6-10-2016

Adams v. State Respondent's Brief Dckt. 42920

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLAYTON ROBERT ADAMS,	)	
	)	**No. 42920**
Petitioner-Appellant,	)	
	)	**Canyon Co. Case No.**
vs.	)	**CV-2010-6258**
	)	
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 RENAE J. HOFF, District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR DEFENDANT-RESPONDENT

DENNIS BENJAMIN
Nevin, Benjamin, McKay & Bartlett LLP
303 W. Bannock
P. O. Box 2772
Boise, Idaho 83701
(208) 343-1000

ATTORNEY FOR PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Clayton Adams appeals from the judgment entered on the order summarily dismissing his petition for post-conviction relief and from the denial of his motion to set aside that judgment.

Statement of Facts and Course of Proceedings

The following testimony and evidence was presented during trial, and is taken the state's Respondent's Brief in Adams' direct appeal proceeding:

At about 5:00 or 6:00 on the evening of March 10, 2006, three friends, Mikeal Campbell, James Nelson, and Stephen Maylin, drove with Nelson to the Dutch Goose bar in Caldwell, where they drank alcohol until they met a friend of Campbell's, Tyler Gorley, at about 7:30 or 8:00 p.m.[1] (R., Vol. 2, pp.944-945, 991 (Tr., p.61, L.2 - p.66, L.6; p.67, L.24 - p.68, L.1; p.243, Ls.14-18).) Campbell, Gorley and Maylin stayed at the bar until it closed at 1:00 a.m., buying rounds of drinks for each other, and drinking beer and other alcoholic drinks during that time. (R., Vol. 2, pp.945-946 (Tr., p.67, L.20 - p.69, L.20).) Campbell and Maylin were drunk. (R., Vol. 2, pp.946, 990, 991 (Tr., p.69, Ls.13-14; p.242, L.21 - p.243, L.1).)

As Campbell, Gorley, and Maylin left the bar, Campbell saw an acquaintance, Clayton Adams, standing under the bar patio, and Adams agreed

[1] Stephen Maylin testified he and his roommate, James Nelson, arrived at the Dutch Goose bar between 8:00 and 9:00 p.m. (R., Vol. 2, p.990 (Tr., p.239, L.20 - p.240, L.9).)

to first drive Maylin to his home nearby, drive to Meridian to buy some beer, and then take Campbell and Gorley with him to a party. (R., Vol. 2, pp.946, 947, 956, 957, 992, 1002, 1003 (Tr., p.69, L.23 - p.73, L.2; p.112, Ls.3-24; p.114, Ls.9-17; p.248, Ls.2-4; p.290, L.12 - p.291, L.9 Ø).)[2]

The three friends -- Maylin, Gorley, and Campbell -- got into the back seat of Adams' compact 4-door car, with Campbell sitting behind the passenger's seat, Gorley in the middle, and Maylin behind the driver's seat. (R., Vol. 2, pp.847, 890 (Tr., p.76, L.18 - p.77, L.4; p.246, L.9 - p.247, L.9).) Adams' friend, Sergio Madrigal, who was not known by the others, sat in the front passenger's seat. (R., Vol. 2, p.1011 (Tr., p.324, Ls.1-3).)

Adams drove away from the Dutch Goose, and traveled down the Nampa-Caldwell Boulevard. (R., Vol. 2, p.947 (Tr., p.73, Ls.10-17).) According to Campbell's testimony,[3] as Adams reached the intersection of the Boulevard and Linden Road, he stopped the car a few seconds, and then, while the light was still red, he bolted left onto Linden, despite not being in the left turn lane. (R., Vol. 2, p.948 (Tr., p.77, L.14 - p.78, L.10).) After turning onto Linden, Adams was "flying through everything," going 60 or 70 miles per hour. (R., Vol. 2, p.948 (Tr., p.78, L.22 - p.79, L.1).)

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[2] The Clerk's Record, Volume 2, of the post-conviction case is missing a number of pages from the jury trial transcript. Page 291 of the transcript of the jury trial is missing and it, as well as any other missing portions from the post-conviction Clerk's Record, will be signaled by the symbol "Ø".

[3] Stephen Maylin testified that Adams did not run the stop-light at the Linden intersection. (Tr., p.292, Ls.2-24 Ø.)

When Adams turned onto Linden, Adams told the three men in the back seat that they had to give him $10 each for beer. (R., Vol. 2, pp.948, 992 (Tr., p.78, Ls.17-19; p.79, L.4 - p.80, L.3; p.249, Ls.4-16).) The three men yelled at Adams that they did not have any money and "weren't going to give him fucking shit, nobody was going to get nothing." (R., Vol. 2, pp.948, 992 (Tr., p.80, Ls.6-9; p.249, Ls.20-21).) At that point, there was a lot of commotion in the car, with the three young men in the back seat screaming for Adams to pull the car over so they could walk, and Adams refusing to stop, threatening he "had a fucking knife and a gun and that somebody was going to get hurt if they didn't give up money." (R., Vol. 2, pp.948, 992 (Tr., p.80, Ls.18-21; p.249, L.23 - p.250, L.2).) As the three men were screaming at Adams to stop the car, and as Adams screamed for money, saying "he's going to hurt people, stab people," Adams slammed on the car's brakes and came to a stop in the middle of Linden Road, between Middleton and Midland roads.[4] (R., Vol. 2, pp.949, 992 (Tr., p.81, L.24 - p.83, L.6; p.250, Ls.5-16).)

With the car stopped, the three men in the back seat were all screaming "run," and Maylin got out of the car from the left rear door, and Campbell and Gorley, who Campbell could feel pushing behind him, got out of the car from the right rear door. (R., Vol. 2, p.949 (Tr., p.83, L.13 - p.84, L.1).) When Maylin was attempting to get out of the car from his back seat, Adams got out of car from the driver's door, opened Maylin's rear door, and struck Maylin on his left side as he was standing up to get out of the car. (R., Vol. 2, p.993 (Tr., p.253, L.16 - 254,

[4] The front passenger, Sergio Madrigal, was not saying or doing anything during this time. (R., Vol. 2, p.949 (Tr., p.82, Ls.8-12).)

L.8).) Maylin, not realizing he had been stabbed, doubled over, caught himself on the car, and ran away from the scene and off the side of the road until he noticed he was having trouble breathing. (R., Vol. 2, pp.993, 994, 998, 999 (Tr., p.254, L.9 - p.255, L.10; p.273, Ls.2-13; p.275, L.26 - p.276, L.7).) Maylin heard Campbell yelling his name, and when he ran back to the scene, Campbell was on a cell phone talking to 911 and Gorley was lying in the road. (R., Vol. 2, p.994 (Tr., p.255, L.13 - p.256, L.13).) Maylin did not see Adams and Gorley fighting. (R., Vol. 2, pp.994, 1005 (Tr., p.257, L21-24; p.302, Ls.4-6).)

