Electronically Filed
11/21/2018 12:01 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY RAYMOND HIGGINS, JR.,	)	
	)	**No. 45752**
Petitioner-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CV-2015-9195**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE DAVIS F. VANDERVELDE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR DEFENDANT-RESPONDENT

DENNIS BENJAMIN
Nevin, Benjamin, McKay & Bartlett LLP
303 W. Bannock
P. O. Box 2772
Boise, Idaho 83701
(208) 343-1000
E-mail: db@nbmlaw.com

ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

Gregory Raymond Higgins, Jr. appeals from the judgment dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In the underlying criminal case the state charged Higgins with First Degree Murder with a weapons enhancement. (R., p.69.) The case went to jury trial. (R., p.69.)

At trial the state admitted and published Exhibit 5: "a DVD containing footage of [a police] interview with [Higgins] during which [Higgins] invoked his Fifth Amendment right to remain silent." (R., p.72.) Soon after, the trial court excused the jury and discussed its "concerns about the potentially prejudicial nature" of the invocation portion of the DVD. (R., pp.73-74, 250 (Tr., p.646, Ls.2-18).)[1] So the trial court decided it was "going to be giving a limiting instruction" regarding Exhibit 5. (R., p.250 (Tr., p.646, L.2 – p.647, L.2).)

The parties further agreed that Exhibit 5 would be withdrawn from evidence, and the state would "redact and resubmit a new Exhibit"—now referred to as Exhibit 5A—into evidence. (R., pp. 73-74, 250-51 (Tr., p.647, L.1 – p.652, L.6).) The trial court brought the jury back in and gave them the limiting instruction: "Any reference or testimony that the Defendant may have invoked his Fifth Amendment right is to be stricken, and is not to be considered by you for any purpose during your deliberations."

[1] The transcript of the jury trial in the underlying case, found in the post-conviction record on pages 83 through 430, is denoted herein as "Tr."

(R., p.251 (Tr., p.653, Ls.15-19).) This instruction was later designated as Instruction 11.[2] (R., pp.79-81, 365 (Tr., p.1107, L.17 – p.1108, L.15).)

Higgins was found guilty and sentenced to fixed life. (R., p.69.) His sentence was affirmed by the Idaho Court of Appeals in an unpublished opinion. State v. Higgins, 2014 Unpublished Opinion No. 719, Docket No. 41572 (Sept. 11, 2014).

Higgins filed a *pro se* petition for post-conviction relief. (See R., p.2.) His appointed counsel later filed an amended petition (R., pp.47-50), which the district court construed as containing two claims:[3]

---

[2] A bit of housekeeping regarding Instruction 11: at the outset of this appeal Higgins moved this Court to take judicial notice "of the trial transcripts and Jury Instruction No. 11," purportedly in the direct-appeal record, to which the state had no objection. (Mot. to Take Judicial Notice; Resp. to Mot. to Take Judicial Notice.) This Court partially denied the motion because it determined "it appears that the Jury Instructions were not included in the Clerk's Record" in the direct appeal. (Order on Mot. to Take Judicial Notice.) However, this Court should still consider Instruction 11 because Instruction 11 is already part of the Clerk's Record in *this* case. (R., p.81.) Because Instruction 11 can be found on page 81 of the record in this case, it was simply unnecessary to ask this Court to take judicial notice of it. Moreover, the district court took judicial notice of Instruction 11 and relied on it in its dismissal order. (R., pp.79, 452.) The state therefore agrees with Higgins that Instruction 11 "is needed for this Court to fully consider the trial court's ruling" (Mot. to Take Judicial Notice; R., p.79), and this Court should not hesitate to consider Instruction 11 on appeal.

[3] Higgins appears to merge these separate ineffective assistance claims on appeal; he says the district court "erred in dismissing the Ineffective Assistance of Trial Counsel Claim." (Appellant's brief, p.7.) The state submits that ineffective assistance claims are not fungible (see, e.g., Hemmerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007)), and that where claims are based on separate actions of counsel—i.e., the failure to review and/or object, and the separate failure not to move for a mistrial—the claims should be analyzed separately. Moreover, the district court expressly analyzed the claims separately—dismissing Claim One for failure to show prejudice, but dismissing Claim 2 for failure to show both prejudice and deficient performance. (R., p.456.) This Court should analyze the claims separately, too.

> [T]rial counsel was ineffective for:
>
> 1. Failing to review the State's exhibits and object to introduction of a DVD containing an interrogation of [Higgins], during which he invoked his Fifth Amendment right to remain silent.
>
> 2. Failing to move for mistrial once the DVD with the invocation of rights was admitted and published.

(R., p.70.) The state filed an answer to the amended petition. (R., pp.64-66.)

The district court issued a notice of intent to dismiss the amended petition (R., pp.69-78), and took judicial notice of the trial transcripts and Instruction 11 (R., pp.79-81). The court found with respect to Claim 1 that Higgins "failed to specifically allege any prejudice," and that Higgins did not assert or show "with any facts that but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different." (R., p.73.) The court further found Claim 2 should be dismissed because "a motion for mistrial would not, and should not, have been granted," and "a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test." (R., p.76 (citing Padilla v. State, 158 Idaho 184, 187, 345 P. 3d 243, 246 (Ct. App. 2014)). The district court accordingly gave notice that it intended to dismiss both claims. (R., pp.76-77.)

Higgins responded to the notice of intent and acknowledged he failed to allege prejudice with regard to either claim; he argued "that it is impossible to determine what the result would have been if the Exhibit 5 had been excluded or what the court would have ruled in that moment on a motion for a mistrial." (R., p.433.) Higgins nevertheless thought that the claims should be analyzed "under fundamental error," which would "not require proof as such that the errors affected the outcome of the trial." (R., p.433.)

The district court issued an order dismissing the amended petition (R., pp.447-457), and dismantling Higgins's "fundamental error" theory:

> Petitioner's assertion is that counsel's actions or inactions themselves comprised the fundamental error. Regardless of the nature of the error, the claims still allege ineffective assistance of counsel, not a direct constitutional violation. As set forth above, to prevail on a claim of ineffective assistance of counsel Petitioner is required to show both deficient performance and prejudice. Both prongs must be established for such a claim to be maintained. Even if the analysis in *Umphenour* [160 Idaho 503, 509-510, 376 P.3d 707 (2016)] was controlling case law, it would apply only to the issue of direct appellate review. It would not be applicable with respect to a claim of ineffective assistance of counsel in a post-conviction proceeding. In any event, the controlling law does require the existence of prejudice to establish a claim for ineffective assistance of counsel. As Petitioner has failed to allege sufficient facts to demonstrate deficient performance as to claim 2 and prejudice with respect to either claim 1 or claim 2 as detailed above and in the Notice of Intent to Dismiss, both claims necessarily fail.

(R., pp.455-56 (internal citations omitted).)

The district court issued a judgment dismissing the amended petition. (R., pp.470-71.) Higgins timely appealed. (R., pp.458-61.)

ISSUES

Higgins states the issues on appeal as:

1. Does the prejudice prong of *Strickland* always require a showing of a reasonable probability of a different result, even when the deficient performance rendered the proceedings fundamentally unfair?

2. If such a showing is required in this case, was it made?

(Appellant's brief, p.3.)

The state rephrases the issues as:

I. Did the district court correctly dismiss Higgins's ineffective assistance of counsel claims for failure to even allege, much less show, any prejudice?

II. Did Higgins waive his newfound prejudice argument on appeal by conceding below that he did not allege any prejudice?

III. Even assuming Higgins has preserved a prejudice argument, does it fail on the merits?

IV. Irrespective of prejudice, should the dismissal of Claim 2 be affirmed because the district court found no deficient performance, and Higgins has failed to challenge this alternative basis for affirming on appeal?

ARGUMENT

I.
The District Court Correctly Dismissed Higgins's Ineffective Assistance Of Counsel Claims Because Higgins Did Not Allege Or Show Any Prejudice

A. Introduction

Higgins made two ineffective assistance of counsel claims below but failed to allege or show any prejudice. (R., pp.47-50, 432-34.) The district court unsurprisingly dismissed the claims because "the controlling law does require the existence of prejudice to establish a claim for ineffective assistance of counsel." (R., p.456.)

Higgins fails to show the district court erred. A claim under Strickland v. Washington, 466 U.S. 668, 687 (1984), requires a showing of prejudice and Higgins never alleged, much less showed, any prejudice at all. While Higgins now argues the district court applied the wrong standard to assess prejudice—and that some novel framework should be applied where the purported deficient performance "renders the proceedings fundamentally unfair"—he fails to show his new standard is the correct one. (Appellant's brief, p.4.) And even if it is the correct standard, he seems to concede it would not apply in this case. In any event, Higgins fails to show any error at all, much less reversible error.

B. Standard Of Review[4]

Summary dismissal is appropriate where the petitioner's evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802

[4] This standard of review would likewise apply to Section III herein, but to conserve space will not be re-written.

(2007). On review of a summary dismissal of a post-conviction petition, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Id. at 523, 164 P.3d at 803.

C. Higgins Did Not Allege, Much Less Show, Any Prejudice; The District Court Therefore Correctly Dismissed His Ineffective Assistance Of Counsel Claims

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).

Courts normally "apply a 'strong presumption of reliability' to judicial proceedings and require a defendant to overcome that presumption" by proving prejudice. Smith v. Robbins, 528 U.S. 259, 286 (2000) (citing Strickland, 466 U.S. at 694). With that said, there are three limited circumstances in which courts will "presume prejudice rather than require a defendant to demonstrate it": (1) where there has been a "denial of counsel"; (2) where there has been "state interference with counsel's assistance"; and (3) where counsel has acted on an "actual conflict of interest." Robbins, 528 U.S. at 287 (internal quotations omitted). If these circumstances are not present, then a petitioner

"must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of trial counsel." Id. at 289.

Below, Higgins never alleged any prejudice. (R., pp.47-50, 432-34.) When he received the notice of intent of intent to dismiss for failure to allege any prejudice, he only explained that it was "impossible" for him to do so. (R., p.433.) Higgins nevertheless theorized he could argue ineffective assistance without prejudice, as some sort of makeshift "structural" or "fundamental error" claim.[5] (R., pp.433-34.)

Higgins's misguided "fundamental error" claim was quickly dispatched by the district court, which pointed out that 1) fundamental error "would not be applicable with respect to a claim of ineffective assistance of counsel in a post-conviction proceeding"; 2) "[i]n any event, the controlling law does require the existence of prejudice to establish a claim for ineffective of counsel"; and 3) because Higgins "failed to allege sufficient facts to demonstrate … prejudice with respect to either claim 1 or claim 2 … both claims necessarily fail." (R., p.456.)

The district court's ruling was plainly correct. Strickland is a two-prong test and, with limited exceptions that are inapplicable here, a petitioner is required to allege prejudice to press a viable claim of ineffective assistance. 466 U.S. at 687-96; Robbins, 528 U.S. at 287. Because Higgins did not allege, much less show, any prejudice

[5] Higgins has abandoned his "fundamental error" theory on appeal and instead debuts his "fundamental unfairness" theory. While clearly similar conceptually, the two standards are different; the former stems from a novel reading of Idaho state law (R., pp.433-44), and the latter is premised on a novel reading of Weaver v. Massachusetts, 137 S. Ct. 1899 (2017). In any event, both theories are fatally flawed as explained below.

whatsoever, the district court correctly dismissed his claims of ineffective assistance of counsel.

D. Higgins Fails To Show That A "Fundamental Unfairness" Exception To Strickland Prejudice Exists, Or Even If It Does, That It Would Apply Here

On appeal, Higgins fails to show that the district court's plainly correct application of Strickland was incorrect. Higgins starts off with a noncommittal claim of error: "it appears that the district court was incorrect when it held that *Strickland* prejudice always means the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Appellant's brief, p.4.) Higgins's reluctance to claim outright error is understandable given what his tentative position would require this Court to do: radically reengineer Strickland prejudice. Higgins claims, based on Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), that there is now an "exception" to the usual Strickland prejudice rule, applicable where there is "deficient performance which renders the proceedings fundamentally unfair." (Appellant's brief, p.4.)

Of course, this proposed new exception would upend Strickland and its progeny, which at bedrock require a but-for prejudice test that shows "the results of the proceedings would have been different." Strickland, 466 U.S. at 694; Hill v. Lockhart, 474 U.S. 52, 59 (1985); Bell v. Cone, 535 U.S. 685, 69 (2002); Wiggins v. Smith, 539 U.S. 510, 534 (2003); Premo v. Moore, 562 U.S. 115, 128-29 (2011); Harrington v. Richter, 562 U.S. 86, 104 (2011); Lafler v. Cooper, 566 U.S. 156, 163 (2012); State v. Abdullah, 158 Idaho 386, 480, 348 P.3d 1, 95 (2015); Dunlap v. State, 159 Idaho 280, 297, 360 P.3d 289, 306 (2015).

