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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY MARSALIS,	)	
	)	
Petitioner-Appellant,	)	**NO. 45583**
	)	
v.	)	**Blaine Co. CV-2016-194**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S BRIEF

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

HONORABLE JONATHAN P. BRODY
District Judge

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STATEMENT OF THE CASE

<u>Nature of the Case</u>

Jeffrey Marsalis (hereinafter Appellant/Petitioner and/or Mr. Marsalis) appeals from the summary dismissal of his petition for post-conviction relief based on three claims of ineffective assistance of counsel arising from a rape supposedly occurring in October of 2005 and prosecuted in 2009.

First, Appellant asserts that the district court erred in summarily dismissing his claim that trial counsel should have objected to expert testimony extrapolating BACs of the complaining witness and him using a formula and then determining how the alcohol affected them based on a chart. The district court did not even discuss the affidavits of Petitioner's expert witnesses opining that the prosecution expert's methods were scientifically unreliable. The court then dismissed his alternative claim that defense counsel should have called his own expert witnesses, holding that defense counsel cross-examined the state's expert so Petitioner would have not been in any materially different position if had he called his own experts.

Second, the district court summarily dismissed Petitioner's claim that defense counsel should have called a known and interviewed witness who controverted important witnesses of the state regarding the condition of the complaining witness during a cab ride. The district court erred when it made credibility determinations and also confused the legal standards.

Third, Petitioner alleged that his attorney failed to advise him that the speedy trial clock under the Interstate Agreement on Detainers was 120 days and not 180 days, so his speedy trial waiver was not knowing. The state argued that Petitioner's waiver was valid. The district court summarily dismissed this claim on a ground not raised by the state, to wit, that the speedy trial right was not Mr. Marsalis' to exercise and that counsel validly waived it. Since there was no notice of this grounds for dismissal, this claim must be remanded.

Statement of the Facts and Course of Proceedings

The published opinion in this case in the direct appeal, *State v. Marsalis*, 151 Idaho 872, 264 P.3d 979, (Ct.App. 2011), describes the following facts as being shown to the grand jury:[1]

> Marsalis and K.G., who became acquainted through their work at Sun Valley, arranged to go to a bar in Ketchum for a drink. Having already consumed one beer, K.G. rode with Marsalis to the bar, where they each drank a beer. Marsalis told K.G. that she was prettier than her sister, which made K.G. uncomfortable because it gave her the impression that Marsalis believed they were on a date. She testified that she was not interested in Marsalis as a sexual partner.
>
> After the two finished their beers, Marsalis ordered a shot of liquor for each of them and refused to tell K.G. what was in it. She testified that the drink had a slightly bitter or salty taste and that there was a grainy substance left on the bottom of the glass. After a trip to the

[1] The state in its Amended Memorandum in Support of Motion for Summary Disposition recites the following facts without citation to the opinion, but refers to them as being shown both at the grand jury and at the jury trial. (R. p. 338.)

> restroom, K.G. drank another beer that Marsalis had ordered for her. She testified that after drinking this beer, her recollection became spotty which was unusual because she could normally drink three to four beers and a shot of alcohol without experiencing memory problems. Testimony of the bartender established that Marsalis had ordered a total of twenty beers and four shots for the two of them, and K.G. had also ordered a few beers for herself.
>
> Following several hours of drinking, Marsalis and K.G. took a cab back to Sun Valley. The cab driver testified that K.G. appeared to be very intoxicated and that during the ride, she was curled up with her eyes closed. The driver also said that Marsalis had a difficult time rousing K.G. and getting her out of the cab once they reached their destination—Marsalis' condominium building.
>
> K.G. testified that she had no recollection of how she left the bar or came to find herself at Marsalis' residence, where she woke up the next morning. Upon waking, she did not know where she was and saw that Marsalis was in bed next to her. She was sick and vomited several times that morning, felt pain when urinating, and felt like her vagina was "bruised." She also noticed that her clothes had been put on in a different order than she remembered wearing them the night before.
>
> K.G. spent the rest of the day feeling sick. That night she reported to Ketchum police officers that she thought she had been raped, and she then went to a hospital where samples of her blood and urine were taken. . . .
>
> Marsalis was arrested for rape, and the State sought an indictment from a grand jury.

Id., at p. 873-874.

> The case proceeded to a jury trial, where additional evidence was presented, including DNA test results showing that semen found during a sexual assault examination of K.G. was from Marsalis. The jury found Marsalis guilty of rape. He now appeals, challenging only the denial of his motion to dismiss the indictment.

Id., at p. 875.

The Court of Appeals affirmed.

As explained in the Memorandum and Order on Motion for Summary Dismissal (hereinafter Order), after the jury found Mr. Marsalis guilty as charged of one count of rape, the court sentenced him to life with the first 15 years fixed. (R. p. 577.) This term is consecutive to a sentence of 10½ years for sexual assault that Mr. Marsalis is currently serving in Pennsylvania. (R. p. 577.)

After his conviction was affirmed on direct appeal, Mr. Marsalis timely filed a verified petition for post-conviction relief. (R. p. 18-35.)

Petitioner requested the court take judicial notice of various parts of the criminal case file, including the trial transcript, which the district court granted.[2] (R. p. 48, 91.)

After lengthy proceedings in the district court which are not relevant to the issues herein, a verified Second Amended Petition for Post-Conviction Relief (Second Amended Petition) was ultimately filed, the dismissal of which is at issue here. (R. p. 280-316.) The state filed an answer. (R. p. 327-334.) The state also filed a motion for summary dismissal and an amended memorandum in support. (R. p. 335-337, 338-391.) Petitioner filed a response to the state's motion for summary judgment. (R. p. 412-447.) The state filed what it captioned Second Amended

[2] Appellant likewise has contemporaneously filed a motion to take judicial notice of the trial transcripts.

Memorandum in Support of Motion for Summary Disposition of Second Amended Post-Conviction Application (Second Amended Memorandum). (R. 454-555.) Petitioner then filed a Reply to the State's Amended Memorandum to Dismiss the Second Amended Petition (Reply). (R. p. 556-573.)

The district court held oral argument on the motion for summary dismissal and took the matter under advisement. (R. p. 574-575.)

The court granted the state's motion to dismiss in a written order. (R. p. 576-588.) A separate judgment was entered. (R. p. 596-597.)

Appellant timely appeals. (R. p. 589-592.)

ISSUE

WHETHER THE COURT ERRED IN SUMMARILY DISMISSING THE PETITION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

ARGUMENT

THE COURT ERRED BY SUMMMARILY DISMISSING THE PETITION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id*.

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss,

but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

More specifically as to allegations of ineffective assistance of counsel based on tactical decisions, the Court of Appeals explained in *Stevens v. State*, 156 Idaho 396 (Ct. App. 2013):

> This Court has long adhered to the proposition that tactical or strategic decisions of counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. There is a strong presumption that counsel's performance fell within the wide range of professional assistance.

Id., p. 385-386 (internal citations omitted).

C. Cumulative Error

"Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Bias v. State*, 159 Idaho 696, 705 (Ct. App. 2015).

D. The Claims and the Court's Rulings

Mr. Marsalis' claim for relief was ineffective assistance of counsel with three subparts as well as a cumulative error claim. One subpart, that he was deprived of his right to testify, was not pursued below. The three subparts will be fully addressed below in turn.

1) Failure to object to the state's expert testimony on intoxication and/or to call a defense expert

a) Petitioner's claim and the evidence in the post-conviction

Petitioner succinctly explained the problematic testimony of the state's expert witness at trial in the Second Amended Petition:

> 21. Counsels' performance was deficient because they failed to challenge the testimony of Marc LeBeau regarding the complaining witness's and Mr. Marsalis's blood alcohol concentration.
>
> 22. At trial, Marc LeBeau testified for the state.
>
> 23. Mr. LeBeau estimated the complaining witness's blood alcohol level by the use of the "Widmark formula." He did the same for Mr. Marsalis.
>
> 24. Using the Widmark formula, Mr. LeBeau estimated that, under one set of assumptions, the complaining witness's blood alcohol concentration peaked at about 1:30--2:30 a.m., and was about approximately .28.
>
> 25. Mr. LeBeau then testified that according to the "Dubowski chart," the complaining witness would have been in a "stupor," which meant she had lost motor function, had reduced response to stimuli, such as being touched, had impaired or loss of consciousness, or would have fallen asleep.
>
> 26. Mr. LeBeau also testified that Mr. Marsalis's blood alcohol concentration during the same period peaked at about a .16.
>
> 27. Mr. LeBeau testified that, according to the Dubowski chart, Mr. Marsalis, at a .16 blood alcohol concentration, would have been in a state of "excitement," which is associated with the loss of judgment and some memory impairment, but not blackouts or amnesia.
>
> 28. Thus, according to Mr. LeBeau, at the time Mr. Marsalis and the complaining witness arrived at Mr. Marsalis's home, the complaining witness was incapacitated due to alcohol consumption and could have fallen asleep or been unconscious when sexual intercourse occurred.

29. At the same time, according to Mr. LeBeau, Mr. Marsalis would have been conscious, but with impaired judgment, and would have been able to recall the events of the evening the next day as Mr. Marsalis was short of the stage where blackouts or memory loss would have occurred.

30. All the testimony above supported the state's allegation that Mr. Marsalis had sexual intercourse with the complaining witness at a time she was asleep or unconscious due to her excessive alcohol consumption. It also rebutted the defense theory of the case, i.e., that the complaining witness was awake and consented to sexual intercourse, but had no memory of the event due to voluntary intoxication.

31. This evidence should not have been admitted under I.R.E. 702 because estimation of blood alcohol levels using the Widmark formula is not scientifically reliable.

32. Even assuming the admissibility of the evidence, trial counsels' performances were deficient because they failed to contradict or impeach Mr. LeBeau's testimony with evidence that estimation of blood alcohol concentration using the Widmark analysis is not scientifically reliable.

33. Further, trial counsels' performances were deficient because they failed to challenge the admissibility of the testimony regarding the Dubowski chart. There is no Idaho authority finding the Dubowski chart sufficiently reliable enough for admission into evidence.

34. Further, trial counsel did not consult with or obtain the testimony of a defense expert on the issues about which Mr. LeBeau testified. Had such an expert been contacted, that expert would have testified regarding the admission of the Dubowski chart, and if admitted over objection would have testified that Mr. LeBeau's testimony about the effects of alcohol were speculative and not supported by the evidence in this case.

35. Had the jury not heard Mr. LeBeau's testimony in the above regard, or had the jury heard that Mr. LeBeau's conclusions were

> derived from unreliable methods, and had the jury heard from a defense expert, there is a reasonable probability that the jury would have acquitted Mr. Marsalis.

Second Amended Petition, p. 4-7. (R. p. 283-286.)

Attached to the Second Amended Petition was an article from The Champion concluding that underlying uncertainties characterizing retrograde extrapolation of blood alcohol levels using the Widmark formula renders it scientifically unreliable.

Petitioner argued that in the instant case, the problems with retrograde extrapolation were exacerbated because Mr. LeBeau attempted it without a BAC test to use as a baseline. (R. p. 288.) Rather, the estimate of the BACs above was not based on any sort of known BAC based on a test because no blood alcohol tests were performed on either K.G. or Mr. Marsalis. Rather, the estimates were entirely based on the bar tab and witness testimony and assumptions such as that all drinks were consumed and the tab drinks were divided equally.

In response to the State's motion for summary disposition, Petitioner asked D. Timothy Anstine, Ph.D., a tenured Associate Professor of Chemistry and Chair of the Chemistry Department at Northwest Nazarene University, to study the reliability of the Widmark formula and the Dubowski chart in determining blood alcohol concentrations (BACs) and associated actions. (R. p. 432-433.)

According to the affidavit of Dr. Anstine (Exhibit A), the Widmark formula is a simple formula to calculate the percentage of blood alcohol content. It takes the

ounces of alcohol consumed and the time it was consumed in, the weight of the person and a predetermined alcohol ratio "r" which is .73 for the average male and .66 for the average female. (R. p. 434). Kurt Dubowski, Ph.D., determined the ranges for males to be 0.60 to 0.87 and females 0.54 to 0.85. (R. p. 434.) The actual alcohol ratio "r" for an individual is generally unknowable. (R. p. 434.) Even with this limitation, this formula is considered scientifically relevant when used with individuals with known variables.

More recently, programs such as AlcoTrace used by Mr. LeBeau are used, but are still based on the Widmark formula and can add things such as whether the person is a novice, average or experienced drinker and factor in meals. (R. p. 434-435.) However, estimating an individual's BAC is still subjective since there are a myriad of parameters affecting it such as body mass index, dehydration, altitude, body temperature, time of day, and regularity of alcohol consumption, to name a few. (R. p. 435.) "Therefore, extreme caution must be used when the subjective results of a hypothetical if not arbitrary range of values from a Widmark calculation are generated." Anstine Affidavit, para. 4. (R. p. 435.)

The affidavit next explained that Dubowski developed a well-known chart that attempts to correlate the clinical signs and symptoms caused by alcohol and classify them into stages and overlapping ranges. (R. p. 435.) Dr. Anstine warned that "great caution" must be used in assessing stages of alcohol influence as each

individual is unique and how different individuals are affected has enormous ranges of influence. (R. p. 436.) The scientific assessment of an individual's actual BAC is very complex due to the wide range of the person's unique physiological and biochemical parameters, so it is not a good scientific practice to rely too heavily on any single technique. Rather, it is best to look at multiple overlapping, albeit subjective, techniques. (R. p. 437.)

Dr. Anstine concluded:

> 7. In the case of Mr. Marsalis, the state did not have blood or breath analysis, nor did it have any video or audio files. To my knowledge the State relied solely on Dr. LeBeau's Widmark calculations that he based off a bar tab and eye witnesses to establish a possible level of intoxication for both Mr. Marsalis and [K.G.]. From these highly subjective assumptions he estimates a BAC of 0.28 for [K.G.], peaking at around 1:30-2:30 a.m. He likewise estimates a BAC of 0.16 for Mr. Marsalis around the same time. From these very crude and subjective estimations, Dr. LeBeau makes sweeping conclusions about their "stage of alcoholic influence" based solely on the highly subjective Dubowski charts. In one of his published articles, Dr. Dubowski says, "In forensic practice, expert witnesses are often requested to engage in speculative retrograde extrapolation of an experimentally found BAC to an assumed BAC at a prior time. In addition to the uncertainty of the presumed post-absorptive state during the entire extrapolated interval, the assumed linearity and regularity of the BAC decrease with time are also open to serious challenge in any given individual instance. When these considerations are coupled with the established unpredictable occurrence of the steepling effect in the BAC time curve and with the wide range of the elimination rate, it becomes clear that the speculative retrograde extrapolation of the BAC to any point from an experimentally determined value must be avoided in forensic practice, or so qualified by stated assumptions that the exercise becomes pointless." (Dubowski K. M. *Alcohol Technical Reports, 1976,5:* 55-63). Dr. LeBeau's statement that [K.G.] would have been in

> a "stupor" and Mr. Marsalis would have been in a state of "excitement" is pure speculation and not based on any objective scientific facts.
>
> 8. In summary, it is my opinion that the State relied too heavily on one single technique, specifically the Widmark formula, and from these speculative calculations made sweeping assumptions, based on the Dubowski chart, concerning the levels of intoxication and its influence on Mr. Marsalis and [K.G.]. Scientifically, there is no way to know either of their levels of intoxication with any accuracy or certainty based solely on Widmark calculations. Without knowing their level of intoxication, any discussion concerning the "stages of alcoholic influence" is complete speculation.

Affidavit of Dr. Anstine, para. 7-8 (emphasis added). (R. p. 437-438.)

Also filed in response to the state's motion for summary dismissal was the affidavit of Kim Fromme, Ph.D. (Exhibit B). Dr. Fromme is a Professor of Clinical Psychology at The University of Texas at Austin where he teaches courses that focus on psychological disorders, substance use, memory, and personality assessment and specializes in the effects of alcohol intoxication on cognitive processes, especially alcohol-induced blackouts. (R. p. 439.)

Dr. Fromme explained that alcohol-induced blackouts are amnesia for all or part of a drinking episode. This is anterograde amnesia, meaning memory loss for events occurring after alcohol intake. (R. p. 442.) Blackouts also involve impairments in episodic memory, specifically memories for the emotional, spatial-temporal, and social context of events (e.g., where you were, what events

transpired). There is no evidence that any other cognitive abilities are necessarily impaired while in a blackout. (R. p. 442.)

Alcohol-induced blackouts may be fragmentary, which is amnesia for parts of a drinking episode which may later be recalled with appropriate cues (K.G.'s report of snippets here or there) or an en bloc blackout which is amnesia for an entire block of time during the drinking episode (K.G.'s report of waking up on a bare mattress). (R. p. 442.)

A person in a blackout is able to engage in complex activities, including engaging in conversation, driving, or having sexual intercourse, they are simply not forming memories for those events. (R. p. 442.) There are no observable signs that another person is in a blackout, so their actions may be seen as conscious and volitional to an observer. (R. p. 442.)

K.G. testified she had previously experienced blackouts when she drank which is important because only about 50% of drinkers experience blackouts, indicating she is genetically predisposed to having alcohol-induced blackouts. (R. p. 442-443.)

Dr. Fromme concluded:

> 13. I conclude with a reasonable degree of psychological certainty that [K.G.] was experiencing both fragmentary and en bloc blackouts during the night of October 9, 2005 and the early morning hours of October 10, 2005. This conclusion is reached when considering her reported failure to remember events which others observed, such as

> consuming additional Bud Lights and the taxi ride to Mr. Marsalis' residence, as well as her estimated blood alcohol concentrations (BACs) by Dr. LeBeau. Whereas blackouts can occur at BACs as low as .07 g%, most occur at BACs of .15g% and higher (Hartzler & Fromme, 2003).

Affidavit of Dr. Fromme, para. 13. (R. p. 443.)

Dr. Fromme had the additional opinions regarding Mr. LeBeau's report and the Dubowski chart:

> 14. I have reviewed Dr. Mark LeBeau's report for his BAC estimations and opinions about [K.G.'s] physical and mental capacity. Dr. LeBeau's BAC estimations for five hypothetical amounts of alcohol consumption were based on [K.G.s] self-report, a bar record of sales, and a bartender's recollection of drinks purchased on the night in question. <u>BAC estimations based on self-reports or eyewitness reports are of questionable validity</u> because memory is a reconstructive process that is highly susceptible to distortion (Lacy & Stark, 2013; Schacter, Guerin, & St. Jacques, 2011).
>
> 15. Further, Dr. LeBau's [sic] opinions about [K.G.'s] physical and mental capacity were based exclusively on the Dubowski Chart (copyright 1976). Although this chart was copyrighted by Dr. K.W. Dubowski, and is included in both Dr. LeBeau's book on forensic psychology, as well as numerous other non-peer reviewed books, <u>there is no basis for the specific signs and symptoms associated with the BAC levels in the Dubowski chart</u>. In addition, the BAC levels in each category are so large that they are not useful for any given person. The lower and upper limits differ by an average of .15 g% BAC; which is a large difference in drinking quantity. Most importantly, <u>I have not been able to find any scientific basis for the signs and symptoms attributed to the categories of BAC in the Dubowski chart</u>.
>
> 16. Based upon the materials provided to me, it is my expert opinion that a complete scientific evaluation of the role of alcohol intoxication and alcohol-induced blackouts was not presented at the trial of Jeffrey Marsalis.

Affidavit of Dr. Fromme, para. 14-16 (emphasis added). (R. p. 443-444.)

b) The district court's characterization of the issue

> The plaintiff alleges that "counsel's [sic] performance was deficient because they failed to challenge the testimony of Marc LeBeau regarding the complaining witness's and Mr. Marsalis's blood alcohol concentration." Specifically, the plaintiff alleges that Mr. LeBeau's testimony regarding the "Widmark formula," used for blood alcohol estimation, and the "Dubowski chart" should not have been admitted because they are not scientifically reliable and therefore in violation of Idaho Rule of Evidence 702.
>
> In addition, the evidence should not have been admitted because an objection to their admissibility would have been sustained under Idaho Rule of Evidence 403. As backing for his allegations the plaintiff has included an article from The Champion, a periodical published by the National Association of Criminal Defense Lawyers. The Champion article details the work of Dominick A. Labianca, Ph.D., a professor emeritus at Brooklyn College, showing the lack of reliability of the Widmark formula. The plaintiff therefore alleges that the information contained in the article from The Champion would have refuted Dr. LeBeau's testimony when presented by another expert.
>
> The plaintiff alleges further that if the Widmark formula had not been accepted, then the Dubowski chart also would not have been admissible.

Order at p. 5. (R. p. 580.)

c) The district court's ruling

The district court's ruling is as follows in full:

> Under Idaho Rule of Evidence 702, an expert may testify if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise:" I.R.E. 702.

First, it is clear that Dr. LeBeau is in fact an expert and allowing him to testify without objection was not an error by counsel. It is clearly within sound trial strategy to not attack an expert who is in fact an expert. Therefore, defense counsel's performance did not fall below an objective standard of reasonableness.

Second, the substance of Dr. LeBeau's testimony is not sufficiently in question, as discussed below.

b. Whether Defense Counsel Should Have Objected to Dr. LeBeau's Testimony under Idaho Rule of Evidence 403

Under Rule of Evidence 403, "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...." I.R.E. 403.

Firstly, this is not a question of fact, but a question of law. Decisions on evidentiary decisions fall squarely within the sound discretion of the trial court.

Secondly, evidence may only be excluded if the probative value is ***substantially*** outweighed by the danger of unfair prejudice. I.R.E. 403 (emphasis added). All evidence that serves to convict a defendant is prejudicial to his or her case. In this instance, the probative value of the evidence presented by the expert is high. While the average lay person can likely tell when someone is drunk and even how drunk they are, the average lay person will not know the line between when a person will have memory problems and when they are so intoxicated that they are in a stupor, which was a significant fact of consequence in the trial.

'l'hirdly, the transcript is replete with questioning, cross-examination, and examination of the expert witness's testimony. Counsel effectively ruled out "date rape" drugs such as GHB, Catemine and Rohypnol, which could be seen as exculpatory, (Second Amended Memorandum in Support of Motion for Summary Disposition of Second Amended Post

> Conviction Application, Ex. 1 p. 699-706). In addition, defense counsel effectively cross-examined the State's expert regarding alcohol. Specifically, defense counsel asked about vomiting after a certain level of alcohol and discussed how drunk someone would have to be in order to vomit, including speed of consumption. *Id.* at 709-11
>
> When coupled with additional testimony regarding the length of time the defendant and the victim were drinking and what they had to drink, the jury could have found that the victim was suffering from mixing hard alcohol with beer in order to become sick, which would have acted to negate the State's position that the victim was drunk to the point of blacking out. However, that is not the conclusion that the jury reached.
>
> Moreover, there is no requirement that counsel call an expert witness to rebut the State's expert witness. Defense counsel already ascertained from the State's expert that the Widmark formula and Dubowski chart are not exact measurements, *Id.* at 684-87. Based on the exhibits presented by the plaintiff in this case, the defendant would not have been in a materially different position had defense counsel presented another expert.
>
> The Court cannot conclude that defense counsel's performance was objectively unreasonable, nor that at the time for the objection the testimony was unfairly prejudicial. Defense counsel's performance at trial did not fall below an objective standard of reasonableness, and the Court does not reach the second prong of the test as the first is refuted by the record. Therefore, for the purposes of summary dismissal, the Court finds no issue of material fact regarding counsel's performance related to the expert witness, and summary dismissal is granted on behalf of the State on this issue.

Order at p. 6-8 (bold emphasis in the original, underlined added). (R. p. 581-583.)

d) The court erred in dismissing this claim

To begin with, while the district court correctly characterizes the issues raised by Petitioner, it never actually rules on them, substituting its own issues

instead. To further explain, the district court initially correctly states that Petitioner alleges that Mr. LeBeau's testimony regarding the Widmark formula and Dubowski chart should not have been admitted because they are not scientifically reliable and are therefore in violation of I.R.E. 702. In addition, according to the district court, Petitioner alleges the evidence should have been objected to under I.R.E. 403.

When it comes time to rule on these issues, the district court has turned Petitioner's claim into one of Mr. LeBeau not being an expert at all and that counsel was ineffective for not objecting to him testifying, period. Petitioner of course never made that claim, but regardless, the court ruled that Mr. LeBeau was in fact an expert and that it is not error to allow him to testify without objection and "[i]t is clearly within sound trial strategy to not attack an expert who is in fact an expert." (R. p. 581.)

The actual claim, that Mr. LeBeau's testimony regarding the Widmark formula and Dubowski chart was inadmissible under I.R.E. 702 and should have been objected to, was not addressed by the court. Rather than determining whether the evidence was scientifically reliable or not, the court simply moved on to the I.R.E. 403 analysis and determined the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Then, while the district court specifically mentions The Champion article, it disregards the affidavits of Petitioner's experts and only tangentially refers to them as his exhibits and incredibly holds that the defendant would not have been in a materially different position had the defendant presented another expert.

Thus, since the district court did not actually address Petitioner's allegations the dismissal of this sub-claim must be reversed. Further, since the district court simply ignores the evidence produced by Petitioner, this matter should actually be remanded for an evidentiary hearing.

To begin with, the evidence produced by Petitioner via his experts' affidavits show that the Widmark formula and the Dubowski chart are scientifically unreliable, so Mr. LeBeau's testimony about them was not admissible under I.R.E. 702. The problem begins with the Widmark formula and then gets bigger with the leap it allows to the Dubowski chart and the stage of alcoholic influence that the complaining witness was supposedly in.

But to start with the Widmark formula, according to Dr. Anstine, even Dr. Dubowski stated that:

> . . . it becomes clear that the speculative retrograde extrapolation of the BAC to any point from an experimentally determined value must be avoided in forensic practice, or so qualified by stated assumptions that the exercise becomes pointless.

Affidavit of Dr. Anstine, para. 7. (R. p. 438.)

Significantly, this warning is for extrapolating from a known BAC, which we did not even have in our case. Dr. Dubowski identified some problems as assuming the linearity of the presumed elimination rate and the wide range of said rate (.54 to .85 for females with .66 used as average). (R. p. 437-438.) Of course, Dr. Anstine stated there are a myriad of parameters that affect one's BAC. (R. p. 435.)

Again, Dr. Anstine concluded:

> In summary, it is my opinion that the State relied too heavily on one single technique, specifically the Widmark formula, and from these speculative calculations made sweeping assumptions, based on the Dubowski chart, concerning the levels of intoxication and its influence on Mr. Marsalis and [K.G.]. Scientifically, there is no way to know either of their levels of intoxication with any accuracy or certainty based solely on Widmark calculations. Without knowing their level of intoxication, any discussion concerning the "stages of alcoholic influence" is complete speculation

Affidavit of Dr. Anstine, para. 8. (R. p. 438.)

Next was Dr. Fromme. Regarding Mr. LeBeau's testimony, he first opined that BAC estimations based on self-reports and eyewitness reports are of questionable validity. (R. p. 443.) But more to the point, he again concluded:

> 15. Further, Dr. LeBau's [sic] opinions about [K.G.'s] physical and mental capacity were based exclusively on the Dubowski Chart (copyright 1976). Although this chart was copyrighted by Dr. K.W. Dubowski, and is included in both Dr. LeBeau's book on forensic psychology, as well as numerous other non-peer reviewed books, there is no basis for the specific signs and symptoms associated with the BAC levels in the Dubowski chart. In addition, the BAC levels in each category are so large that they are not useful for any given person. The lower and upper limits differ by an average of .15 g% BAC; which is a

> large difference in drinking quantity. Most importantly, I have not been able to find any scientific basis for the signs and symptoms attributed to the categories of BAC in the Dubowski chart.

Affidavit of Dr. Fromme, para. 15. (R. p. 443-444.)

Petitioner asserts that had defense counsel brought a motion in limine with the evidence of these or similar expert witnesses that the testimony of Mr. LeBeau regarding the Widmark formula and/or the Dubowski chart (the bigger problem) would not have been admitted under I.R.E. 702 as they are scientifically unreliable. In the alternative, the evidence should have been excluded under I.R.E. 403. The experts are expressing opinions such as "complete speculation" and unable "to find any scientific basis" and so the danger of unfair prejudice to the defendant from the testimony regarding the Widmark formula and Dubowski chart is exceptionally high and substantially outweighs the very low probative value.

Or, even if the evidence of the Widmark formula and the Dubowski chart were admitted, defense counsel still should have called his own expert witnesses. The court's response to this is that defense counsel established on cross-examination that the Widmark formula and Dubowski chart were not exact measurements. Not an exact measurement is a far cry from learning that Dubowski himself warned against even using the Widmark formula to do a more mild version of what Mr. LeBeau was doing with it (warning against extrapolating from a known BAC). Likewise, not an exact measurement is hardly the same as

"there is no basis for the specific signs and symptoms associated with the BAC levels in the Dubowski chart."

Furthermore, it is unclear whether the district court really understands the issue when it comments about "the State's position that the victim was drunk to the point of blacking out." The state's position was that the victim was drunk to the point of stupor or unconsciousness. The defense's position was that the victim had consensual sex, but did not remember it because she was in a blackout.

Regardless, by not calling an expert witness, the defense was unable to meaningfully put on this defense at trial. All the jury learned about blackouts was from Mr. LeBeau, who testified that blackouts did not start to occur until .25 on the Dubowski chart, which also coincided with where stupor began on the Dubowski chart. (Trial Tr. p. 660, 664.) So that did not provide a defense at all.

Had defense counsel called an expert on alcohol induced blackouts like Dr. Fromme, he would have testified that while blackouts can occur at BACs as low as .07, most occur at BACs of .15 and higher. Dr. Fromme would have also explained that alcohol-induced blackouts are simply amnesia for all or part of a drinking episode. Again, a person in a blackout is able to engage in complex activities, including engaging in conversation, driving, or having sexual intercourse, they are simply not forming memories for those events. There are no observable signs that

another person is in a blackout, so their actions may be seen as conscious and volitional to an observer.

Dr. Fromme would have testified that based on K.G.'s prior blackouts which indicate her genetic predisposition to alcohol-induced blackouts:

> 13. I conclude with a reasonable degree of psychological certainty that [K.G.] was experiencing both fragmentary and en bloc blackouts during the night of October 9, 2005 and the early morning hours of October 10, 2005. . . .

Affidavit of Dr. Fromme, para. 13. (R. p. 443.)

To reiterate the court's ruling on the defense calling expert witnesses, it was:

> Based on the exhibits presented by the plaintiff in this case, the defendant would not have been in a materially different position had defense counsel presented another expert.

Order, p. 7. (R. p. 582.)

Other than the conclusory statement, the court does not even attempt to explain how Mr. Marsalis would not have been better off with expert witnesses than without. Had they been called, the jury would have not just learned the state's side of things, but would have learned that BAC extrapolation based on the Widmark formula was complete speculation which means so is then using the Dubowski chart for stages of alcohol influence. They also would have learned that there is no scientific basis for the Dubowski chart. It was argued in the post-conviction that defense counsel tried to argue to the jury that the Dubowski chart was garbage

based on his questioning of Mr. LeBeau that vomiting occurred only at .25 and above according to the Dubowski chart (the questioning noted by the court), but defense counsel had no evidence it was garbage. (R. p. 424-425.)

More importantly, the jury would have learned the scientific basis for the blackout defense from an expert in them, to wit, what a blackout was, how people acted in them, and the expert opinion that K.G. experienced one that night.

Contrary to the court's ruling, Petitioner would be in a materially different position had his attorney called expert witnesses. He would have been in trial with a viable defense, which is not where he was in his actual trial without expert witnesses.

2) Failure to call a witness favorable to the defense

a) Petitioner's claim and the evidence in the post-conviction

The Second Amended Petition explained that prior to trial, the defense hired an investigator who interviewed John Hampton, a passenger in the taxi (shuttle van) taken by Petitioner and the complaining witness, and attached the transcript of that interview. (R. p. 291.) Had he been called as a witness, Mr. Hampton would have testified that the victim was not forced into the taxi, that there was no argument of any sort between the Petitioner and her, and when they left the cab

neither appeared to have trouble getting out the cab or walking after exiting the cab. (R. p. 291.)

This would have directly controverted the state's two trial witnesses who testified that the victim was drunk, almost passed out during the cab ride home and that she had trouble walking before she entered the cab and when she exited the cab in Sun Valley. (R. p. 292.) Defense counsel had barely any questions for these witnesses and did not challenge their accounts despite knowing about the report from a third occupant of the cab who directly contradicted their version of the events. (R. p. 292.) In closing argument, the prosecutor stressed the significance of the taxi driver's testimony as corroboration for the condition of the complaining witness. (R. p. 293.)

Attached to the Petitioner's Reply to the State's Amended Memorandum to Dismiss the Second Amended Petition was the Declaration of [Attorney] Charles F. Peterson. He stated that a reasonably prudent trial counsel under those circumstances would have called the witness. (R. p. 570.) This is because the state's case rested on the notion that it was obvious to Petitioner that the complaining witness was intoxicated and incapable of consenting to sex. Evidence that she was unable to stand on her own from the state witnesses buttressed that notion and was left almost entirely uncontroverted by defense counsel. (R. p. 570-571.)

Attorney Peterson continued by stating there was no strategic reason for not calling Mr. Hampton as a defense witness. The failure to call him is not excused by any strategy as the state's witnesses had confirmed the premise of the case, that the victim was too drunk to consent. Providing a witness who saw her leave the club in a van and depart under her own ability would have countered the state's evidence. (R. p. 571.)

b) The district court's ruling

The district court ruled as follows in full:

> Plaintiff contends that defense counsel should have called John Hampton to testify at trial and provided a transcript of what Mr. Hampton would have testified to. (Second Amended Petition for Post-Conviction Relief, Ex. B). One of the State's witnesses was the cab driver, the only person completely sober in the cab. By contrast, Mr. Hampton was sitting in the middle seat in front of the defendant and victim, and expressly stated in his interview that he wasn't paying attention to the defendant and victim. *Id.* at 4.
>
> A witness who wasn't paying attention and had been drinking that night is not a reliable witness at trial and it is objectively reasonable to avoid calling this person as a witness. This becomes even more true when the only sober person in the car directly contradicts the testimony of the drunk witness who wasn't paying attention. In short, calling Mr. Hampton would have had no effect on the outcome of the case.
>
> Therefore, even in the light most favorable to the plaintiff, there is no issue of material fact concerning defense counsel's decision at trial to not call Mr. Hampton. Defense counsel's judgment was objectively reasonable and the Court again does not address the second prong of the test because of the failure in the first prong. Summary dismissal is granted as to this cause of action.

Order at p. 8-9. (R. p. 583-584.)

c) The district court erred in dismissing the claim

First, the court is making a credibility determination in a summary proceeding and essentially ruling that because it does not believe Mr. Hampton defense counsel did not need to call him.

That is what an evidentiary hearing is for. There, the significance of the fact that Mr. Hampton was sitting in front of Mr. Marsalis and the complaining witness can be explored, along with the fact that the two witnesses believed by the court were sitting even farther forward. Likewise, why Mr. Hampton was not paying attention can also be addressed, to wit, whether he was not paying attention because there was nothing to pay attention to.

Next, the court holds that not calling a witness is objectively reasonable without addressing the opinion of the attorney opining as an expert that it fell below the standard of effective trial counsel. As the attorney stated, the state's evidence of the taxi ride was significant, and it needed to be controverted so there was no excuse not to.

Finally, the court confuses the standards when it states that it is not addressing the prejudice prong after it does that very thing when it states that not calling Mr. Hampton did not affect the outcome of the trial. But this is only true if

the court's credibility determination is true. If the jury believed Mr. Hampton (possible since the court was fine with K.G.'s reliability despite her drinking), and particularly if Mr. LeBeau had not testified and/or if defense had called its expert witnesses, the outcome of the trial would have been different. Accordingly, dismissal of this claim must be reversed and remanded for an evidentiary hearing on it.

3) Failure to advise Petitioner of the time limits for trial in the Interstate Agreement on Detainer statute and the remedies available for breach of that statute.

a) The claim and the arguments in the post-conviction

The Second Amended Petition alleged as follows:

> 39. While Petitioner was released on bail from the charges in the underlying criminal case in Idaho, he was charged with separate offenses alleged to have occurred in the State of Pennsylvania.
>
> 40. Petitioner was tried first in the State of Pennsylvania, convicted and sentenced to prison.
>
> 41. While he was housed in the Pennsylvania Department of Corrections, the Blaine County Prosecuting Attorney filed a Request for Temporary Custody on April l7, 2008. See Exhibit C, attached hereto. The document indicates that Blaine County "propose[s] to bring this person to trial on the indictment within the time specified in Article IV(c) of the Agreement."
>
> 42. While the document reflects that a copy must be sent to the prisoner, Petitioner did not receive a copy of this document via mail.
>
> 43. Petitioner was taken to Court in Pennsylvania on this request and was eventually returned to Idaho on August 18, 2008, and he appeared in court in Blaine County on August 19, 2008.

44. The Interstate Detainer Statute, I.C. § 19-5001 et. seq. contains specific time limits on when a defendant must be brought to trial. Specifically, a trial must begin with 120 days of a defendant's arrival in the receiving state. "In respect of any proceeding made possible by this paragraph, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." I.C. § 19-5001(d)(3).[2]

[footnote]

2Note that this statute corresponds to Article IV(c) of the agreement referenced in Exhibit C.

45. Defense counsel failed to discuss with Petitioner the rights set forth in this statute and Petitioner was thus unaware of his rights to a speedy trial under this detainer agreement.

46. By failing to inform Petitioner of these rights, any waiver of time entered by Petitioner related to his rights under the Detainer agreement was not knowing and voluntary.

47. The 120 day time limit for trial expired on December 17, 2008.

48. At a scheduling conference on December 1, 2008, held in chambers with Petitioner present, there was some discussion concerning the time for trial and the effect of the detainer. The prosecutor Mr. Thomas indicated a time period of 180 days and noted this would expire on February 19, 2009. (See, partial transcript of status conference attached hereto as Exhibit D.) No time waiver was entered on that date.

49. The Court minutes reflect that there was a hearing held on December 15, 2008, which lasted approximately 3 minutes. While there is no transcript of that proceeding, the minutes reflect that Petitioner signed a speedy trial waiver. That written waiver does not appear to be in the Clerk's Record. Indeed, the attorneys appear to

> have believed that the time for trial under the detainer did not expire until February 19, 2009.
>
> 50. Under the Detainer Agreement, any extension beyond the time limit had to have been made in open court. Because Petitioner was never advised of these rights, the record in the criminal proceedings does not reflect that the required findings were made to permit a showing of waiver or that there was a proper extension of the 120 day time limit in this case.
>
> 51. Had trial counsel advised Petitioner of these rights, Petitioner would have been entitled to a dismissal of the charges against him in the State of Idaho as there was no valid waiver of the extension of the 120 day time limit for trial.
>
> 52. Defense counsel failed to discuss with Petitioner, the rights set forth in this statute.
>
> 53. By failing to inform Petitioner of these rights, any waiver of time entered by Petitioner was not knowing and voluntary.

Second Amended Petition, p. 13-17. (R. p. 293-296.)

The trial that was continued had been set for January 5, 2009. (R. p. 548-549.)

In its Second Amended Memorandum, the state explained that on December 1, 2008, a hearing was held in which the state made counsel and the court aware of an additional 300—400 pages of state's discovery documents that not been provided to defense counsel (and still was not provided at that time), including DNA analysis which matched Mr. Marsalis. (R. p. 465.) Further, due to the press coverage a change of venue to Ada County was discussed, as well as speedy trial (which was

believed to be 180 days). (R. p. 465-466.) After the hearing, a stipulation for change of venue was entered into on December 5, 2008 between state and defense counsel. (R. p. 466.) A stipulation to continue jury trial was signed and an Order granting the continuance was entered on December 8, 2008. (R. p. 466.)

On December 9, 2008, a waiver of speedy trial was signed by Mr. Marsalis. (R. p. 466.) An email exchange between the district judge and defense counsel showed the judge wanted to confirm the signature was in fact Mr. Marsalis' and that he personally authorized the waiver. (R. p. 466.) On December 15, 2008, a hearing was held where the parties discussed the speedy trial waiver and change of venue. (R. p. 466.) The case was ultimately transferred to Ada County and set for trial on April 20, 2009. (R. p. 466.)

The state argued in its Second Amended Memorandum:

> It is clear from the record that there were multiple reasons for the continuance which, in fact, were in the interests of the Petitioner. The record indicates Petitioner was aware of these reasons, they were discussed on the record with counsel and Petitioner present and signed documents waiving speedy trial, agreeing to a trial continuance and a change of venue were filed in the case.
>
> Petitioner's claim does not meet the standards necessary to receive relief under an ineffective assistance of counsel claim.
>
>> The standard for evaluating a claim of ineffective assistance of counsel was set forth by the United States Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and in *Strickland v. Washington*, 466 U.S. 668 (1984). Idaho has explicitly adopted this standard. *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365,

> 368 (1994). "[C]ounsel's performance must have been so incompetent that the trial can not be relied upon as having produced a just result. It is for the accused to show that counsel made serious errors and that the errors resulted in actual prejudice." *Giles*, 125 Idaho at 924, 877 P.2d at 368 (citing *Strickland*, 466 U.S. at 686). The two tests which must be met in order to be entitled to relief are: (1) a showing that counsel's performance fell below an objective standard of reasonableness, and (2) a showing that, but for counsel's errors, the result of the proceedings would have been different. *McCoy v. State*, 129 Idaho 70, 76, 921 P.2d 1194, 1200 (1996).
>
> Even if Petitioner was erroneously given information that speedy trial was 180 days versus 120 days from the time he was brought back to Idaho, Petitioner waived these rights to take advantage of receiving additional discovery materials including a DNA semen blood match and the favorable change of venue. Under either theory the claim should be dismissed. Furthermore, Petitioner has failed to show prejudice as to the erroneous information. If the trial would have gone forward prior to the 120 day speedy trial limit it would have been to the detriment of the Petitioner as his attorney was not aware until 10 days before the 120 day time period expired that his client, Marsalis, had been biologically connected to the rape victim through a DNA semen/blood analysis. In fact he had not received the report through discovery at that point. Had the trial occurred in the 120 day timeframe Petitioner once again would have been at a disadvantage due to the case being tried in Blaine County where considerable press coverage had been afforded the case. Both the waiver of speedy trial and to the change of venue were at the request of and on behalf of the Petitioner which would constitute good cause and provide for a continuance of the trial beyond the 120 day detainer time limit.

Second Amended Memorandum p. 13-14. (R. p. 466-467.)

b) <u>The district court's ruling</u>

The district court's exact ruling, while lengthy, is important to this issue.

The State's detainer request form (Addressment on Detainer's Form V) specifically states that the request for the plaintiff was made under Article IV(a) of the Agreement on Detainers. Article IV corresponds to Idaho Code § 19-5001(d). The relevant sections of Idaho Code § 19-5001(d) state:

> (3) In respect of any proceeding made possible by this paragraph, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> (4) Nothing contained in this act shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (1) of this subsection, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.
>
> (5) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to subsection (e)(5) of this section, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Idaho Code § 19-5001(d)(1), (3)-(5). However, the provisions of this detainer can be waived for “good cause" in a variety of ways. New York v. Hill, 528 U.S. 110, 114 (2000). "What suffices for waivers depends on the nature of the right at issue" Id. For fundamental rights, the defendant must be fully informed in order to waive his rights, but other rights may be waived by counsel. Id. Scheduling issues are "plainly among those [rights]" under the control of defense counsel. Id. at 115.

As stated above, although the State indicated that it believed it had

180 days to prosecute the offense, the actual time was 120 days pursuant to subsection (3).

Scheduling is not a fundamental right. As this was not a fundamental right, there is no error in defense counsel exercising that right. The rule also addresses continuances granted for "good cause." However, where there is an agreement regarding continuation, there is no requirement to show "good cause." *Id.* at 116 n.l. Moreover, even though "good cause" did not need to be shown because of the agreement, there was good cause shown on the record. Therefore, defense counsel effectively, but properly, waived the plaintiffs right to trial within 120 days.

Moreover, finding that the trial was not just has little to do with procedural safeguards in this instance. The purpose of the Interstate Act on Detainers (IAD) was to prevent prosecutors from interfering with a prisoner's treatment while incarcerated elsewhere and to force either dismissal or prosecution, so that a prisoner could clear his record. *See Fulgham v. State,* 400 P.3d 775, 778 (Okla. Crim. App. 2016) (citing *Carchman v. Nash,* 473 U.S. 716 (1985). Therefore the key section of Idaho Code § 19-5001(d) is section (5). Section (5) contains the substantive right that the creators of the IAD intended to create, which requires dismissal of the charges when a defendant is returned to his original place of imprisonment. This was not that type of case. The plaintiff was never returned to his state of incarceration prior to being convicted.

In *Fulgham,* the defendant had been brought to the state some 565 days prior to trial and trial had been continued without a complete record showing good cause for every continuance. The Oklahoma Court, citing *Hill,* stated that waiver can occur from more than affirmative conduct because

> Such an approach would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and the recanting later on. Nothing in the IAD requires or even suggests a distinction between waiver proposed and waiver agreed to. In light of its potential for abuse-

> -and given the harsh remedy of dismissal with prejudice--we decline to adopt it.
>
> *Fulgham,* 400 P.3d at 779 (citing *Hill,* 528 U.S. at 118).
>
> The *Strickland* standard states that "counsel's performance must have been so incompetent that trial cannot be relied upon as having a just result." Such is not the case before the Court, even in the light most favorable to the plaintiff. Defense counsel made a proper decision regarding the plaintiff's rights, as is permissible for a non-fundamental right, in order to ensure a just trial. The Court can find no error in such a decision.
>
> Even if defense counsel did not know of the 120 day time limit, his behavior did not fall below an objective standard of reasonableness, nor does the waiver affect the outcome at trial. The venue of the trial needed to be changed to ensure a substantive right would be granted, and the plaintiff would have been more severely prejudiced by a failure to continue the trial than he is by supposition the defense counsel did not know the correct time frame for trial.
>
> Moreover, finding that the trial was not just has little to do with procedural safeguards in this instance. Good cause was clearly shown because delay was needed to ensure an unbiased jury for the plaintiff. The good cause was clearly shown on the record, and the case was transferred to Ada County for the plaintiff's benefit.
>
> Therefore, counsel's performance was not below an objectively reasonable standard and the motion for summary dismissal is granted on behalf of the State on the issue of interstate detainer.

Order, p. 9-12 (emphasis added). (R. p. 584-587.)

c) The district court erred in dismissing this claim

In short, this claim was dismissed by the court without any notice at all of the grounds for dismissal.

As the Idaho Supreme Court held in *DeRushe v. State*, 146 Idaho 599 (2009):

> . . . if the State moves to dismiss a petition under Idaho Code § 19–4906(c), the court cannot dismiss a claim on a ground not asserted by the State in its motion unless the court gives the twenty-day notice required by Section 19–4906(b).

Id. at p. 602.

Here, Mr. Marsalis alleged in his petition that he had not been informed by his attorney of his right to trial within 120 days under the Interstate Agreement on Detainers and thus his waiver of his speedy trial rights was invalid. Thus, the argument went, had he been advised of his rights, he would have been entitled to dismissal of the charges since there was no valid waiver.

In response, the state argued that Mr. Marsalis did enter a valid waiver and agreed to the continuance which was in his interest. The state further argued that even if he was erroneously advised that the speedy trial time was 180 instead of 120 days he still waived these rights to take advantage of receiving additional discovery.

Of course, the district court did not dismiss this claim on grounds urged by the state. Rather, the district court dismissed the claim, not because Mr. Marsalis had waived his speedy trial rights, but because his attorney had effectively, but properly, waived Mr. Marsalis' speedy trial rights for him. The court held that the scheduling of the trial was not a fundamental right and so Petitioner's attorney exercised that right for him.

The court's ground for dismissal, to wit, that Mr. Marsalis had no personal right to exercise his right to a speedy trial and his attorney could validly waive it for him, is a completely different argument raised for the first time by the district court. In fact, the state's recitation of the proceedings discussed a diametrically opposed procedure in the criminal court, to wit, a district court ensuring that the criminal defendant personally signed the speedy trial waiver.

Likewise, to the extent that it is part of its ruling, the district court's comments addressing the purpose of the Interstate Agreement on Detainers and whether the trial was just or not in relation to the procedural safeguards was never mentioned by the state in its arguments regarding summary dismissal.

In short, the petition and the state's motion for summary dismissal addressed defense counsel's failure to advise Petitioner about the Interstate Agreement on Detainers 120 day time limit and whether or not Petitioner's waiver was accordingly valid or invalid.

The district court, on the other hand, addressed whether or not the criminal defendant even has a personal right to exercise regarding speedy trial under the Interstate Agreement on Detainers and held he did not and so counsel was not ineffective for exercising that right for him by waiving it. For this reason, the court's dismissal of this claim must be reversed and remanded to the district court to give Petitioner 20 days to respond to the district court's grounds for dismissal.

Appellant points out that even assuming *arguendo* that the district court is correct and an attorney is able to validly waive the 120 day time limit for a defendant and it was validly done so in this case, the district court's further conclusion is still wrong that counsel was not ineffective if defense counsel waived the 120 day time limit without knowing about it.

Again, the court held:

> Even if defense counsel did not know of the 120 day time limit, his behavior did not fall below an objective standard of reasonableness, nor does the waiver affect the outcome at trial. The venue of the trial needed to be changed to ensure a substantive right would be granted, and the plaintiff would have been more severely prejudiced by a failure to continue the trial than he is by supposition the defense counsel did not know the correct time frame for trial.

Order at p. 11 (emphasis added). (R. p. 586.)

First, Petitioner would have been better served with an attorney who knew of the time limits rather than by one who did not. While it should go without saying but apparently cannot, an attorney does need to know about relevant time limits. Petitioner did provide uncontroverted proof of this below.

The Declaration of Charles F. Peterson stated that the lawyers in this case had a duty to be aware of the time limitations and the failure to be aware of the limits fell before the standard of care for trial defense counsel. (R. p. 571-572.)

Second, if the attorney knew of the 120 day time limit and refused to waive the speedy trial right and refused to move to continue the case and the case had not

been tried, the case would have been dismissed with prejudice. *State v. Knauff*, 115 Idaho 74 (Ct.App. 1988); *e.g. State v. Richardson*, 163 Idaho 523 (Ct. App. 2018). Cleary, Petitioner would have been better off with the case against him dismissed with prejudice.

Third, if the attorney knew of the 120 day time limit and refused to waive the speedy trial right and refused to move to continue the case, the case would have been tried because the state would not move for a continuance. Petitioner still would have been better off as explained below.

In its Second Amended Memorandum the state argued Petitioner was not prejudiced because if trial went forward within 120 days his attorney would not have been aware until 10 days prior about the DNA evidence and he would have been at a disadvantage being tried in Blaine County given the press coverage and both the waiver of speedy trial and the change of venue were at the request of and on the behalf of the Petitioner.

At the hearing on the motion for summary dismissal the prosecutor again pointed out that the continuance and the change of venue were at the request of and on behalf of the petitioner, but that the state did agree to them. (Tr., *Marsalis v. State*, 9/5/17, p. 17.) The prosecutor also again pointed out that had Mr. Marsalis not waived his speedy trial rights and proceeded to trial he would not have had the benefit of having his own expert review the DNA evidence that he had just received

and also, it would have kept the trial in Blaine County where there had been negative press. (Tr., *Marsalis v. State*, 9/5/17, p. 17-18.)

The prosecutor continued:

> The State was ready to proceed. We weren't seeking a continuance. We weren't seeking necessarily the change of venue. We ultimately agreed to that, but the State was ready to proceed with the trial. So this idea that somehow we would have dismissed and had to refile, we would have just pushed the Court to proceed with the trial if, in fact, Mr. Marshals [Marsalis] did not want to waive his speedy trial.

Tr., *Marsalis v. State*, 9/5/17, p. 18, lns. 5-12.

The state's claims that it was ready to proceed to trial seem incredible. The timeline is important here. The trial was set for January 5, 2009, the speedy trial issue first came up in court on December 1, 2008, the stipulation to continue the trial was filed on December 5, 2008, the court entered its order continuing the trial on December 8, 2008, and the 120 day speedy trial clock ran on December 17, 2008.

The prosecutor's statements that the state was ready for trial can only refer to proceeding with the established trial setting, but that was beyond the 120 day speedy trial clock. Otherwise, had defense counsel known the speedy trial time was 120 rather than 180 days and refused to stipulate to a continuance on December 5, 2008, there would have been less than two weeks to set a jury trial and call in a jury pool sufficiently large enough to empanel a jury in a high profile case in Blaine County. The fact that it was just before the holidays would only make matters worse.

Likewise, the prosecutor's repeated assurances that the state was ready to proceed sounds like so much wishful thinking. On December 1, 2008, the state was explaining to the court that three or four of its witnesses are from out of state. (R. p. 543.) The state certainly did not produce evidence below in the post-conviction (it was just argument by the prosecutor) that it could have really had gotten its out of town witnesses to trial on such short notice before the holidays. This is particularly true for Mr. LeBeau, the state's expert discussed above, who was the Unit Chief of the Chemistry Laboratory at Quantico, Virginia. (R. p. 460.) As is clear from the issue above, the trial would have been significantly different without his testimony. Likewise, the cab driver discussed above lived in Yuma, Arizona at the time of trial. (Trial tr., p. 456.)

The state also repeatedly argues about what an advantage it was for Mr. Marsalis to receive the 300-400 pages of discovery including DNA he was first alerted to (but not given) on December 1, 2008, and what a disadvantage it would have been to go to trial without his own expert looking at it. However, the state does not explain why its late disclosure (even with a January trial setting) was not a discovery violation and so how the evidence was admissible to begin with. So really, the state would have been going to trial without the DNA evidence, or at the very least, this is a reason why summary dismissal of this issue cannot simply be affirmed but evidence on it is required.

Further, the district court's complaints about enforcing the Interstate Agreements on Detainers are contrary to Idaho law. In *State v. Knauff*, 115 Idaho 74 (Ct.App. 1988), the Idaho Court of Appeals vacated a conviction and directed an order of dismissal with prejudice where the 120 day time limit was exceeded by 33 days. Of course there, the defendant's attorney was protecting his client's speedy trial rights rather than sharing in what the Court of Appeals called "a regrettable misunderstanding of the applicable statutory time period." *Id*. at 77.

To conclude, the dismissal of this claim must be reversed and this claim remanded to the district court for an evidentiary hearing, or at the very least for further summary dismissal proceedings so that Petitioner can have an opportunity to respond.

4) <u>Cumulative instances of ineffective assistance of counsel</u>

In the Second Amended Petition it was asserted that even if the above sub-claims do not warrant relief individually, they do when the cumulative impact is considered. (R. p. 296.)

The court of course dismissed this claim since it found none of the allegations to have been ineffective assistance of counsel. (R. p. 587.)

Appellant asserts that since the district court erred regarding the individual sub-claims, it erred regarding the cumulative error claim as well and its dismissal must be reversed.

CONCLUSION

Wherefore, for the reasons above stated, Appellant respectfully requests the district court's order summarily dismissing his petition for post-conviction relief be reversed and remanded to the district court for an evidentiary hearing and/or for further summary dismissal proceedings on appropriate claims.

DATED this 9th day of October, 2018.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2018, I caused a true and correct copy of the foregoing brief to be served via the file and serve system to the email identified as the party's service contact:

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 9th day of October, 2018.

/s/ Greg S. Silvey
Greg S. Silvey