When Campbell got out of the car, he fled into a field, until he realized that Gorley was not behind him anymore. (R., Vol. 2, pp.949, 950, 965 (Tr., p.83, L.251 - p.84, L.1; p.86, Ls.8-24; p.141, L.6 - p.142, L.19).) Campbell turned around and saw Adams and Gorley fighting a short distance from the back of Adams' car, with both men swinging at each other, Adams appearing to throw body blows at Gorley, and Gorley appearing to be "fighting over the top" of Adams. (R., Vol. 2, pp.950, 966 (Tr., p.87, L.10 - p.88, L.5; p.143, Ls.11-19).) Campbell did not see any weapon. (R., Vol. 2, pp.950, 965-966 (Tr., p.88, Ls.9-10; p.142, L.25 - p.143, L.1).)

Campbell ran back towards Adams, and picked up some rocks on the way and threw them at Adams. (R., Vol. 2, p.950 (Tr., p.88, Ls.11-21).) Adams appeared to stumble, and then got into his car, turned off his car's lights, and drove away rapidly towards Meridian. (R., Vol. 2, p.951 (Tr., p.89, Ls.2-23).) Campbell held Gorley up under his arm and told him they had to get out of there, whereupon Gorley said "wait," that he needed to catch his breath, then fell over,

pulling Campbell on top of him. (R., Vol. 2, p.951 (Tr., p.89, L.6 - p.90, L.11).) Campbell could feel blood coming from Gorley's chest, and after pulling Gorley's jacket back and seeing a lot of blood, he began screaming for Maylin to come back so he could use Maylin's cell phone to call 911 -- but then remembered Gorley had a cell phone, and retrieved it from Gorley's pants pocket and made the 911 call himself. (R., Vol. 2, p.951 (Tr., p.90, L.14 - p.91, L.6).) The 911 operator asked Campbell to go to a nearby residence to see what the address was, which Campbell did after Maylin came back to the scene to stay with Gorley. (R., Vol. 2, p. 952 (Tr., p.94, L.8 - p.95, L.5).)

Minutes later, law enforcement officers arrived on the scene, followed by paramedics. (R., Vol. 2, pp.952, 953 (Tr., p.96, L.14 - p.97, L.2).) According to Canyon County Paramedic Jenifer Wyatt, who responded to the 911 call, Gorley was transported to St. Alphonsus Regional Medical Center after Gorley's heart unexpectedly began to show a heartbeat. (R., Vol. 2, pp.1045, 1047, 1048 (Tr., p.466, Ls.9-16; p.474, L.6 - p.475, L.11).) Wyatt also testified that later that morning she transported a second stabbing victim (Stephen Maylin, as identified by Wyatt through State's Exhibit 16) to a hospital, and noted he had what appeared to be a stab wound about one inch wide that went in deep under his left armpit, although he appeared to be stable. (R., Vol. 2, p.1048 (Tr., p.476, L.4 - p.477, L.10).) Stephen Maylin did not realize he had been stabbed until he removed his coat much later that morning while being interviewed at the Canyon County Sheriff's Office; paramedics were summoned and he was transported to the hospital. (R., Vol. 2, pp.995-996 (Tr., p.259, L.9 - 263, L.2).)

Sergio Madrigal testified that he was Adams' friend, and he was with Adams at the Dutch Goose on the evening of March 10, 2006. (R., Vol. 2, pp.1008-1009 (Tr., p.311, Ls.6-17; p.314, L.7 - p.315, L.21).) Madrigal affirmed that after closing time, he, Adams, and the three men (whom he did not know), left in Adams' car to go to Meridian to buy beer, then to go to a party. (R., Vol. 2, pp.1009--1011 (Tr., p.316, L.18 - p.319, L.2; p.324, Ls.1-3).) Madrigal recalled Adams asking the three men in the back seat for "like $3" to buy beer, but did not hear the men's response because the radio was too loud. (R., Vol. 2, pp.1010, 1011 (Tr., p.321, L.21 - p.323, L.17).) Adams got very mad, stopped the car by screeching the tires, and told the three men in the back seat to "get the F out." (R., Vol. 2, p.1010 (Tr., p.322, Ls.6-14).) The three men got out of the car, but Madrigal did not see what occurred outside, as he stayed in the vehicle. (R., Vol. 2, p.1011 (Tr., p.323, L.6 - p.324, L.13).)

After sitting in the car a few minutes. Madrigal opened the door and saw Adams coming back to the car, saying "let's go." (R., Vol. 2, pp.1011, 1018 (Tr., p.325, Ls.7-24; p.351, Ls.2-5; p.352, Ls.3-8).) Adams got in the car and drove away fast, appearing to be very mad, and told Madrigal pointedly that he thought he was his friend. (R., Vol. 2, p.1011 (Tr., p.326, Ls.2-26).) As they drove away, Adams told Madrigal, "I think I stabbed somebody," and then (when Madrigal did not believe him), "I think I did stab somebody." (R., Vol. 2, p.1012 (Tr., p.327, Ls.9-24).) Adams showed Madrigal his knife, and asked him if he saw any blood on it. (R., Vol. 2, p.1012 (Tr., p.328, Ls.1-3).) Madrigal looked at the knife a little bit, but did not see any blood. Adams appeared very worried, and repeated a

couple of times, “you don’t see no blood?” (R., Vol. 2, p.1012 (Tr., p.328, L.24 - p.329, L.3).) Adams told Madrigal not to tell “nobody” and to lie “to police or whoever said something, not to say anything.” (R., Vol. 2, p.1013 (Tr., p.331, L.24 - p.332, L.8).) Madrigal was afraid of Adams at that point because Adams was real upset, saying “nobody fucks with me.” (R., Vol. 2, p.1013 (Tr., p.332, Ls.15-19).) Madrigal attempted to calm Adams down, and the two drove to a Meridian convenience store and bought beer and cigarettes. (R., Vol. 2, p.1013 (Tr., p.333, Ls.4-24).) They then drove around Caldwell unsuccessfully looking for the party they had heard about. (R., Vol. 2, pp.1013, 1014 (Tr., p.334, L.23 - p.335, L.23).) Adams finally drove Madrigal to his (Adams’) trailer house, and when they pulled in, Adams was arrested and Madrigal was taken in for questioning. (R., Vol. 2, p.1014 (Tr., p.336, Ls.1-25).)

When Adams was arrested at his trailer, Canyon County Sheriff’s Sergeant Timothy Bowen found a knife in Adams’ right front pocket, “a fold-up clasp type knife with a clip on it, and it was clipped on to his front pants pocket.” (Tr., p.521, Ls.15-25 Ø.) A swab of that knife was tested for DNA analysis, and at trial, Idaho State Police Forensic Services Lab forensic scientist Cynthia Hall testified the DNA on the “knife blade swab matched Tyler Gorley.” (R., Vol. 2, p.1093 (Tr., p.649, L.24 - p.650, L.1).)

The ER trauma surgeon at St. Alphonsus hospital that treated Tyler Gorley was Dr. George Munayirji, M.D. (R., Vol. 2, pp.969, 970 (Tr., p.155, Ls.1-3; p.158, L.20 - p.159, L.5).) He testified Gorley appeared to be close to death when he arrived at the ER, but after an ampule of epinephrine was given to him,

a blood pressure was produced, which caused the surgeon to take Gorley into the operating room to examine his injuries in surgery. (R., Vol. 2, pp.970, 971 (Tr., p.162, L.2 - p.163, L.9).) Dr. Munayirji determined during the surgery that it was not offering any help for Gorley, and Gorley was given a CT scan to assist in determining the extent of his injuries, which showed there was blood around Gorley's heart, and that he had already suffered brain damage. (R., Vol. 2, p.971 (Tr., p.164, L.5 - p.165, L.5).) According to the surgeon, he detected four stab wounds, the two most serious of which (1) penetrated the liver and (2) "penetrated his pericardium, the sac that encloses the heart, and caused the bleeding, and the blood was posing pressure on the heart." (R., Vol. 2, p.971 (Tr., p.164, Ls.3-4; p.165, Ls.10-16).) According to Dr. Munayirji, the stab wound to the heart required a "good amount of force," and caused Gorley's life to expire at the ER. (R., Vol. 2, pp.971, 972 (Tr., p.166, Ls.2-8; p.168, Ls.9-24).)

Dr. Glen Groben, the forensic pathologist who conducted the autopsy on Tyler Gorley's body, determined there were five stab wounds on Gorley's body, one on the back of the upper left leg (that would have been easily missed by the ER physicians), three wounds to the side of his chest (one of which cut through Gorley's liver), and one wound toward the center of his chest.[5] (R., Vol. 2, p.978 (Tr., p.191, L.1 - p.192, L.2; p.194, L.11 - 201, L.8).) Dr. Groben confirmed it was the stab wound to Gorley's chest, which cut between his ribs and into the right

[5] Two of the stab wounds to Gorley's side, and the wound to the back of his left leg, although more than superficial in nature, were not potentially fatal. (R., Vol. 2, pp.982, 983 (Tr., p.209, L.4 - p.210, L.25; p.211, Ls.3-24).)

ventricle of Gorley's heart, that caused his death. (R., Vol. 2, pp.981-984 (Tr., p.206, Ls.4-16; p.208, L.4 - p.209, L.3; p.214, Ls.16-23; p.215, L.8 - p.216, L.10.)

The state charged Adams with first degree murder (or in the alternative felony murder), aggravated battery, and three counts of attempted robbery. (R., Vol. 3, pp.1677-1681.) A jury convicted him after a trial of second degree murder and aggravated battery. State v. Adams, 147 Idaho 857, 216 P.3d 146 (Ct. App. 2009). The district court imposed a life sentence with twenty-five years fixed for Adams' second degree murder conviction, and a consecutive ten years with three years fixed for aggravated battery. (Id.) The Idaho Court of Appeals affirmed Adams' convictions and sentences. (Id.)

In 2010, Adams filed a lengthy pro se post-conviction petition (R., Vol. 1, p.12 *et seq*), and in 2012 (through appointed counsel), he filed an Amended Petition (R., Vol. 3, pp.1641-1675). On January 18, 2013, the state filed a Memorandum for Trial and Motion for Summary Dismissal. (R., Vol. 3, pp.1730-1735.) At a hearing on the state's motion for summary dismissal held on June 23, 2014, the court dismissed all but two of Adams' post-conviction claims and ordered he be re-sentenced on his second degree murder conviction as a result of his prevailing on the two sentence-related claims.[6] (R., Vol. 3, pp.1855-1861; see generally 6/23/14 Tr.) Adams fax-filed a motion for reconsideration which was denied. (R., Vol. 3, pp.1904-1907, 1922-1935.)

[6] On re-sentencing, the court again sentenced Adams to a unified life term with 25 years fixed for second degree murder, which sentence was affirmed on appeal. State v. Adams, Docket No. 42667, 2015 Unpub. Op. No. 588 (Idaho App. Aug. 11, 2015).

Adams filed a timely notice of appeal. (R., Vol. 3, pp.1936-1939.) This case was remanded briefly to the district court to determine whether the court, in denying Adams' motion for reconsideration, had considered the affidavit of a DNA expert, Dr. Hampikian, which lacked a notarized signature page. (12/7/15 Mot. for Temp. Remand; 1/7/16 Order Granting Motion for Temp. Remand.) The district court entered findings that, although the notarized signature page had not been received through the fax-filing, "the court considered the information contained in his affidavit as if it had been notarized[,]" and "would have reached the same conclusions had Dr. Hampikian's affidavit had [sic] been received and filed in proper form." (2/11/16 Findings upon Remand from Supreme Court.)

ISSUES

Adams' statement of the issues on appeal is lengthy and needs not be repeated here, but can be found at pages 7-8 of the Appellant's Brief. The state rephrases the issues as:

Has Adams failed to demonstrate error in the district court's summary dismissal of his claims because he failed to present a genuine issue of material fact? Additionally, has Adams failed to that the district court abused its discretion in denying his request for investigative funds?

ARGUMENT

Adams Has Failed To Show The District Court Erred In Summarily Dismissing His Post-Conviction Claims; Additionally, Adams Has Failed To Show The Court Abused Its Discretion In Denying His Request For Investigative Funds

A. Introduction

Adams contends the district court erred in summarily dismissing five claims presented in his post-conviction petition. (Appellant's Brief, pp.8-40.) However, a review of the record and of the applicable law supports the district court's determination that Adams failed to present an issue of material fact entitling him to an evidentiary hearing on any of the five post-conviction claims he presents on appeal. Adams has also failed to show the court abused its discretion in denying his request for investigative funds.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 802 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises

no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

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

D. Legal Standards Applicable To Ineffective Assistance Of Counsel Claims

In State v. Abdullah, 158 Idaho 386, 417-418, 348 P.3d 1, 32-33 (2015), the Idaho Supreme Court set forth the following standards applicable to ineffective assistance of counsel claims:

> This Court utilizes the *Strickland* two-prong test to determine whether a defendant in a criminal case received effective assistance of counsel. [Citations omitted.] To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688 . . . . To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694 . . . . A reasonable

> probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id*. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 . . . (2011).
>
> The defendant also must overcome a strong presumption "that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, . . . 131 S.Ct. 1388, 1407 . . . (2011) (quoting *Strickland*, 466 U.S. at 690 . . .). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689 . . . . Thus, strategic decisions are "virtually unchallengeable" if made after a "thorough investigation of law and facts relevant to plausible options." *Id*. at 690 . . . . Decisions "made after less than complete investigation" are still reasonable to the extent "reasonable professional judgments support the limitations on investigation." *Id*. at 691 . . . . Counsel is permitted to develop a strategy *Richter*, 562 U.S. at 107 . . . .

E. Adams Has Failed To Show Error In The Summary Dismissal Of His Ineffective Assistance Of Counsel Claims

1(a). Failure To Call Crissy Powell And Lynette Skeen As Witnesses

The district court summarily dismissed Adams' claim that his trial counsel was ineffective for failing to investigate and call Crissy Powell and Lynette Skeen as witnesses at trial. (6/23/14 Tr., p.62, L.15 – p. 65, L.12.) The court concluded: (1) trial counsel's decision was strategic and tactical, (2) Adams failed to show that either witness would have been available to testify at trial, (3) Adams failed to show that the two women would have testified consistently with their prior statements, and (4) even if they had testified in accordance with their earlier statements, the outcome of the trial would not have been different. (Id.)

Adams was required to overcome a strong presumption "that counsel 'made all significant decisions in the exercise of reasonable professional

judgment.'" Strickland v. Washington, 466 U.S. 668, 690 (1984). Adams also had the burden of presenting admissible evidence that, based upon counsel's perspective at the time, he failed to call the two women as witnesses because of an objective shortcoming, such as inadequate preparation or investigation.[7] Id. at 689. Based on the information known by Adams' counsel prior to trial – not by 20–20 hindsight or by what further investigation "might" discover – he exercised competent professional judgment in making the tactical decision that further investigating Crissy Powell and Lynette Skeen and calling them to testify at trial was not warranted. Crissy Powell's statements show she could not present relevant and admissible testimony at trial. Lynette Skeen's statements provided no benefit to the defense.

First, Crissy Powell's alleged statement to Ashley Adams that "she was at the bar and Tyler was just rude and a jerk and *he was looking for a fight all night* and called her the town whore" (R., Vol. 1, p.376), was not evidence of Tyler's "then existing state of mind" under I.R.E. 803(3)[8] because it was not a statement made by Tyler Gorley about his own state of mind. (See Appellant's Brief, pp.15-

[7] Adams' request that this Court apply the less deferential "inadequate preparation" (or "investigation") standard for reviewing trial counsel's decision to not call the two women to testify at trial is unfounded. See Abdullah, 158 Idaho at 418, 348 P.3d at 33 (quoting Strickland, 466 U.S. at 691 ("Decisions 'made after less than complete investigation' are still reasonable to the extent 'reasonable professional judgments support the limitations on investigation.'")

[8] I.R.E. 803(3) excepts from the hearsay rule "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

16 (arguing that the statement was "state of mind" evidence).) Rather, it was a conclusory statement allegedly made by Powell about what *she* thought Gorley's state of mind may have been. Moreover, Powell's alleged comments to Ashley Adams were not relevant because they did not threaten any violence or harm against Adams; therefore, even if Powell would have testified as Ashley Adams suggested, her testimony would not have been admissible under I.R.E. 402 and 403.

Crissy Powell's alleged comments (clearly hearsay in need of an exception) did not show that Tyler Gorley had a "pertinent trait" for violence under I.R.E. 404(a)(2), which would have been admissible in the form of opinion or reputation testimony under 405(a).[9] (See Appellant's Brief, p.15.) Even assuming, *arguendo*, that Powell would have testified at trial consistently with the

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[9] I.R.E. 404(a)(2) states:

> (a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on the particular occasion, except:
>
> . . . .
>
> (2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

I.R.E. 405(a) states in relevant part:

> **Rule 405. Methods of proving character.**
>
> (a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

statements attributed to her by Ashley Adams,[10] such testimony would not have been admissible as opinion or reputation evidence because there was no indication Powell knew Gorley sufficiently to have formed an opinion about his allegedly violent character, or knew he had a reputation in the community for violence.

Next, Lynette Skeen's witness statement explained that when she woke up from her sleep after hearing male voices yelling, she looked out her bedroom window and "saw car headlights and heard someone yell, 'Get the Fuck back here.'" (R., Vol. 1, p.393.) Adams claims Gorley was the person who was yelling. However, as shown above, the state's evidence was that Campbell, Maylin and Gorley fled from a knife wielding Adams who remained in the proximity of his *own* car, in which he shortly thereafter sped away with his friend, Sergio Madrigal. Based on the facts of the case, the assertion that Gorley was the person who yelled, "Get the Fuck back here" runs counter to common sense and logic. Adams failed to present any reason for trial counsel to believe that, if located, Lynette Skeen could have said anything more than what was already in her written statement, much less that she would have identified Gorley and not Adams as the man who yelled "Get the Fuck back here."

There is no basis for concluding that Adams' trial counsel should have concluded that Crissy Powell or Lynette Skeen could have added any information to their statements, which were respectively inadmissible and unhelpful to the

[10] The district court explained, "Mr. Adams has failed to show that Powell would have testified consistently with what his sister has stated nor that she was even available to testify." (6/23/14 Tr., p.63, Ls.15-18.)

defense, that would have supported Adams' defense. Even if relying on the statements made counsel's investigation "less than complete," Strickland, 466 U.S. at 691, based on the information known by Adams' counsel prior to trial, he exercised "reasonable professional judgment" in deciding tactically to not fruitlessly spend time and money investigating Powell and Skeen and calling them to testify at trial. The district court therefore correctly concluded that Adams' trial counsel's decision to not call Crissy Powell and Lynette Skeen as witnesses, or conduct further investigation before making that decision, was a rational tactical and strategic decision.[11]

In sum, Adams' trial counsel had no reason to believe either Crissy Powell or Lynette Skeen could provide either admissible evidence or evidence that would support Adams' defense of self-defense. The fact that Adams' trial counsel could not recall the names of the two women when he was deposed in 2011 does not mean that counsel did not make a reasonable strategic decision – based on what information he had at the time – to not investigate them further or call them as witnesses at trial. Adams has failed to demonstrate any error in the district court's determination that Adams failed to rebut the presumption that his trial counsel's decision was tactical or strategic; therefore, he has failed to show that counsel's performance was deficient under Strickland. See Abdullah, 158

[11] Adams does not explain where the record shows that his trial counsel did not contact the two women prior to trial. Instead, he speculates that if the two women had been contacted in the post-conviction proceeding (presumably by a court authorized investigator), they "*could* have also shown that defense counsel never contacted either witness which would tend to show there was no strategic decision not to call them as witnesses." (Appellant's Brief, p.19.) Adams' assertion that his trial counsel failed to contact Crissy Powell and Lynette Skeen prior to trial is merely conclusory and not based on any concrete evidence.

Idaho at 418, 348 P.3d at 33 (there is a strong presumption counsel exercised reasonable professional judgment).

Moreover, Adams has failed to demonstrate that his trial counsel's decision to not call Crissy Powell and Lynette Skeen as witnesses resulted in any prejudice, the second requirement of Strickland. Based on the reasoning expressed above (i.e., lack of relevance and/or admissibility) and the testimony and evidence presented at trial as set forth in the Statement of Facts and Course of Proceedings, supra, relied upon here, and the scant (if any) impact the two women's statements would have had in supporting Adams' defense, this Court should conclude that there is no "reasonable probability" that, but for counsel's alleged error, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Adams has failed to demonstrate any error in the district court's summary dismissal of his claim that his trial counsel was ineffective for failing to investigate Crissy Powell and Lynette Skeen and have them testify at trial.

1(b). Denial Of Request For Investigative Funds

Adams has failed to show that the district court abused its discretion in denying his request for funds to hire an investigator to locate Crissy Powell and Lynette Skeen prior to granting the state's summary dismissal motion. A review of the record reveals the district court acted well within its discretion by denying Adams' motion for funds for investigative services.

Discovery during post-conviction relief proceedings is a matter left to the sound discretion of the district court. I.C.R. 57(b); Raudebaugh v. State, 135

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

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

Thirteen days before the hearing on the state's motion for summary dismissal, Adams filed an "Ex Parte Motion to Authorize Costs and Notice of Hearing." (R., Vol. 3, pp.1812-1816.) Adams' motion requested the court to authorize funds for an investigator to locate Crissy Powell and Lynette Skeen, and stated that Adams' trial counsel testified during a 2011 deposition that he

"did not recall if he questioned Crissy Powell" and did not remember who Ms. Skeen was. (R., Vol. 3, pp.1814-1815; see generally 9/21/15 Aug., 8/22/11 Tr.[12]) Adams' motion for investigative funds did not state what efforts Adams' counsel made to locate the two women. However, during the October 26, 2015 hearing on Adams' motion for investigative funds, his counsel explained:

> And Judge, just so you're aware, in what limited resources I have, I have not been able to find these witnesses. So it wasn't – we didn't come to the Court first for costs. We first – I first tried to do what I could to find them, but was unable to.

(6/10/14 Tr., p.10, Ls.14-19.)

The district court denied Adams' request for investigative funds based on its untimeliness and Adams' counsel's inability to explain why it was filed so late. (6/10/14 Tr., p.10, L.22 – p.11, L.19.) The court voiced concern about the fact that the motion for funds came so close to the imminent hearing date on the state's motion for summary dismissal. The court explained, "And here we are on the eve of the State noticing up their motion. And I get this responding matter that an investigator's needed to locate the witnesses."[13] (6/10/14 Tr., p.11, Ls.8-11.) The court noted the motion came long after Adams' trial counsel's deposition (in 2011), and two years after Adams filed his amended post-conviction petition containing the claims relating to Crissy Powell and Lynette

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[12] On September 21, 2015, this Court entered an Order Granting Motion to Augment and Suspend the Briefing Schedule, augmenting the appellate record with, *inter alia*, the deposition of Judge Dayo Onanubosi (Adams' former trial counsel). References to the transcripts included in that Order will be prefaced by "9/21/15 Aug.", followed by the date of the proceeding, page number (as per transcript quadrant page numbers), and line numbers.

[13] At the end of the pre-trial conference/motion hearing, the court set the hearing on the state's motion for summary dismissal for June 23, 2014, 13 days later.

Skeen. (6/10/14 Tr., p.10, L.24 – p.11, L.9.) Based on the timing of Adams' motion for investigative funds, the court was well within its discretion to find that Adams' motion was untimely.

The district court also concluded that Adams' post-conviction counsel failed to provide a valid reason for the lengthy delay by her statements that she had "limited resources," that she had "not been able to find these witnesses," and she had "first tried to do what [she] could to find them, but was unable to." (6/10/14 Tr., p.10, Ls.14-19.) Adams' counsel failed to explain (1) what efforts she made to contact the two women, (2) why she could not locate the two women because her resources were limited, and (3) why an investigator could be expected to locate the two women within days of the hearing on the state's motion for summary dismissal when counsel was unable to do so over a much longer period. Based on the lateness of the motion and Adams' counsel's lack of specificity for why she had not been able to locate the two women, the court properly, and within its discretion, concluded there was no showing of good cause for the delay and denied the motion. (6/10/14 Tr., p.10, L.22 – p.11, L.19.)

Further, none of Adams' substantial rights were impacted by the district court's denial of is request for investigative funds. For the same reasons Adams' claim that his trial counsel's performance failed to meet the prejudice prong under Strickland – that Lynette Skeen and Crissy Powell's statements were irrelevant and/or inadmissible – the district court's order did not prejudice Adams' substantial rights. As discussed, hoping that Skeen would be able to identify the person who said "Get the Fuck back here" is pure speculation, and Powell's

statements would have been inadmissible and irrelevant at trial and there was no indication that she had anything to add to them.

Perhaps most significant is the fact that, based on what he knew prior to trial, Adams' trial counsel had no Sixth Amendment obligation to investigate Crissy Powell and Lynette Skeen or call them as witnesses at trial. Therefore, it would have been utterly pointless for Adams' post-conviction counsel to hire an investigator with public funds in order to go on a "fishing expedition" to find out what trial counsel "might" have learned. Inasmuch as Adams' trial counsel had no Sixth Amendment duty to investigate the two women or call them at trial, whatever the post-conviction investigation found would have been irrelevant to Adams' claim and the germane question of what information trial counsel had at the time. Not only would such investigation constitute a fishing expedition, but there would be no possibility of fish in the lake. Because none of Adams' substantial rights were affected by the denial of his request for investigative funds, the district court's order should be affirmed.

2. Failure To Seek DNA Analysis Of Tyler Gorley's Clothing

The district court granted Adams' request "that DNA testing be performed on the presumed knife wound entrance holes in Tyler Gorley's clothing" (R., Vol. 3, p.1775), to determine if there had been any transfer of Stephen Maylin's DNA onto Gorley's clothing. After testing, Forensic Scientist Cyndi Hall concluded that Gorley was the source of DNA on all four swabs submitted to her: two swabs from his t-shirt and two swabs from his red jacket. (12/18/13 Forensic Biology Report.) At a hearing on June 23, 2014, the court summarily dismissed all but

two of Adams' post-conviction claims and ordered he be re-sentenced on his second degree murder conviction as a result of his prevailing on the two sentence-related claims. (R., Vol. 3, pp.1855-1861; see generally 6/23/14 Tr.) In dismissing Adams' claim, the court explained, "I don't see how any – the DNA report that we have, that there was not a genetic transfer would have made any difference in the outcome of the trial." (6/23/14 Tr., p.65, Ls.7-10.)

Adams fax-filed a motion for reconsideration regarding the summarily dismissed claims, with an attached affidavit by Dr. Greg Hampikian, Ph.D. – however, the last page containing the sworn oath was not received by the court. (R., Vol. 3, pp.1904-1907.) The court entered an order and judgment denying the motion in its entirety, but did not specifically mention the affidavit of Dr. Hampikian (R., Vol. 3, pp.1922-1935). On appeal, Adams' appellate counsel was granted a motion to remand to determine whether the district court had actually considered Dr. Hampikian's affidavit despite the fact that it lacked the sworn signature page. (12/7/15 Mot. for Temp. Remand; 1/7/16 Order Granting Motion for Temp. Remand.) On remand, the district court entered findings that, although the notarized signature page was not received by the Clerk's office, "the court considered the information contained in his affidavit as if it had been notarized[,]" and "would have reached the same conclusions had Dr. Hampikian's affidavit had [sic] been received and filed in proper form." (2/11/16 Findings upon Remand from Supreme Court.)

Adams' claim that his trial counsel was ineffective for failing to seek DNA testing to see if Stephen Maylin's DNA transferred to Tyler Gorley's clothing is

predicated on the notion that the absence of such transfer would show that Adams did not stab Maylin.[14] The district court correctly summarily dismissed Adams' claim because he failed to demonstrate prejudice under Strickland. Moreover, the district court's summary dismissal of this claim should be upheld because Adams has failed to show that his trial counsel's performance was deficient under Strickland. See State v. White, 102 Idaho 924, 925, 644 P.2d 318, 319 (1982); Row v. State, 135 Idaho 573, 579, 21 P.3d 895, 901 (2001).

Although the district court granted Adams' motion for DNA testing of Tyler Gorley's clothing, the results of such testing – either way – could not have been exculpatory. If Stephen Maylin's DNA would have been on Gorley's clothing, it would have certainly supported Maylin's testimony that he was stabbed first. However, the inverse does not hold true. The absence of Maylin's DNA on the four areas of Gorley's clothing that were swabbed does not show Maylin was not stabbed first, or, as Adams even further suggests, that Maylin was not stabbed by a knife at all. (See Appellant's Brief, p.27 ("The absence of his DNA indicates that Mr. Maylin had not been stabbed when he first left the car and that he may not have been stabbed by a knife at all. . . . Besides Mr. Maylin's testimony there was no other evidence presented that he was even stabbed by a knife.") Adams' argument fails on several fronts.

Contrary to Adams' argument, the negative results of testing for Stephen Maylin's DNA on Tyler Gorley's t-shirt and jacket do not tend to prove Adams did

[14] It should be noted that Forensic Scientist Cynthia Hall also testified at trial that Adams' knife had another, but unknown, person's DNA on it, besides Tyler Gorley's. (R., Vol. 2, Tr., p.649, L.25 – p.650, L.11.)

not stab Maylin. Significantly, Dr. Glen Groben, the forensic pathologist who conducted the autopsy on Tyler Gorley's body, testified at trial that Tyler suffered five stab wounds, one on the back of the upper left leg, three wounds to the side of his chest, and one wound toward the center of his chest. (Trial Tr., p.191, L.1 - p.192, L.2; p.194, L.11 - 201, L.8.) As argued by the prosecutor in his objection to Adams' motion for reconsideration:

> Somehow the concept that there was no DNA evidence from one victim on the clothing of the deceased victim suggests that Petitioner is innocent, is an unsupported conclusory statement. There are many possibilities of why there was not [sic] DNA evidence found. One is the testing site selection. Another may be the tissue and clothing of Mr. Mayhlin [sic] may have wiped away DNA evidence off the knife before it was repeatedly used on Tyler Gorley. Perhaps Petitioner wiped the blade clean before he stabbed the deceased. . . .
>
> Again, there is nothing in the Motion for Reconsideration that comes close to being admissible evidence. Petitioner has failed to provide any evidence that would indicate that Petitioner did not stab *Tyler Gorley* as related to DNA evidence. He has merely suggested that because there was no DNA of Steven Maylin on the entry wound sites on Tyler Gorley's clothing, that he did not stab *Tyler Gorley*.[15]

(R., Vol. 3, p.1914.)

As the prosecutor explained, there are several possible reasons for not finding Stephen Maylin's DNA on Tyler Gorley's t-shirt and jacket. The "testing site selection" may not have been where Maylin's DNA was located. Adams did not present any evidence to explain whether the four sites (two on the t-shirt, two on the jacket) analyzed four separate stab wounds, or, alternatively, if the two t-

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[15] The highlighted references to Tyler Gorley were obvious misstatements. Adams argues that the absence of transfer DNA (Stephen Maylin to Tyler Gorley) showed that he did not stab Stephen Maylin.

shirt holes and two jacket holes aligned with each other to reflect only two stab wounds, each one penetrating Gorley's t-shirt and jacket. If so, the DNA analysis of Gorley's clothing related only to two of the five stab wounds inflicted, and Maylin's DNA may have been wiped off during any of the other three stabbings of Gorley – none of which were tested. It is also possible that Adams wiped the knife blade himself after he stabbed Maylin, as it appeared to Sergio Madrigal that Adams was worried about whether blood was on his knife when he returned to his car. (R., Vol. 2, p.1012 (Tr., p.328, L.1 – p.329, L.3).) It is also possible that Maylin's DNA was wiped off the knife when Adams extracted it from Maylin's body and back through Maylin's own clothing and jacket. Inasmuch as DNA testing for transfer evidence could not have helped (and only possibly harmed) Adams' case, Adams' trial counsel cannot have been deficient in failing to pursue such evidence, nor could his conduct have prejudiced Adams' case.

Further, Dr. Hampikian's affidavit does nothing to help Adams' contention that his trial counsel provided ineffective assistance.[16] The first relevant part of Dr. Hampikian's affidavit states the obvious:

> 8. I would expect to find DNA on an object or weapon after it punctured a person and caused extensive bleeding."
>
> 9. Assuming that the knife or object that caused a puncture wound *had not been cleaned in any way*, it is extremely unlikely that DNA would not be found on that object or weapon.

[16] Although Dr. Hampikian's affidavit states that he is a DNA expert, it does not state that he had any training or other expertise in the *transfer* of DNA. (See R., Vol. 3, p.1906-1907.)

(R., Vol. 3, p.1906 (emphasis added).) The above scenario is based on the undisputed idea that an object causing a puncture wound and extensive bleeding would be "extremely unlikely" to not have DNA on it – unless it was cleaned. There, however, is no mention of multiple persons being stabbed, or that the stabs were through clothing. Dr. Hampikian's subsequent hypothetical comes a bit closer to the facts of this case; it states:

> 10. Hypothetically, if someone were to stab one person (person A) with an instrument and then stab a second person with that same instrument (person B), I would expect to find a mixture of person A and person B's DNA on the instrument. If person B was stabbed through his or her clothing, I would also expect to find person A's DNA transferred to person B's clothing.

(R., Vol. 3, p.1907.) Dr. Hampikian's hypothetical, while closer to the facts in this case in regard to the clothing worn by Tyler Gorley ("person B"), does not account for the fact that Stephen Maylin ("person A") was wearing a shirt and jacket that, to some extent, had to have a "wiping" effect on Adams' knife when he pulled it out of Maylin's body. (See R., Vol. 2, p.995 (Tr., p.259, L.19 – p.262, L.6).) Even though he did not account for the possibility that Stephen Maylin's shirt and jacket may have been a "way" Adams' knife was "cleaned" (see R., Vol. 3, p.1906, ¶ 8), Dr. Hampikian only opined that he "would expect" a DNA transfer – hardly the type of opinion that would have affected the outcome of the trial against Adams for committing aggravated battery against Maylin.[17] Dr.

[17] During trial, Forensic Scientist Cynthia Hall was questioned about whether Stephen Maylin's blood would be expected to be found on areas around the knife holes in Tyler Gorley's clothing, and she repeatedly said it was "possible," but it depended on other factors such as the amount of blood and whether it was cleaned or washed, finally explaining, "It's possible for blood to transfer and it's

Hampikian's affidavit fails to show that Adams' trial counsel's performance was either deficient or prejudicial.

Lastly, the testimony and evidence presented at trial showing Adams committed aggravated battery against Stephen Maylin was overwhelming. The testimony and evidence set forth in the Statement of Facts and Course of Proceedings, supra, and relied upon here in part, clearly shows Adams' guilt. Conversely, as discussed, the absence of "transfer" DNA on the knife does not show that Maylin was not stabbed by Adams, and would have little, if any, impact on the trial. The following additional points support the district court's summary dismissal of this claim on the ground that Adams failed to show prejudice.

Adams' contention that the evidence and testimony presented at trial did not show that he stabbed Stephen Maylin and, further, that Maylin was not even stabbed, is belied by the record. Maylin testified that he was stabbed by Adams and the physical evidence of his wound clearly supported his testimony. (See St. Exs. 14, 16), As discussed, Paramedic Jenifer Wyatt's explained that, based on her six years of experience as an EMS and EMT in Utah, stab wounds leave clean-edged (not jagged) cuts without bruising around the cut (R., Vol. 2, p.1045-1047 (Tr., p.466, L.14 – p.467, L.15; p.472, Ls.7-25)), and described Maylin's wound has "a one-inch in width laceration type puncture wound" that was "in deep through the tissue to where you could see like the muscle and the fatty tissue underneath, so it appeared to [her] to be a deep – a deep puncture" (R., Vol.2, p.1050 (Tr., p.483, Ls.18-23)). Wyatt concluded that Stephen Maylin's

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also possible to not see blood, depending on the circumstances and the amount of blood present. (R., Vol. 2, pp.1094-1095 (Tr., p.653, L.18 – p. 656, L.4.)

wound was "consistent" with "what [she has] seen of stab wounds in the past[,]" and she believed Maylin had a stab wound. (R., Vol. 2, P.1050 (Tr., p.483, L.11 – p.485, L.21).) Adams' admission that he was swinging his knife toward both Maylin and Gorley (albeit in an alleged attempt to defend himself), also adds to the certainty that he stabbed Maylin. (R., Vol. 2, p.1127-1128 (Tr., p.786, L.4 – p.790, L.13).) There was no testimony at trial that any other person held a knife during the incident, or that Maylin was "punctured" by any other object.

Considering the total inability of the DNA test results (or lack of DNA transfer) to show that Adams did not stab Stephen Maylin, and the overwhelming evidence presented at trial showing he did, the district court correctly summarily dismissed Adams' claim that his trial counsel was ineffective for failing to seek such DNA testing. Because Adams has failed to demonstrate that his trial counsel's performance was both deficient and prejudicial under Strickland, the district court's summary dismissal of this claim should be affirmed.

3. Concession Of Voluntary Manslaughter During Closing Argument

During closing argument at trial, Adam's counsel stated that the incident involved "a sudden quarrel that rises from the heat of passion" (R., Vol. 2, p.1164 (Tr., p.947, L.23 – p.948, L.14), and made several other similar statements reflecting some of the instructional language of the lesser included offense of voluntary manslaughter. (See R., Vol. 2, p.1154 (Tr., p.909, L.21 – p.911, L.4) (Instr. Nos. 19, 20)); p.1166 (Tr., p.955, L.25 – p.56, L.2); p.1168 (Tr., p.963, Ls.4-6); pp.1168-1169 (Tr., p.966, L.12 – p.967, L.18).) Adams claimed in his post-conviction petition that his trial counsel's comments constituted a

concession that Adams was guilty of manslaughter and, as a result, counsel failed to pursue a self-defense theory. (R., Vol. 3, pp.1667-1668.)

The district court rejected Adams' claim, stating in relevant part:

> I think it's essential to note that Mr. Onanubosi never instructed the jurors to return a verdict of manslaughter, nor did they. And, again, I think his – it's important to clue on what he did say to the jury. He maintained it was a fight. He maintained it was a quarrel. He maintained it was self-defense as he stated in his deposition. Unfortunately, the jurors didn't agree.
>
> From the record that I reviewed, the statements of counsel were strategically designed to minimize the charges against his client. His client was charged with first degree murder, and I think the findings of the jury evidence the facts [sic] that further because Mr. Adams was found not guilty of the robbery, was not convicted of first degree murder. So summary dismissal is appropriate.

(6/23/14 Tr., p.78, L.25 – p.79, L.17.)

On appeal, Adams contends the district court erred in summarily dismissing his claim, alleging that his trial counsel conceded he was guilty of voluntary manslaughter, and that counsel mentioned, but never argued, self-defense "nor [did] he ask the jury to acquit on the murder or battery charge on that basis." (Appellant's Brief, p.29.) Adams further argues that such "concession of guilt" without his consent so undermined the proper functioning of the adversarial process as to trigger a presumption of prejudice entitling him to a new trial. (Appellant's Brief, pp.31-39 (citing, *e.g.*, United States v. Cronic, 466 U.S. 648 (1984)). Review of the record shows Adams' argument fails.

First, Adams has failed to identify from the record any actual concession by counsel to the voluntary manslaughter charge. Adams merely points out that his trial counsel told the jury several times that the incident involved "a sudden

quarrel" that rises to the level of "heat of passion." (Appellant's Brief, pp.28-29.) However, at no point during his opening statement or closing argument did Adams' counsel concede that the state had proven all of the elements of voluntary manslaughter, nor did he ask the jury to return a verdict finding Adams guilty of that charge. As the district court noted, the fact that the jury did not convict Adams of voluntary manslaughter is an indication that the jury was not invited to do so by such an alleged concession.[18] (See 6/23/14 Tr., p.78, L.25 - p.79, L.4.) Because Adams has failed to identify from the record any concession of guilt to the voluntary manslaughter charge, his claim that such "concession" was presumptively prejudicial necessarily fails.

Next, the self-defense theory of Adams' defense was evident throughout trial. During opening statements, Adams' counsel told the jury:

> Now, in the process of this trial, you will hear testimony as to Mr. Gorley, how big he is, how tall he is. Mr. Campbell will also tell you when he looked back, he can see them actual [sic] fighting – actually fighting, throwing blows at each other. At some point they went down on the ground rolling around. There was a point in time [Adams] was pinned down. He knew there were two other people in the surrounding area, and all this was going on, we're talking about seconds, minutes.
>
> At that point, the testimony will be *he feared for his life*. He didn't know what was going on. *He perceived a danger*. Instantly he remembered he had a knife clipped to his belt. He pulled it out, opened it, and he was still swinging. He was still swinging while they were still on the floor fighting still.

[18] Even if trial counsel had conceded that Adams was guilty of voluntary manslaughter, considering the obvious strength of the state's case on the second degree murder charge, such a concession would have been within the "exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. See State v. Abdullah, 158 Idaho at 509 n.51, 348 P.3d at 124 n.51 (recognizing "that such concessions (or partial concessions) of guilt in opening statement or closing argument have been upheld by federal appellate courts.").

(R., Vol. 2, p.941 (Tr., p.50, L.20 – p.51, L.10) (emphasis added).)

As promised by his trial counsel, Adams testified at length during trial about how he was allegedly forced to defend himself from attack by Stephen Maylin and Tyler Gorley, and at some point he realized he was "in deep shit" and "needed to defend [him]self." (R., Vol. 2, pp.1126-1127 (Tr., p.782, L.21 – p.783, L.6; p.786, Ls.15-24); see generally id., pp.1111-1149.) At the outset of Adam's closing argument, his trial counsel told the jury:

> This is a case – you guys already figured this out the first day or the second day what this case is all about. I told you during my opening argument what this case is all about, and I want you to hold me to it.

(R., Vol. 2, p.1164 (Tr., p.947, Ls.16-20).)

Although trial counsel's terminology during closing argument reflected some of the language relating to voluntary manslaughter, it accurately described the incident. The fact that the incident involved a "sudden quarrel" that rose to the level of "heat of passion" is not inconsistent with self-defense. The murder charge was of foremost importance for trial counsel to defend against, and counsel skillfully attempted to do so by arguing that the "sudden quarrel" and "heat of passion" nature of the incident precluded the jury from convicting Adams of murder – while simultaneously maintaining Adams' self-defense theory. The following part of Adams' trial counsel's closing argument demonstrates counsel's dual strategy:

> This is a fight, *a sudden quarrel that rises to the heat of passion* among a group of drunk people that night that turned deadly.

> Now, if there is no robbery, there's no attempted robbery, felony murder disappear [sic]. Then what do we have left? First degree murder. There's no premeditation here. Read the instruction of premeditation. *Read the instruction of malice aforethought.* We don't have that. And he'll take responsibility for what he did, but no more and no less.
>
> Then what do we have after that? We have aggravated battery. Mr. Maylin I already put over here telling us how he got – you know, we talk a lot about *self-defense*, and the instructions say, you know, hindsight is good. . . .
>
> . . . .
>
> Read the instructions. You'll have them.
>
> You know*, I told you talking about self-defense*, you know, hindsight is good, 20-20 is good. It describes what happened, where he was. I wasn't there. They were not there. But one thing we know for sure is there was testimony about two people swinging at each other. . . .
>
> . . . .
>
> Hindsight is good. 20-20 is good. I wasn't there, you were not there, and he told you how he felt. *That's why we have that self-defense jury instruction*. *You don't have to be 100 percent sure before you defend yourself. You don't. And not only that, and this is even better, you don't have to retreat. I didn't make that all up. It's right there in the jury instruction. You can stand your ground.*
>
> *He's entitled to the benefit of that law*, just like each and every one of us are.
>
> *This is a fight, a sudden quarrel that rise [sic] to the level of heat of passion* that took place among a group of drunken people that night, and the end result was tragedy, deadly, I concede.

(R., Vol. 2, p.1168 (Tr., p.963, L.4 – p. 966, L.15 (emphasis added); see Jury Instrs. 29-31 (re: self-defense).) Based on the above-described ways in which Adams' self-defense theory was advanced at trial, his assertion that his trial counsel failed to pursue a self-defense theory and argue against "malice aforethought" is wholly dispelled by the record.

Adams has failed to demonstrate that his trial counsel conceded he was guilty of voluntary manslaughter, and he has failed to show that his trial counsel abandoned Adams' self-defense theory; therefore, he has failed to show that his trial counsel's performance was deficient or prejudicial under Strickland.

4. Adams Has Failed To Show Error In The District Court's Rejection Of His Cumulative Error Claim

Adams argues that this Court "should consider all the deficient performance and then determine whether the cumulative effect was prejudicial." (Appellant's Brief, p.39.) Some courts have applied the cumulative error doctrine to the prejudice prong of Strickland. Wilson v. Simmons, 536 F.3d 1064, 1122 (10th Cir. 2008). Under Idaho's doctrine of cumulative error, a series of trial errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 407, 958 P.2d 22, 33 (Ct. App. 1998). Thus, if a petitioner fails to prove more than one incident of deficient performance then there is no prejudice to cumulate. See Commonwealth v. Spotz, 18 A.3d 244, 321 (Pa. 2011). The ultimate question of Strickland prejudice is whether the defendant was denied "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

Adams has failed to show his counsel committed two acts of deficient performance, and therefore has failed to show any errors to cumulate. Even if there had been multiple acts of deficient performance, Adams has failed to show

that they would be cumulatively prejudicial. For these reasons, Adams has failed to show cumulative error.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of dismissal and the order denying Adams' motion for reconsideration.

DATED this 10th day of June, 2016.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of June, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
NEVIN, BENJAMIN, McKAY & BARTLETT LLP

at the following email addresses: db@nbmlaw.com and lm@nbmlaw.com.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd