them. (R., p. 667.) Because the district court found Anderson did have access to the audio recordings, and was apprised of the claims against him and witnesses he would need to call, Anderson fails to show any deficient performance.

Even assuming any deficient performance, Anderson fails to show prejudice. Anderson's roundabout prejudice claim is that allegedly unshared audio recordings "revealed his daughter asserting ownership over the car," and if Anderson had heard them sooner he would have been "aware of the other witnesses on the scene who could have potentially provided testimony at trial." (Appellant's brief, pp. 20-21.) Anderson claims that "[r]eviewing and discussing the audio recordings with [him] could have helped trial counsel understand the importance of Jennifer's testimony." (Appellant's brief, p. 21.)

But the slightest scrutiny unravels this prejudice claim. First, this claim ignores that Jennifer's co-ownership of the car was not a revelation to Anderson, or to trial counsel. Anderson was obviously aware that "there was ownership of the car by both [him] and [his] daughter," because it was Anderson himself who helped Jennifer finance the purchase of the car, and whose name was therefore placed on the title. (2/2/17 Tr., p. 48, Ls. 11-25.) One presumes that this historical fact from Anderson's own life was not "revealed" to him by the jail transport audio.

Anderson also understood the potential significance of the ownership issue from the very beginning: Anderson testified that at his first meeting with trial counsel, his defense was "[i]t ain't my car." (2/2/17 Tr., p. 47, Ls. 12-22.) Trial counsel likewise testified that prior to trial, Anderson informed him that the car actually belonged to Jennifer. (2/2/17 Tr., p. 103, Ls. 4-19.) As a result, Anderson fails to show the audio recording would have provided any new information or defenses, either to Anderson or to his counsel, and he cannot show any prejudice from an alleged failure of the two of them to review it.

Second, even if trial counsel and Anderson were unaware of Jennifer's presence on the scene, and unaware of the "ain't my car" defense, there is no reason to think the audio recordings *would have* convinced trial counsel to call Jennifer as a witness. Trial counsel made a strategic decision not to call Jennifer, and Anderson fails to show the audio recordings would have changed the strategic reasons not to call her, explained above.

Lastly, even if Anderson has shown that the audio recordings contained new information, with a novel defense, that would have convinced trial counsel to call Jennifer to testify, he still fails to show prejudice. Even if Jennifer had been called as a witness, her testimony, as explained above, would have only established that Anderson was *also* an owner of the car. Anderson cannot show how avoiding this testimony about his ownership of the car prejudiced him.

In sum, Anderson cannot show the audio recording contained any new information or novel defense theories that would have convinced his trial counsel to act differently; or that if counsel had acted differently, it would have had any impact on his trial. As a result, Anderson fails to show any prejudice whatsoever, and fails to show ineffective assistance on this claim.

5. Trial Counsel's Failure To Obtain Fingerprint Analysis Or Do Independent Testing

The district court concluded that trial counsel's decision not to obtain a fingerprint analysis or do independent drug testing of the methamphetamine was not ineffective assistance of counsel. (R., pp. 676-77.)

On appeal, Anderson shows no error. Anderson argues he was "insistent on his innocence, was certain his fingerprints would not be on the container and did not know whether the substance was truly methamphetamine." (Appellant's brief, p. 23.) With no citation to authority, Anderson argues that, based on these circumstances, and on Lavoy's possession of the car earlier that day, "it was unreasonable for trial counsel to fail to obtain fingerprint testing of the container and independent testing of its contents." (Appellant's brief, p. 23.) Regarding prejudice, Anderson asserts—without citation—"[s]ince the container was plastic and could hold a print, fingerprint testing showing [Anderson's] fingerprints were *not* on the container would have been critical evidence establishing [Anderson] did not knowingly possess methamphetamine." (Appellant's brief, pp. 23-24 (emphasis in original).)

These arguments fail. They fail first because Anderson ignores the district court's factual finding that "[a]fter discussing it further with [trial counsel], *Anderson himself decided not to have the container fingerprinted*." (R., p. 659 (emphasis added).) This finding was supported by substantial evidence (2/2/17 Tr., p. 102, L. 23 – p. 103, L. 2), and has not been shown clearly erroneous on appeal (see Appellant's brief, pp. 22-24).