And while there are exceptional circumstances where such prejudice is presumed, this is not what Higgins is talking about. See Robbins, 528 U.S. at 287 (listing three narrow categories of presumed prejudice, none of which apply here). Higgins's sweeping new rule dispenses with the narrow exceptions, and simply declares that "relief must still be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair even if there is no showing of a reasonable probability of a different outcome." (Appellant's brief, pp.3-4.)

It is telling that Higgins musters a single case in support of his "fundamental unfairness" paradigm shift and proposed upheaval of "the ordinary standard of *Strickland* prejudice." (See Appellant's brief, pp.3-4 (citing Weaver, 137 S. Ct. at 1910-11).) Without a strong supporting cast in the table of authorities, one expects nothing less than a decisive holding from Weaver to settle things and usher in the new era.

But the citation to Weaver underwhelms. Weaver never held that there is "an exception to that rule for deficient performance which renders the proceedings fundamentally unfair." Compare Appellant's brief, p.4 with Weaver, 137 S. Ct. 1899. In fact, the Court there explicitly stated it was *not* deciding that question:

> Petitioner therefore argues that under a proper interpretation of Strickland, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. *For the analytical purposes of this case, the Court will assume that petitioner's interpretation of Strickland is the correct one. In light of the Court's ultimate holding, however, the Court need not decide that question here.*

Id. at 1911 (emphasis added).

The Weaver Court could not have made it clearer: the Court was not holding that Weaver's "fundamental unfairness" theory was the law of the land—it was *assuming* it

was for the purposes of asking whether Weaver could even show the proceedings were fundamentally unfair. (He could not.) Id. at 1911-14.

Accordingly, this purported exception from Weaver cannot bear the disruptive weight Higgins places on it. And the conspicuous lack of any other support for Higgins's "fundamental unfairness" exception suggests Higgins has over-read and improvidently relied on Weaver (as the concurring Justices who flagged the "assumption" language[6] were no doubt concerned about). In any event, Higgins has not shown that that his novel exception even exists, much less that the district court erred by not explicitly adopting it.

The deeper puzzle is why this proposed new exception would even matter here. Because even assuming *arguendo* the "fundamental unfairness" exception exists, and, as "it appears" to Higgins, the district court erred by not recognizing it, Higgins has not shown—or even argued—that the exception applies in *this* case. In his entire brief Higgins never once claims that the proceedings below were fundamentally unfair. (See generally Appellant's brief.) In fact, it looks like Higgins concedes the exact opposite—that the proceedings were *not* fundamentally unfair:

---

[6] The concurring Justices correctly noted that the Majority's "assumption" was not only contrary to Strickland but simply unnecessary for the holding:

> Second, the Court "assume[s]," for the "analytical purposes of this case," that a defendant may establish prejudice under *Strickland v. Washington*, by demonstrating that his attorney's error led to a fundamentally unfair trial. … *Strickland did not hold, as the Court assumes, that a defendant may establish prejudice by showing that his counsel's errors "rendered the trial fundamentally unfair." Because the Court concludes that the closure during petitioner's jury selection did not lead to fundamental unfairness in any event, no part of the discussion about fundamental unfairness, is necessary to its result."*

Weaver, 137 S. Ct. at 1914 (Thomas, J., concurring) (internal citations omitted).

> In this case, however, it may be that the ordinary standard of *Strickland* prejudice applies. While the deficient performance in *Weaver* dealt with a structural error, the deficient performance here, *i.e.*, permitting the jury to hear a comment upon the petitioner's right to remain silent, is an error of the trial type which is subject to harmless error review. *Thus such an error would not fall within the fundamental unfairness form of Strickland prejudice.*

(Appellant's brief, p.4 (emphasis added, internal citations omitted).)

This concession ends the discussion. Higgins gets no further than Weaver himself, who also lost—despite the benefit of the assumed exception—because the Court there found the proceedings were not fundamentally unfair. Weaver, 137 S. Ct. at 1911-14. Like Weaver, Higgins cannot show reversible error—even assuming the exception exists—because he admits that the purported errors here "would not fall within the fundamental unfairness form of *Strickland* prejudice." (See Appellant's brief, p.4.)

Higgins fails to show there is a "fundamental unfairness" exception to Strickland's prejudice analysis. Even if there is, he apparently concedes it would not apply here. In any event, Higgins fails to show that the district court erred, much less committed reversible error, when it concluded Higgins failed to show Strickland prejudice.

II.
By Never Arguing There Was Any Prejudice Below Higgins Waived His Newfound Prejudice Claim On Appeal

Higgins hastily departs from his "fundamental unfairness" exception to argue in the alternative that, "even under the ordinary standard, the court erred in dismissing the *Strickland* claim." (Appellant's brief, p.4.) He goes on to argue, for the first time on appeal, "[w]hy the error was prejudicial." (Appellant's brief, pp.4-7.)

This alternative argument fails as a threshold matter because it has not been preserved. It is well-settled that Idaho's appellate courts "will not consider issues raised for the first time on appeal." State v. Garcia-Rodriguez, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017) (quoting Mickelsen Const., Inc. v. Horrocks, 154 Idaho 396, 405, 299 P.3d 203, 212 (2013)). "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." Id. (citing Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979); Marchbanks v. Roll, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005); Frasier v. Carter, 92 Idaho 79, 82, 437 P.2d 32, 35 (1968) ("We have held generally that this court will not review issues not presented in the trial court, and that parties will be held to the theory on which the cause was tried.")).

Below, Higgins never claimed that there was any prejudice that resulted from counsel's purported deficient performance. (R., pp.47-50, 432-34). When confronted with his failure "to specifically allege any prejudice" (R., p.73), Higgins conceded the point with poetic regret:

> The Court states its intention to dismiss, however, on grounds that the Defendant has not been able to raise a material issue of fact as to whether the deficiency prejudiced his case. *The Petitioner acknowledges that it is impossible to determine what the result would have been if the Exhibit 5 had been excluded or what the court would have ruled in that moment on a motion for a mistrial*. After all, when two roads diverge in the woods it is impossible to tell where a road not traveled leads; especially with the passage of time.

(R., p.433 (emphasis added).)

Below Higgins lamented, in bucolic terms, that it was "impossible" to even determine prejudice—precisely why he chose his ill-fated fundamental error theory. (See R., pp.433-34.) Now, eyeing perhaps the better claim on appeal, Higgins argues the opposite: he purports to have found the impossible prejudice, as set forth in his brief. (Appellant's brief, pp.5-7.)

But this claim has not been preserved. One might say that two roads diverged in the post-conviction woods: arguing prejudice or fundamental error. And unlike wandering poets, litigants can travel multiple paths at once by pressing alternative arguments. Higgins chose to take the path less traveled—his doomed fundamental error claim—and that has made all the difference. (R., pp.432-34.) Because Higgins did not allege there was prejudice below, his newfound prejudice argument cannot be made for the first time on appeal.

III.
Even If Preserved, Higgins's Prejudice Argument Fails On The Merits, Not Least Because It Depends On The Demonstrably Incorrect Factual Claim That There Was No Fifth Amendment Cautionary Instruction

A. Introduction

Even if Higgins preserved his newly minted prejudice argument, if fails. The district court correctly concluded that, even if Higgins had "sufficiently alleged" a claim of prejudice, that claim failed in light of the "overwhelming evidence" of guilt presented at trial. (R., pp.452-54.) On appeal Higgins fails to show any error—and in particular fails to do so because his argument depends on a demonstrably incorrect fact. Higgins thinks that "[a]bsent a cautionary instruction, the jury likely took Mr. Higgins's assertion

of his Fifth Amendment rights" as an admission of guilt. (Appellant's brief, pp.5-6.) This claim necessarily fails because, well, there was a cautionary instruction.

B. The District Court Correctly Determined There Was No Prejudice

The district court gave Higgins every benefit of the doubt. Despite Higgins not alleging any prejudice, the district court went on to analyze what it could charitably construe as "implied" claims of prejudice. (R., pp.451-55.) It nevertheless found, even "if such prejudice had been sufficiently alleged, the claim for relief fails." (R., p.452.) The district court pointed out that "[i]t is clear that the trial court had concerns about the potentially prejudicial nature of the portion of Exhibit 5 at issue, however, the [trial court] took adequate steps to cure any potential prejudice by requiring the State to redact and resubmit a new Exhibit, and also by instructing the jury to disregard any reference to Petitioner's invocation of his rights." (R., p.452.)

The district court went on to outline the strength of the state's case against Higgins. (R., pp.452-56.) The state adopts and incorporates the district court's entire prejudice analysis (R., pp.452-56), and its correct conclusion that in light of the "overwhelming evidence against" Higgins, he "failed to allege sufficient facts to demonstrate … prejudice with respect to either claim 1 or claim 2" (R., pp.454, 456).

C. Higgins's Prejudice Arguments Necessarily Fail, As They Hinge On A Demonstrably Incorrect Factual Claim That There Was No Fifth Amendment Cautionary Instruction

On appeal Higgins fails to show the district court erred. Higgins's prejudice argument depends almost entirely on the purported fact that "prejudice was not ameliorated by a cautionary instruction." (Appellant's brief, p.6.) Higgins claims that

"[w]hile the jury was instructed that it could not draw an inference of guilt from the fact that Mr. Higgins did not testify at trial, it was not instructed it could not draw such an inference from his assertion of Fifth Amendment rights in Exhibit 5." (Appellant's brief, p.6, n.1.) Higgins concludes that "[a]bsent a cautionary instruction, the jury likely took Mr. Higgins' assertion of his Fifth Amendment rights during the police interview as an admission of guilt," which he purports was "highly prejudicial" in light of the rest of the state's evidence. (Appellant's brief, p.6.)

This claim fails because it is predicated on an incorrect fact. Saying there was no cautionary Fifth Amendment jury instruction—while likely an oversight—is simply wrong. The record unmistakably and repeatedly shows the jury *was* instructed that it could not consider Higgins's invocation of his Fifth Amendment rights for any purpose.

The subject first came up after Exhibit 5 was admitted into evidence and published for the jury. (R., p.248 (Tr., p.641, L.6 – p.642, L.5).) Shortly thereafter, outside the presence of the jury, the district court itself raised concerns about the unredacted statements captured in the exhibit:

> THE COURT: … Couple of things we need to put on the record. The parties will—if I get it wrong, the parties will make a more clear record. The video, State's Exhibit No. 12 [sic], DVD footage of a video interview, was previously disclosed. The parties had discussed what portions would be redacted, and the redacted version was reviewed prior—prior to being played here in court today by both the State and the defense.
>
> *The Court has some concerns about the initial statements on that DVD, so the Court is going to be giving a limiting instruction. That instruction will read as follows: Any reference or testimony that the Defendant may have invoked his Fifth Amendment right is to be stricken, and is not to be considered by you, the jury, for any purpose during your deliberations.*
>
> Ms. Morrison, does the State have any objection to that instruction?

> [Prosecutor] MS. MORRISON: No, Your Honor.
>
> THE COURT: Mr. Peterson?
>
> [Defense Counsel] MR. PETERSON: No.
>
> [Prosecutor] MR. HEMMER: Judge I'm sorry. *It is Exhibit 5.*
>
> THE COURT: *I'm sorry, Exhibit 5. That's right, Exhibit 5.* The Court is also going to require that that exhibit be further redacted to remove that first portion. I do not want that exhibit with that statement going back to the jury room. So we will have to—the State is going to have to withdraw that exhibit, provide a redacted—just that first sentence about the invocation. The subsequent waiver should come in. I don't think there's any problem with that.

(R., p.250 (Tr., p.646, L.2 – p.647, L.10) (emphasis added).)

The district court and the parties agreed that the redacted Exhibit 5—now referred to as "Exhibit 5A"—would be reviewed by defense counsel; that the original Exhibit 5 would be kept in the court record but not be given to the jury; and that Exhibit 5A would be the video the jury had access to. (R., pp.250-51 (Tr., p.647, L.6 – p.652, L.6).)

At this point the jury came back in and the court instructed them:

> Members of the jury, every day I tell you it's going to be 4:00. Today it's going to be about 3:41. *Before I release you for the day, I need to give you a limiting instruction, and then I'll give you your final instruction.*
>
> *Any reference or testimony that the Defendant may have invoked his Fifth Amendment right is to be stricken, and is not to be considered by you for any purpose during your deliberations.*

(R., p.251 (Tr., p.653, Ls.10-19) (emphasis added).)

The Fifth Amendment instruction came up again during the district court's review of the jury instruction packet. With the parties' assent, the trial court decided not to re-read the Fifth Amendment instruction; but the court clearly included the instruction in the jurors' instruction packet:

> THE COURT: Okay. There's two instructions that I already gave that will be included in this packet. Let me see if I can find them really quick. Oh, it's the very—
>
> MR. PETERSON: First two.
>
> THE COURT: Yeah, the very first two. There should be one more. Yes, the first three, actually, were given already. *So those are numbers 9, 10, 11. Just because they've already been given.*
>
> MS. MORRISON: And, Your Honor, 9 would be the controlled substances, 10 would be the sexual misconduct, *and 11 would be the Fifth Amendment?*
>
> THE COURT: Yes.
>
> MR. PETERSON: So will the Court be rereading those, or will you begin with Instruction 12?
>
> THE COURT: That was going to be my question to the parties. I don't wish to unduly emphasize anything, and so I'm wondering since they've already been read, is there a reason to read them again?
>
> MR. PETERSON: No.
>
> MS. MORRISON: No, Your Honor.

(R., p.365 (Tr., p.1107, L.17 – p.1108, L.15) (emphasis added).)

Lastly, if there were any lingering doubt, Instruction 11 itself, hidden in plain sight in the post-conviction record, confirms the instruction made its way back to the jury room:

> INSTRUCTION NO. 11
>
> Any reference or testimony that the defendant may have invoked his Fifth Amendment right is to be stricken and is not to be considered by you for any other purpose during your deliberations.

(R., p.81.)

So if one accepts Higgins's fictional premise that "[a]bsent a cautionary instruction, the jury likely took Mr. Higgins's assertion of his Fifth Amendment rights during the police as an admission of guilt" then the reality-based inverse must go as follows: due to the cautionary instruction, the jury likely did not take Higgins's assertion of his Fifth Amendment rights as an admission of guilt. See State v. Johnson, ___ Idaho ___, 414 P.3d 234, 244 (2018). Higgins altogether fails to show—in light of the state's overwhelming evidence of guilt and the cautionary instruction—that the district court erred.

IV.
Irrespective Of Prejudice, The Dismissal Of Claim 2 Should Be Affirmed Because The District Court Found No Deficient Performance And Higgins Has Not Challenged This Alternative Basis For Affirming On Appeal

"Where a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis." Rich v. State, 159 Idaho 553, 555, 364 P.3d 254, 256 (2015) (quoting State v. Grazian, 144 Idaho 510, 517-18, 164 P.3d 790, 797-98 (2007)). To preserve arguments on appeal parties must raise issues in their opening briefs. Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief.").

Below, the district court dismissed Claim 2 not just because Higgins failed to show prejudice, but because Higgins failed to show deficient performance:

> In any event, the controlling law does require the existence of prejudice to establish a claim for ineffective assistance of counsel. *As Petitioner has failed to allege sufficient facts to demonstrate deficient performance as to*

> *claim 2* and prejudice with respect to either claim 1 or claim 2 as detailed above and in the Notice of Intent to Dismiss, both claims necessarily fail.

(R., p.456 (emphasis added).)

On appeal, Higgins focuses entirely on the district court's prejudice finding, and never claims the district court's deficient performance finding was erroneous. (See generally Appellant's brief.) Higgins does not argue that the district court erred when it correctly concluded, based on Padilla v. State, 158 Idaho at 187, 345 P.3d at 246, that because the mistrial motion "would not, and should not" have been granted, it was determinative of *both* prongs of Strickland, including deficient performance. (See generally Appellant's brief; R., pp.454-55.) Higgins never mentions the district court's ultimate findings regarding deficient performance in his statement of the case. (See Appellant's brief, p.2.)

A petitioner must prove both deficient performance and prejudice to successfully allege ineffective assistance of counsel. See Strickland, 466 U.S. at 687-96. Because Higgins has not bothered to challenge the district court's deficient performance finding—and because the district court's ruling on Claim 2 can be affirmed on this unchallenged basis—this Court should affirm the dismissal of Claim 2 in any event.

CONCLUSION

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

DATED this 21st day of November, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

DENNIS BENJAMIN
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
db@nbmlaw.com

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

KDG/dd