Even if was not Anderson's own decision to not test the container for fingerprints, and Anderson in fact sought such testing, trial counsel is not required "to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Beard, 545 U.S. at 383. Anderson cites no authority that this deferential standard should be recalibrated because a client is certain of his innocence, or certain of a lack of fingerprints, or unsure about the true nature of a substance, or subjectively certain or

existentially puzzled about anything else. (See Appellant's brief, pp. 22-24.) Trial counsel is simply required to do "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See Strickland, 466 U.S. at 690–91.

And declining to test for fingerprints was a particularly reasonable line to draw here, because the state did not need to prove that Anderson ever *touched* the container to prove he possessed it. The state's theory, argued before the jury, was that Anderson constructively possessed the container. (Pet.'s Ex. 3, p. 243, Ls. 4-15 (arguing in closing "[a] person has possession of something if the person knows of its presence and has the power and the intention to control it"); p. 237, L. 23 – p. 238, L. 1.) Unlike an *actual* possession claim, this theory would not require proof that Anderson ever touched the container. See Gomez, 126 Idaho at 706, 889 P.2d at 735. This is, presumably, precisely why the district court concluded "[t]here has been no showing what the fingerprinting … would have shown that would have made a difference." (R., p. 677.)

Declining to retest the drugs here was equally reasonable. The initial state lab testing showed the methamphetamine was, in fact, methamphetamine. (R., p. 658; Pet.'s Ex. 3, p. 213, L. 11 – p. 215, L. 2.) Anderson gave no reason below, and no reason now, to think the state lab results were wrong (other than eyeballed appraisals that the container maybe was an "eye makeup bottle," or "could be cheek makeup," or "could be lip balm. I don't know"). (2/2/17 Tr., p. 60, Ls. 1-23.)

Because the methamphetamine was methamphetamine there was simply no reason to retest it. Trial counsel's supervising attorney agreed. (2/2/17 Tr., p. 102, Ls. 1-3.) Anderson cites no authority holding that in a constructive possession case, with positive

lab results, a battery of forensic tests are required based solely on the defendant's subjective beliefs about the facts—or that failure to take such unwarranted steps would be deficient performance. (See Appellant's brief, pp. 22-24.)

Even if he could show deficient performance, Anderson's prejudice claims certainly fail. Responding to the district court's prejudice finding, Anderson declares that "fingerprint testing showing Arnold's fingerprints were *not* on the container **would have been** critical evidence." (Appellant's brief, pp. 23-24 (italics in original, boldface added).) Of course, this begs the question. Anderson is premising the game-changing significance of the test solely on what he presumes it "would have" shown. But he gives no objective or record-based reason to think a fingerprint test would have shown anything at all. (See Appellant's brief, pp. 23-24.) Furthermore, even if Anderson's unsupported suppositions about the test results were true, Anderson still cannot establish prejudice—because he does not explain how the absence of fingerprints would affect a constructive possession case.

Likewise, Anderson fails to explain how the failure to do independent drug testing caused him any prejudice. Nor could he: there are no facts in the record showing the methamphetamine was anything but methamphetamine. (See R., p. 658; Pet.'s Ex. 3, p. 213, L. 11 – p. 215, L. 2.) Because Anderson does not argue, and no facts show, that a second test of the methamphetamine would have arrived at a different result, he has not shown any prejudice on appeal.

Not seeking fingerprint analysis or drug retesting was completely reasonable in this case and Anderson fails to show any prejudice—as the district court correctly found, "[t]here has been no showing what the fingerprinting, lab testing or weighing would have

shown that would have made a difference." (R., p. 677.) Anderson fails to show this was incorrect, and fails to show ineffective assistance on this claim.

6. Self-Representation And Ineffective Assistance Of Sentencing Counsel

Anderson presents claims regarding sentencing counsel and the "denial of self-representation at sentencing." (See Appellant's brief, pp. 24-27.) The actual claims at issue here are difficult to discern. As best can be gathered, Anderson finds fault with his trial and/or sentencing counsel's purported failures to review the PSI with him; failures to heed his alleged requests to represent himself at sentencing; and/or failures to inform the district court of any corrections to the PSI. (See Appellant's brief, pp. 24-27.) Anderson does not specifically claim what the deficient performance or prejudice was (see Appellant's brief, pp. 24-27); however, he concludes this section by alleging the following error(s):

> The district court erred in failing to consider the record in considering [Anderson's] claims regarding representation at sentencing. The record establishes that [Anderson] was deprived of meaningful representation by conflict-free counsel or of the ability to represent himself at sentencing.

(Appellant's brief, p. 27.)

Anderson appears to frame these issues as a single ineffective assistance of counsel claim. It is therefore worth noting that this claim appears to blend Anderson's PSI-review claim—which was presented below as ineffective assistance (see R., p. 622)—with his self-representation claim—which was presented below as a Faretta violation. (see R., pp. 26-28.)

On appeal, Anderson appears to have jettisoned the Faretta approach, reframing the deprivation of "meaningful representation by conflict-free counsel or of the ability to

represent himself" as an ineffective assistance claim. (Compare Appellant's brief, pp. 24-27 with R., pp. 26-28.) Thus, to the extent Anderson has merged what were two separate claims below, they are best analyzed separately on appeal.

a. Self-Representation

This claim should not be considered because it has no support in the record. Anderson luridly contended below that he requested to represent himself in case CR-2013-154—the underlying criminal proceeding in this case. (R., pp. 26-27 ("Splattered on the pages of the transcriptions of the above-mentioned cases are discussions between the court and trial counsel concerning Anderson's Faretta request[s] relative to State v. Anderson, CR-2013-154, yet nothing occurred.").)

However, the district court concluded that "there is no support in the record for such a claim," because Anderson's putatively relevant exhibits admitted at the post-conviction hearing relate to a *separate* criminal case—CR-2013-7911—and do not show such a motion was made in *this* underlying criminal case—CR-2013-154. (R., p. 661.) Thus, the district court concluded that Anderson's self-representation claim failed at the outset because "he has failed to establish that he ever made such a request." (R., p. 673.)

On appeal, Anderson has not shown the district court's conclusion was clearly erroneous, because he continues to draw on facts from the incorrect case to support his claim, and still does not show he made a self-representation request in this case:

> On October 21, 2013, trial counsel put the district court on notice that Mr. Anderson wanted to represent himself. Exhibit 10, p. 5 ln. 3-10. On October 22, 2013, trial counsel wrote [Anderson] informing him that he advised the district court that [Anderson] wanted to represent himself. Exhibit 8. Trial counsel indicated the trial court initially set the issue for a hearing, then changed his mind. *Id*. Trial counsel advised [Anderson] could bring up self-representation at the next hearing. *Id.*

(Appellant's brief, p. 27.)

These facts fail to show the district court's finding was clearly erroneous. The October 21, 2013 hearing took place in CR-2013-7911, and it was the *state's* attorney—not Anderson's trial counsel—noting that "[t]he defendant asked to represent himself." (Pet's Ex. 10, p. 5, Ls. 3-10.) Anderson has neither alleged nor shown that the October 22 letter was from this case, and the district court concluded it was not—because it referred to an upcoming pretrial conference, and the pretrial conference in this case took place six months before the October letter was written. (R., p. 661 (citing Pet's Ex. 11).) Neither of these exhibits establish that Anderson ever moved to represent himself *in this underlying case*, much less show that the district court clearly erred by concluding he did not. Anderson continues to fail to show that he made a request for self-representation in this underlying case, and his claims for relief on this point accordingly fail.

Even assuming a self-representation request was made, Anderson's claim fails because Anderson does not address, much less challenge, the district court's explicit holdings on this issue: first, that Anderson should have raised his self-representation claim on direct appeal, and therefore forfeited his right to raise it on post-conviction (R., p. 673 (citing I.C. § 19-4901(b))); and second, that such a request needs to be made before trial, and be unequivocal, both of which Anderson did not establish (R., p. 674). Because Anderson does not present any argument or authority that the district court's actual holdings were erroneous (see Appellant's brief, pp. 24-27), they should not be disturbed. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Even if this Court considers this issue on its newly minted merits, Anderson appears to be presenting the self-representation claim as an ineffective assistance claim

for the first time on appeal. (Compare Appellant's brief, pp. 24-27 with R., pp. 26-28.)[2] Because Anderson posed this as a Faretta claim below, the district court never ruled on whether counsel's performance, vis-à-vis Anderson's purported requests for self-representation, was deficient performance or prejudicial. (See R., pp. 673-74.) This claim therefore fails because it has not been preserved. Garcia–Rodriguez, 162 Idaho at ___, 396 P.3d at 704.

Finally, even if this ineffective assistance claim has been preserved, on appeal Anderson does not explain why counsel's actions regarding a self-representation request were deficient, or how it prejudiced Anderson to proceed with counsel at sentencing, as opposed to representing himself.[3] (See Appellant's brief, pp. 24-27.) Thus, to the extent Anderson's repackaged Faretta claim should be analyzed as ineffective assistance for the

[2] Below, Anderson only alluded that the alleged Faretta violations were ineffective assistance of trial-level counsel; he did not explicitly set this forth as a claim, or explain what the deficient performance or prejudice was. (See R., pp. 26, 28.) Anderson appeared to claim his *appellate* counsel was ineffective in relation to the Faretta issue, but does not raise that claim on appeal. (R., p. 26, n. 2.)

[3] And the record would suggest the opposite: Anderson repeatedly stressed his lack of legal education and inability to navigate criminal justice proceedings without assistance. (See, e.g., 2/2/17 Tr., p. 46, Ls. 12-16 ("Is my understanding of the law. Went only two days in the 6th grade. It's hard to litigate against a, you know, an attorney who's been in this for years when you only went a couple days in the 6th grade, you know."); p. 70, Ls. 14-16 ("Actually, I didn't—I'm not educated. I didn't want to represent myself. I did—I wanted somebody to sit down and help me."); p. 89, Ls. 12-13 ("I don't know. I'm not an attorney. I don't know what is going on.").) Given Anderson's testimony it is entirely unclear what *prejudice* it would have caused Anderson to be represented by counsel at sentencing, as opposed to representing himself.

first time on appeal, Anderson has nevertheless failed to support it with authority.[4] Zichko, 129 Idaho at 263, 923 P.2d at 970.

b. PSI Review, And Sentencing Counsel's Actions

With respect to Anderson's claim that sentencing counsel gave ineffective assistance by not reviewing the PSI, or other claims that sentencing counsel gave ineffective assistance, these claims are unsupported. The district court found that the "record is silent" whether Anderson's newly appointed sentencing counsel went over the PSI with him. (R., p. 663.) Anderson claims to the contrary that "[t]he new attorney also failed to review the PSI with [Anderson] and ignored his requests for discovery in the new case," but gives no citation to the record to support this claim. (Appellant's brief, p. 24.) He provides no other specific argument detailing why sentencing counsel's performance was deficient, or if it was, why it prejudiced him. (Appellant's brief, pp. 24-27.)

On appeal, Anderson simply argues that the post-conviction *court* erred in "failing to consider the record in considering" his sentencing claims. (Appellant's brief, p. 27.) But the district court's conclusions on this point were correct:

> Nevertheless, even *assuming* that Judge Stoker proceeded to sentencing without confirming that Anderson had reviewed the PSI, there is again no evidence in the record as to what errors were found in the PSI, what corrections should have been made, and most-importantly [sic], had those

[4] Similarly, to the extent Anderson raises "conflict-free" counsel as an additional ineffective assistance claim on appeal, he has failed to support it. (See Appellant's brief, pp. 24-27.) Even assuming sentencing counsel had a conflict of interest—a claim Anderson alludes to without any citation to legal authority—Anderson does not explain why such a conflict led to deficient performance. (See Appellant's brief, pp. 24-27.) He similarly makes no attempt to explain why counsel's alleged conflict prejudiced him. (See Appellant's brief, pp. 24-27.) Without any legal authority to explain or support it, this claim fails. Zichko, 129 Idaho at 263, 923 P.2d at 970.

> corrections been made, what difference it would have made in the outcome. Therefore, this claim is denied.

(R., p. 678 (emphasis in original).)

Anderson continues to fail to show what difference the PSI review, or any other sentencing decision would have made. (See Appellant's brief, pp. 24-27.) These claims fail for lack of authority, Zichko, 129 Idaho at 263, 923 P.2d at 970, and Anderson has failed to show deficient performance or prejudice.

7. There Was No Error, And Accordingly No Cumulative Error

Although not explicitly framed as an issue on appeal, in Anderson's section summing up trial counsel's "inadequate preparation," Anderson argues, with no citation to case law, that the errors here constituted cumulative error. (Appellant's brief, pp. 28-29.)

To the extent Anderson raises cumulative error an issue on appeal, he fails to show cumulative error. Anderson does not cite any legal authority supporting his argument and therefore fails to support it from the outset. Zichko, 129 Idaho at 263, 923 P.2d at 970. Moreover, as explained above, the district court correctly found that Anderson failed to show any errors—thus, there were no errors to cumulate. (R., p. 678 (citing State v. Dunlap, 141 Idaho 50, 66, 106 P.3d 376, 392 (2004).) Anderson has therefore failed to show any errors based on counsel's assistance—cumulative or otherwise.

II.
Anderson Fails To Show The District Court Abused Its Discretion By Denying His Motion For Metadata

A. Introduction

In post-conviction proceedings, Anderson made a discovery motion for "verified court transcripts, audio discs and metadata for **all** the hearings held in the criminal cases of State of Idaho v. Arnold Dean Anderson, Case No. CR-13-154 **and** State of Idaho v. Arnold Dean Anderson, Case No. CR-137911." (R., pp. 247-48 (emphasis in original).) The motion contended that Anderson "is of the belief that it is essential he receives certified copies of all court transcripts, audio discs and metadata from both of the above-referenced criminal cases in order for Petitioner and his counsel to fully prepared [sic] for trial in this Post-Conviction matter." (R., p. 248.)

The district court granted Anderson's motion with respect to transcripts and audio, allowing Anderson's trial counsel to compare the transcripts with the audio. (5/16/16 Tr., p. 10, Ls. 3-10.) The court denied the request for metadata without prejudice:

> As to metadata, I'm not aware of any authority for that other than the federal rule you've cited which may or may not apply, but my feeling is it doesn't apply in a state court proceeding. But what I am allowing, Mr. Schwab, is for you to review the audio against the transcript. And if you feel it's in error, there are legal means to try and correct that or bring it to my attention.
>
> And I'm not making a denial absolutely regarding the metadata at this point; but if you find that it does appear to be, that Mr. Anderson's claims are meritorious, then we can have an independent hearing in that regard and try to establish, under his testimony, under oath, what he believes the record should read and following the procedural rules that do govern correcting of transcripts. If that be the case, I'll allow you to pursue it in that fashion.
>
> I'm just not certain how the court reporter's proprietary programs would be taken and reviewed for metadata—but, at all—she certifies. I'm

> presuming, this was a true and correct certified transcription of what went on in the courtroom; and if there's something different on the audio, I'd be happy to rehear this at that point. Okay?

(5/16/16 Tr. p. 10, L. 11 – p. 11, L. 12.)

At a status conference Anderson renewed his motion for metadata. (11/14/16 Tr., p. 4, L. 10 – p. 23, L. 8.) The district court again denied the motion (11/14/16 Tr., p. 23, Ls. 4-8), from which Anderson now appeals (Appellant's brief, pp. 29-31).

B. Standard Of Review

Discovery during post-conviction relief proceedings is a matter left to the sound discretion of the district court. I.C.R. 39(b)[5]; Raudebaugh v. State, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) (citing Fairchild v. State, 128 Idaho 311, 319, 912 P.2d 679, 687 (Ct. App. 1996)). On review, the appellate court must determine whether the district court "acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and whether the court reached its decision by an exercise of reason." State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994). "In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application." State v. LePage, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003) (citing Aeschliman v. State, 132 Idaho 397, 402-403, 973 P.2d 749, 754-755 (Ct. App. 1999)).

[5] Idaho Criminal Rule 39, governing post-conviction discovery procedures, was formerly codified as Idaho Criminal Rule 57.

C. Anderson Fails To Show The District Court Erred In Denying His Motion For "Metadata"

"Unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery." Raudebaugh, 135 Idaho at 605, 21 P.3d at 927. Moreover, discovery is not a mechanism for finding out if evidence supports claims, and this "fishing expedition" discovery is discouraged. Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006) ("'Fishing expedition' discovery should not be allowed. The UPCPA provides a forum for known grievances, not an opportunity to research for grievances.").

The district court denied Anderson's request for metadata and plainly was within its discretion to do so. Despite Anderson's own attorney's assessment that there was "no authority" guiding the motion, "except for that [Anderson] is requesting it" (5/16/16 Tr., p. 6, Ls. 3-5), the district court denied the motion without prejudice, indicating it would "be happy to rehear" the motion in the future (5/16/16 Tr., p. 10, L. 11 – p. 11, L. 12). At the following hearing, Anderson's trial counsel again reiterated that "I don't believe that there's any grounds for us to move forward with requesting the metadata" based on the Idaho rules. (11/14/16 Tr., p. 4, Ls. 18-24.) Explicitly recognizing its discretion to do so, the district court denied his motion again. (11/14/16 Tr., p. 23, Ls. 4-8.)

Anderson claims the district court abused its discretion by denying his request for metadata. (Appellant's brief, pp. 29-31.) This claim is meritless for a variety of reasons.

First, Anderson failed to preserve his arguments below, by explicitly conceding below that they were unsupported by authority. (5/16/16 Tr., p. 6, Ls. 3-5; 11/14/16 Tr., p. 4, Ls. 18-24.) Trial counsel admitted, with sheepish candor, that "there is *no authority*

that would guide me in this matter except for that [Anderson] is requesting it." (5/16/16 Tr., p. 6, Ls. 3-5 (emphasis added).) To the extent Anderson now claims the Idaho Civil Rules, Criminal Rules, and Idaho case law *do* support his motion, the district court never heard that theory, much less ruled on it, and his newfound argument is accordingly waived. Garcia–Rodriguez, 162 Idaho at ___, 396 P.3d at 704.

Second, even if this claim is preserved, Anderson fails to state how the district court abused its discretion. Parties are required to address applicable factors to successfully show an abuse of discretion:

> We note that this Court has seen an increasing number of cases where a party completely fails to address the factors we consider when evaluating a claimed abuse of discretion. We emphasize that when a party "does not contend that the district court failed to perceive the issue as one of discretion, that the district court failed to act within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it or that the district court did not reach its decision by an exercise of reason," such a conclusory argument is "fatally deficient" to the party's case.

State v. Kralovec, 161 Idaho 569, 575, 388 P.3d 583, 589 (2017); see also Cummings v. Stephens, 160 Idaho 849, 855, 380 P.3d 168, 174 (2016). Anderson does not contend that the district court failed to perceive the issue as one of discretion, or failed to act consistently with applicable legal standards or within the boundaries of its discretion, or failed to reach its decision by an exercise of reason. (See Appellant's brief, pp. 29-31.) Thus, even if this claim was preserved, it is improperly pleaded and terminally deficient, and must be dismissed.

Third, even if preserved and properly pleaded, Anderson's claim has no factual support. Anderson does not allege, must less show, what specific metadata he seeks, or that the metadata he requests even exists, or that if it does, that the district court would

have had the ability to produce it or order its production. (See Appellant's brief, pp. 29-32.)

Fourth, even if preserved, properly pleaded, and factually supported, Anderson's claim fails on the merits. The district court correctly denied Anderson's claim because "[w]hen a court reporter stenographically reports court proceedings, the court reporter's certified transcript shall be the official record of the proceedings." (5/16/16 Tr., p. 6, Ls. 6-24 (quoting I.C.A.R. 27(d)).) "A properly certified transcript is prima facie evidence of the validity of the proceedings." State v. Ruddell, 97 Idaho 436, 439, 546 P.2d 391, 394 (1976), State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973). Anderson's own counsel foreshadowed this claim-ending reality below, conceding that "I don't believe that there's any grounds for us to move forward with requesting the metadata; *whereas in the rules, the Idaho court rules very clearly show that the recording, the court recording from those proceedings is to be considered the final and absolute source of information in regards to questions of what happened at a certain hearing.*" (11/14/16 Tr., p. 4, Ls. 18-24 (emphasis added).)

The transcript here was certified as the "full, true and correct copy of the transcript of said evidence and proceedings." (Pet.'s Ex. 12, p. 16.) Anderson has not shown that the transcript was incorrect, nor has he shown that metadata from a *prima facie* correct transcript would be "necessary to protect" his substantial rights. Raudebaugh, 135 Idaho at 605, 21 P.3d at 927.

Moreover, Anderson acknowledges that the transcript at issue does not even come from *this underlying case* (see Appellant's brief, p. 30), and he does not adequately explain how a transcript in a separate criminal case—altered or not—would have any

relevance here. He comes no closer to showing his blanket request for "verified court transcripts, audio discs and metadata for **all** the hearings" in *both* criminal cases would not have been a fishing expedition. Murphy, 143 Idaho at 148, 139 P.3d at 750. ("'Fishing expedition' discovery should not be allowed.") All told, applying the correct standards to the facts, Anderson has failed to show that his discovery motion should have been granted on the merits.

Fifth, even if Anderson has shown that the Idaho Rules of Civil or Criminal procedure import the federal rules pertaining to metadata (see Appellant's brief, pp. 29-30), and by some superimposed *federal* standard he could still successfully move for the metadata, he has failed to show, even under the federal standard, that he laid sufficient foundation for the court to grant his discovery motion.

The federal rules for production of "electronically stored information" require that Anderson's request:

> *(A) must describe with reasonable particularity each item or category of items to be inspected;*
>
> (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
>
> (C) may specify the form or forms in which electronically stored information is to be produced.

F.R.C.P. 34(b)(1) (emphasis added). Accordingly, even if the Idaho rules imported the federal standard Anderson failed to meet it, because he failed to argue *what* metadata he actually sought, or *how* that metadata would prove his claims. (See, e.g., 5/16/16 Tr., p. 5 (where trial counsel explained "in certain computer programs you can change or add to the metadata and—or, I'm sorry—to the regular data, but the metadata, you cannot

change. Apparently, he wants the metadata," without explaining what computer programs and what metadata he was referring to).)

At this point it is worth pausing and reflecting on Anderson's underlying claims about the "altered transcripts." While Anderson's briefing on appeal does not shine a light on this argument, below, here is what Anderson claimed the metadata would reveal:

> MR. ANDERSON: Okay. Thank you, sir.
>
> From my understanding under the Federal Rules of Civil Procedure Rule 34 governs that: "Metadata contained within the district court's audio recording computer system." And on the 24th, on transcript, page 11, Mr. Hatch, it says, "Well, Your Honor, we see this quite a lot where individuals talk to somebody in the jail, and they say, 'Oh, yeah, it's that way.' And they think they know the law and the folly of taking legal advice from someone who is also wearing orange with you seems to be lost to them." *That was not what was said.*
>
> *What was said was, "Your Honor, you don't have to listen to nothing Mr. Anderson says. He's an inmate. He's wearing orange." At this point in time, Mr. Stoker gets up and says, "What happened to case 11227? It was dismissed by Mr. Bevans," and the whole court just shouted out and gone, so…*
>
> THE COURT: The whole court just what, I—just a minute, Mr. Anderson. You said after that, the whole court did what?
>
> MR. ANDERSON: *Mr. Stoker got up off the bench and left. Mr. Hatch got up and ran out of the place, and Mr. Nelson was sitting there trying to turn his laptop computer on, and he says, "I'll get back to you later." And left the court, and we were just sitting there.*
>
> THE COURT: Do you have a transcript, page and line, that you're referring to so you can make that known for the record at this point?
>
> MR. ANDERSON: That was on the 24th, on page 11.
>
> THE COURT: 24th of what and what year, please?
>
> MR. ANDERSON: It was a case 7911, State versus Arnold Anderson, March 24th, 2014.

THE COURT: And you said page 11 of the transcript?

MR. ANDERSON: Uh-huh.

THE COURT: All right. Okay. Thank you for putting that on the record.

I'd like–[state's attorney] Mr. Hatch is here, so I'd like to hear from him in regard to the motion essentially.

I don't know, Mr. Hatch, if you have anything to counter what Mr. Anderson's remembrance of the facts is.

MR. HATCH: Your Honor, I'm not even sure what we're arguing about to be perfectly honest.

(5/16/16 Tr., p. 7, L. 21 – p. 9, L. 21 (emphasis added).) Anderson reiterated this version of events at the subsequent status conference:

THE DEFENDANT: Yes. What I was doing on Exhibit L, *and then my transcripts that I was talking to you on the 16th about it being altered and Randy Stoker running out of the courtroom, this man was there when it happened. You guys got cameras here, I'm sure. If you've got that recording, you will see the actual footage.*

Miss Holgate brought the paperwork. She sent me an affidavit saying these court transcripts are altered. I got supplemental transcripts on appeal on case 7911. Supplemental means they've been added to.

Peter Hatch blatantly told me, "You're nothing but a jailhouse attorney. Mr. Stoker, you don't have to listen to nothing that man has to say."
He was just like this pointing in my face.

Mr. Stoker got up and said, "I want to see you and you in my courtroom."
He walked out. This man was already gone before I could turn back and talk to Mr. Nelson. I'm not fabricating this, sir. And he ran out.

Then on the 28th, that same 7911, we were discussing both cases. That's why they're cross-fertilized, and I told Mr. Stoker that I wanted to represent myself at the beginning of these. Mr. Stoker started saying, "Well, it's your compulsory process. Go ahead. Represent yourself, Mr. Anderson. It's your compulsory process. Go ahead and represent yourself." At the time I didn't know what compulsory meant, which is to get witnesses. So I kind of declined because I was dumbfounded. So then he

> went on, and there is a whole dialog is missing. And I'm not here just fabricating this just—it's not me. I'm not going to lying about it, sir.

(11/14/16 Tr., p. 5, L. 12 – p. 6, L. 20 (emphasis added).)

Anderson's explanation of what he seeks or how it would prove his claims has become no clearer on appeal:

> Here, [Anderson] informed the district court that the transcripts incorrectly reflected what had occurred. He pleaded with the district court: "All I wanted was the truth. Never asked any man to lie for me or nothing, or I ain't come here to lie. I just wanted all the evidence so I can present a defense." [Anderson] explained that Exhibit L to his petition was relevant to his right to self-representation and illustrated how the issues interrelated due to "cross-fertilization." The transcript attached to the petition as Exhibit L and admitted as Exhibit 12 reflects a sentencing proceeding in the other criminal case and discusses [Anderson's] right to self-representation in both cases. Several discussions are labeled "off the record discussion between counsel and defendant" and not transcribed.
>
> [Anderson] harbored serious concerns regarding alternations to the transcripts and audio recordings of proceedings, which were necessary to prosecute his post-conviction claims. Production of the metadata was thus necessary to protect [Anderson's] substantial rights and the district court abused its discretion in declining to grant [Anderson's] motion.

(Appellant's brief, p. 31 (internal citations omitted).)

Reasonable minds could only speculate as to what metadata—other than GPS data—would prove Anderson's claims below that the district court judge and/or prosecutor were "running out of the courtroom." And on appeal, the unconnected dots, mildly sinister references to "cross-fertilization" and Exhibit L, and blanket claims of "serious concerns," come no closer to laying a foundation showing what metadata Anderson seeks, what it would show, or why any of this has any relevance at all.

Anderson's counsel below conceded there was "no authority"—beyond Anderson's request—guiding this motion. (5/16/16 Tr., p. 6, Ls. 3-5.) Correct. The district court was well within its discretion to deny it.

CONCLUSION

The state respectfully requests this Court affirm the denial of Anderson's petition for post-conviction relief.

DATED this 14th day of February, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of February, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ROBYN FYFFE
FYFFE LAW

at the following email addresses: robyn@fyffelaw.com and robynfyffe@icloud.com.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd