Electronically Filed
11/27/2019 2:15 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAXX E. DIAZ,	)	
	)	**No. 46798-2019**
Petitioner-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CV01-18-3154**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MELISSA MOODY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
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

PAUL E. RIGGINS
Riggins Law, P.A.
380 S. 4th Street, Ste. 104
Boise, Idaho 83702
(208) 344-4152
E-mail: rigginslaw@gmail.com

ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

Daxx E. Diaz appeals from the district court's denial of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

On January 24, 2015, Diaz took Lexapro (an antidepressant) and Buspirone (anti-anxiety) pills, smoked marijuana, consumed "Sparks" alcoholic beverages, then drove while under the influence. (4/26/16 Tr.,[1] p.200, L.13 – p.204, L.14; 4/27/16 Tr., p.385, Ls.4-6; p.390, Ls.2-16.) Diaz claimed he was driving on the freeway when he "hit something" (4/27/16 Tr., p.370, Ls.11-13); he then exited the freeway, "drove four or five miles past a bunch of gas stations" (4/27/16 Tr., p.446, Ls.3-11; p.449, Ls.17-23), and turned into an unfamiliar subdivision, where he purportedly "cruise[d] in the neighborhood" before deciding to "check [his] alignment" (4/27/16 Tr., p.370, Ls.16-21). A bystander observed Diaz drive on the wrong side of the road for about half a mile, nearly hitting multiple cars, forcing other drivers to swerve out of the way, and almost running a FedEx truck off the road. (4/26/16 Tr., p.143, L.4 – p.144, L.5; p.153, L.4 – p.155, L.16.) Diaz drove through a drainage ditch, over the sidewalk, through a grass common area, and nearly hit a tree before driving back onto the roadway. (4/26/16 Tr., p.146, Ls.11-25; p.154, Ls.19-24.) Diaz did not stop until a driver in a large truck pulled in front of him to block the road and "force[Diaz] to stop." (4/26/16 Tr., p.155, L.21 – p.156, L.7.)

[1] The transcripts from Diaz's criminal case (no. CR-MD-2015-9083/44298) were judicially noticed by the district court (R., p.282, n.1) and appear in the post-conviction record on pages 105 through 250 and 365 through 490. For ease of reference, citations will refer to the transcripts' internal pagination.

Officers responded and, upon conducting field sobriety tests, arrested Diaz for suspicion of driving under the influence. (4/26/16 Tr., p.214, Ls.14-18.) Officers also located a bag of marijuana in Diaz's vehicle. (4/27/16 Tr., p.248, L.17 – p.249, L.12.) Diaz was transported to the police station and, when offered the opportunity to take a breath test for blood alcohol, he "appear[ed] to be avoiding giving a breath sample." (4/26/16 Tr., p.219, L.24 – p.220, L.9.) Because Diaz did not "provide enough air to get a sufficient sample," the testing instrument detected a "deficient sample" of .061/.070. (4/26/16 Tr., p.221, L.14 – p.224, L.15.) Thereafter, a drug recognition expert conducted a Drug Recognition Evaluation and concluded that Diaz was "under the influence of alcohol, CNS depressants, and cannabis." (4/27/16 Tr., p.295, Ls.14-22.) The state's toxicology expert testified at trial that, in his opinion, Diaz was "impaired by a combination of alcohol, Citalopram," and Buspirone. (4/27/16 Tr., p.349, Ls.4-19.)

The state charged Diaz with felony DUI (two or more convictions within 10 years) with a persistent violator enhancement, driving without privileges, and possession of marijuana. (R., p.282.) Diaz pleaded guilty to the misdemeanors, a jury found Diaz guilty of felony DUI, and Diaz admitted to being a persistent violator of the law. (R., p.282; 4/27/16 Tr., p.463, L.17 – p.464, L.13.) The district court imposed concurrent sentences of 180 days for the misdemeanors, and a concurrent sentence of 13 years, with eight years fixed, for felony DUI with a persistent violator enhancement, and retained jurisdiction. (R., p.283.) Following the period of retained jurisdiction, the district court relinquished jurisdiction and sua sponte reduced Diaz's sentence to 13 years, with five years fixed. (Id.) The Court of Appeals affirmed Diaz's sentence in State v. Diaz, No. 44298, 2017 WL 2243134 (Idaho Ct. App. 2017) (unpublished).

Diaz subsequently filed a pro se petition for post-conviction relief. (R., pp.6-20.) Diaz argued, among other things, that trial and appellate counsel gave ineffective assistance, that there

was an alleged "suppression of illegal search evidence," and that the cumulative error doctrine applied. (R., p.7.) The district court appointed counsel, who filed an amended petition for post-conviction relief. (R., pp.52-53, 62-72.) The district court construed the amended petition as raising the following claims and subclaims:

> First, Petitioner asserts his trial counsel was ineffective by failing to: (1) notice Petitioner's motion to suppress for hearing, resulting in the motion being treated as withdrawn; (2) obtain expert witnesses; (3) investigate Petitioner's medical history or Petitioner's assertion that his vehicle was malfunctioning at the time of the DUI; (4) pursue a motion in limine excluding urinalysis results; (5) request jury instructions for included offenses; (6) object to certain trial exhibits; and (7) move for a mistrial after jurors saw Petitioner handcuffed outside of the courtroom. As a second ground for relief, Petitioner asserts that law enforcement violated *Brady v. Maryland*, 373 U.S. 83 (1963) by concealing exculpatory evidence.

(R., p.286.) The state filed an answer and moved the court to summarily dismiss the amended petition. (R., pp.75-77, 257-78.)

The district court issued a notice of intent to dismiss all of Diaz's claims for lack of supporting evidence and authority. (R., pp.281-95.) The court gave Diaz "an opportunity to reply to the proposed dismissal within twenty (20) days as provided by law." (R., p.281.) However, the district court gave Diaz additional time to gather evidence to support one of his claims; the "claim that his trial counsel was ineffective for failing to obtain a toxicology expert." (R., p.282.) The court pointed out that "[w]ithout affidavits demonstrating the substance of a toxicologist's opinions, it is pure speculation to conclude that obtaining such an expert would have affected the outcome of Petitioner's trial." (R., p.290.) Diaz was accordingly granted over six weeks "to file a response on that particular claim." (R., p.282.)

Diaz then filed a responsive brief in which he argued that trial counsel's "failure to adequately investigate the science of this case made it such that [trial counsel] was not able to

effectively cross examine" the state's toxicology expert, Dr. Gary Dawson, or the drug recognition evaluator. (R., p.311.) Diaz's brief was supported by the affidavit of Kenn Meneely, a retired Oregon State Police Forensic Laboratory forensic scientist, who opined that "[h]ad trial counsel consulted with an independent toxicologist familiar with DRE and current standards and practices he would have been made aware of," and could have "expose[d]," purported evidentiary "contradiction[s] and weakness[es] at trial." (R., p.316.) Meneely also opined that after his "review of all case materials, I respectfully disagree with Dr. Dawson's conclusion that the evidence and data collected in this case provides evidence that Mr. Diaz was impaired." (Id.)

The district court subsequently entered an order dismissing Diaz's claims, "[w]ith one exception":

> The [remaining] claim, that trial counsel was ineffective for failing to consult [with] or retain a toxicology expert, requires an evidentiary hearing. The issue for the evidentiary hearing is whether counsel's failure to consult or retain a toxicology expert constitutes ineffective assistance of counsel.

(R., p.349.)

At the evidentiary hearing, Diaz submitted the Meneely affidavit as well as his own affidavit "including some supporting letters, a letter [Diaz] wrote to the Court in the criminal case, as well as a letter he received from appellate counsel" as exhibits. (1/31/19 Tr., p.6, L.22 – p.7, L.11.) The state called Diaz's trial counsel, Ransom Bailey, who testified that, for various reasons, his trial strategy was to focus on the officers' video of Diaz, as opposed to calling an expert witness to dispute the state's expert testimony. (1/31/19 Tr., p.33, p.5 – p.36, L.23; p.46, L.23 – p.49, L.3.) The state also called Dr. Dawson for a response to the Meneely affidavit. (1/31/19 Tr., p.54, L.1 – p.64, L.8.)

Following the evidentiary hearing, the district court noted that it was "struggling to find a shred of evidence" of deficient performance. (1/31/19 Tr., p.77, Ls.8-9.) It likewise concluded there were "big holes in the evidence" regarding "actual prejudice." (1/31/19 Tr., p.88, Ls.9-16.)

After citing the relevant legal standards, the district court then explained why Diaz had failed to show there was either deficient performance or prejudice:

> I know that I have listened to a lot of testimony this morning, but this case is very straightforward to me. I do not have any evidence, I do not have any evidence that Mr. Bailey's decision not to consult with an expert was deficient performance. I have argument that it was deficient performance. I have argument that the Court can infer on its own that it was deficient performance. But I do not have any evidence that it was deficient performance.
>
> Indeed, Mr. Bailey testified that he intentionally did not consult. Now, that's my word. He did not use the word "intentionally." But I'm characterizing it that way based upon the entirety of his testimony.
>
> He made a decision. He prepared the case. He spoke with the petitioner, he testified, at least 12 times. This was not lack of preparation. This was not ignorance of the law. There's no evidence in the record to the contrary.
>
> So I will make the finding that the petitioner has not met his burden with respect to the first prong of [Strickland v. Washington, 466 U.S. 668 (1984)]. And even if petitioner had met his burden with respect to the first prong, I also agree that the second prong is not adequately supported by evidence, which is to say, even if—and this is a real stretch because I don't think there's enough to bridge this gap in what petitioner has presented to me.
>
> But even if, for example, Kenn Meneely or another expert testified at trial for the defense, there's nothing to say that that testimony would have produced a reasonable probability of acquittal in light of the overwhelming evidence of guilt that, as [the prosecutor] Mr. Naugle points out, had little to do with the area that this hearing has focused on. It had little to do with Dr. Dawson's testimony. It was the driving pattern. It was the citizen witnesses. It was the failed field sobriety tests.
>
> So I am going to find that on both prongs, petitioner's eighth claim fails. I will issue an order dismissing the petition on that claim, so that you'll have that. It will simply say, "Stated for the reasons stated on the record in open court, this final claim is dismissed."

(1/31/19 Tr., p.101, L.19 – p.103, L.14.)

The district court entered an order dismissing Diaz's remaining claim (R., pp.499-500), and issued a judgment dismissing the petition for post-conviction relief (R., p.502). Diaz timely appealed. (R., pp.504-06.)

ISSUE

Diaz states the issue on appeal as:

> Whether the district court erred by dismissing Mr. Diaz'[s] Petition for Post-Conviction Relief?

(Appellant's brief, p.2)

The state rephrases the issue as:

> Has Diaz failed to show the district court erred in finding there was no ineffective assistance of counsel?

ARGUMENT

Diaz Fails To Show The District Court Erred In Finding There Was No Ineffective Assistance Of Counsel

A. Introduction

The district court summarily dismissed all of Diaz's claims except for one: his claim that trial counsel was ineffective for "failing to consult or retain a toxicology expert." (R., pp.348-49.) Following an evidentiary hearing the district court rejected this claim as well; it concluded that Diaz had not shown "any evidence" that the strategic decision not to consult with an expert "was deficient performance." (Tr., p. 101, L.19 – p.102, L.3.) The district court went on to find that even if Diaz "had met his burden with respect to the first prong" of Strickland, that the prejudice prong was likewise "not adequately supported by the evidence." (Tr., p.102, Ls.14-19.)

On appeal Diaz fails to show any error. The district court correctly concluded that Diaz failed to meet his burden to show trial counsel's toxicology expert decision was deficient performance or prejudicial. As such, Diaz failed to show ineffective assistance of counsel, and the district court properly rejected the remaining claim[2] in Diaz's petition.

---

[2] Diaz frames the issue broadly in his issue statement, stating the district court erred by dismissing the petition in its entirety. (Appellant's brief, p.2.) However, the only argument he presents on appeal relates to the claim found unproven after the evidentiary hearing—whether trial counsel was ineffective for failure to consult with a toxicology expert. (See Appellant's brief, pp.3-13.) To the extent Diaz seeks this Court's review of the dismissal of any claims *other* than the toxicology expert claim, he has waived those issues on appeal by not supporting them with any argument or authority. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Even assuming Diaz did not waive review of those claims, the district court correctly dismissed those claims for all the reasons set forth in its Notice of Intent to Dismiss, which the state adopts and incorporates herein. (R., pp.281-295.)

B. Standard Of Review

"Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)).

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. In Light Of The State's Evidence Trial Counsel Made The Strategic Decision Not To Consult With A Toxicology Expert; Diaz Fails To Show This Was Deficient Performance Or That It Prejudiced Him

A criminal defendant has a constitutional right to counsel and to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland, 46U.S. at 687. To prove that counsel was ineffective, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-96; State v. Elison, 135 Idaho 546, 551, 21 P.3d

483, 488 (2001). A court's "scrutiny of counsel's performance must be highly deferential" on review; therefore, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Accordingly, counsel's tactical and strategic decisions "will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation." Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

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

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

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

With respect to deficient performance, the district court concluded that trial counsel "intentionally did not consult" with a toxicology expert as a matter of trial strategy; he "made a

decision" not to consult after speaking with Diaz "at least 12 times," and this decision was not due to "lack of preparation" or "ignorance of the law." (1/31/19 Tr., p.102, Ls.4-12.) The court found that there was "no evidence in the record to the contrary." (1/31/19 Tr., p.102, L.13.)

The record shows these findings were undoubtedly correct. Trial counsel testified that met with Diaz to discuss trial strategy "well over a dozen" times. (1/31/19 Tr., p.32, Ls.9-13.) He affirmed that he "reviewed all of the evidence in this case" and thought "critically about ways in which" he "could best present a compelling case" for Diaz. (1/31/19 Tr., p.32, L.21 – p.33, L.2.)

And trial counsel later explained why he ultimately chose to "focus[] on some issues to the exclusion of others," Suits, 143 Idaho at 164, 139 P.3d at 766, and not consult with a toxicology expert:

> Q. Okay. Would you agree that you did not consult with an independent toxicologist or scientist or medical personnel?
>
> A. I would agree with that. I don't remember having done that. So...
>
> Q. Do you recall why not?
>
> A. Well, my memory of the case is that this wasn't too long after body cameras had been sort of mandated, and so we had a lot of video in this case. In fact, I would say that was our biggest strength in the case, was [Diaz's]—I don't know if performance is the right word. But his demeanor on the video, I thought, was our strength, particularly initially when he is first contacted by law enforcement. I thought that he appeared sober or did not appear to be slurring his words or stumbling around or disoriented or anything like that. I felt that that was the biggest strength of the case.
>
> Q. Okay. So for trial strategy, one of the biggest strengths, you're saying, is some of those layperson-type observations?
>
> A. Well, what's great about the video is that, you know, I have 12 jurors and they don't have to speculate. They're not just hearing audio, or they're not just hearing a recounting of the events by an officer. They can see it for themselves.

So, you know, for instance, if an officer said, "Boy, I really found he was slurring his speech or had glassy eyes," the jurors can look right at the video and see if that's accurate or true. And, again, his initial demeanor, I thought, was a strength.

Q. Okay. And so, basically, you chose to go down that—

A. I did, yeah.

Q. —route, as opposed to digging in too much on the science side of things?

A. Well, yes. Yeah, I think that's fair to say.

(1/31/19 Tr., p.20, L.22 – p.22, L.12.)

This strategy was eminently reasonable in light of the state's evidence. This was not an expert-dependent or even expert-driven case against Diaz. As the state pointed out below, the "most compelling evidence" against Diaz was the driving pattern. (1/31/19 Tr., p.96, Ls.1-16.) "[C]itizen witnesses" watched him "drive completely off of the road, through a grass berm, almost hit a tree, and then continued to run people off the road as he drove along through a subdivision in the middle of the day." (1/31/19 Tr., p.96, Ls.96.) Not only that, but Diaz admitted to consuming alcohol, Buspirone, and Lexapro the morning of his arrest. (4/26/16 Tr., p.204, Ls.7-14.) Trial counsel therefore sensibly affirmed that, "expert or not," he would "have to deal with those issues." (1/31/19 Tr., p.33, L.19 – p.34, L.16.) And no amount of battling expert testimony could explain away Diaz's driving pattern—witnessed by multiple bystanders with no skin in the game—or refute Diaz's own admissions to consuming drugs and alcohol prior to driving.

Furthermore, there were plain risks to Diaz calling his own expert. As trial counsel saw it, "the big risk is that your expert doesn't really hold up very well against the opposition's expert," or gives testimony that is "not compelling" or unconvincing, or, "worst-case scenario, perhaps even detracts from" your argument. (1/31/19 Tr., p.34, L.17 – p.35, L.4.) This case

exemplifies that risk. While the Meneely affidavit made much ado about Buspirone "not being detected in [Diaz's] urine screen," Dr. Dawson acknowledged that Buspirone "is a drug that doesn't commonly show up in urine toxicology tests," and could explain why. (R., pp.315-16; 1/31/19 Tr., p.56, L.19 – p.59, L.11.) Moreover, Diaz *admitted* to taking Buspirone the day he drove. (4/26/16 Tr., p.204, Ls.7-14.) And in any event, trial counsel "knew that test results, by way of the breath sample and the urine sample, showed at the very least that [Diaz] had alcohol and at least one [central nervous system] depressant, Citalopram or Lexapro, in his system." (1/31/19 Tr., p.34, Ls.8-13; see also 4/27/16 Tr., p.224, Ls.11-15; p.336, Ls.9-21; p.379, L.24 – p.384, p.23.) In light of all the other evidence of polysubstance impairment, marshaling a competing expert to quibble over urine screens would have been unconvincing at best and detracting (or distracting) at worst. It was therefore entirely reasonable for trial counsel to focus on his best, most comprehensible evidence. And it made perfect sense to "have the jurors decide for themselves based on their own observation of Mr. Diaz in the parts of the video where he seems quite sober," rather than "have them rely on expert testimony that they may not understand or may not believe." (1/31/19 Tr., p.35, Ls.7-13.)

On appeal, Diaz fails to show any error and fails to show any deficient performance.[3] His half-correct premise is that trial counsel had "a duty to make 'reasonable investigations' regarding the case." (Appellant's brief, p.5.) The actual standard is that counsel had a "duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*." Strickland, 466 U.S. at 690-91 (emphasis added).

Here, trial counsel made a reasonable decision that made a toxicology investigation unnecessary. That decision was to focus on the video of Diaz, as opposed to engaging in a futile battle of the experts. (1/31/19 Tr., p.35, Ls.7-13.) This was manifestly reasonable in light of the evidence. And, having made that reasonable decision, the particular investigation that Diaz now second-guesses about—finding a toxicology expert—was unnecessary. As such, trial counsel plainly satisfied his duties under Strickland, and the district court correctly concluded that there was not "a shred of evidence" otherwise. (1/31/19 Tr., p.77, Ls.16-17.)

Moreover, even if Diaz had shown deficient performance he fails to show any prejudice. Diaz's prejudice arguments below and on appeal are pure speculation:

> Turning to the issue of prejudice, although the district court only summarily addressed the issue in its opinion, Mr. Diaz asserts that his counsel's deficient

---

[3] In addition to his arguments regarding trial counsel's purported deficient performance, Diaz appears to foreshadow a claim of ineffective assistance of post-conviction counsel. (Appellant's Brief, p.6.) Diaz points out that trial counsel was an Ada County Deputy Public Defender at the time he represented Diaz, and "[n]otably, and disturbingly, the Ada County Public Defender's Office also represented Mr. Diaz in the post-conviction proceedings." (Id.) Diaz's appellate counsel goes on to say that he "believes that this was a violation of the duty of loyalty set forth in *Strickland*, and will encourage Mr. Diaz to pursue that claim in a subsequent post-conviction proceeding, if he is unsuccessful in the present appeal." (Id.) While Diaz does not appear to raise this claim in *this* appeal (and if he does, he fails to support it with argument and authority), the state would simply point out that Diaz does not have the right to effective assistance of post-conviction counsel. See, e.g., Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010) (reiterating that, with extremely limited exceptions that are inapplicable here, "there is no right to effective assistance of counsel in post-conviction cases").

> performance severely prejudiced him at trial. If Mr. Diaz'[s] counsel had called a toxicologist to testify at trial, Diaz'[s] claim would have been more credible, and it is very possible the jury would have acquitted Diaz of the DUI charge. Thus there is a reasonable probability that the result of the trial would have been different. *See* [*Marr v. State*, 163 Idaho 33, 39, 408 P.3d 31, 37 (2017)]…. [T]he *Marr* decision mirrors the instant case. Therefore, the second prong of *Strickland* requiring a showing of prejudice is satisfied.

(Appellant's brief, p.12.)

Diaz's guesses about what might have been fail to persuade. Even if Diaz had called a toxicologist to testify that, because Buspirone "was not detected in the urine[,] it should not be relied upon as a potential impairing substance" (R., p.316), what then? Diaz still had no plausible path to overcoming his own admissions of taking Buspirone, much less all the other evidence of impairment. And even if "Diaz's pupils were not dilated and his pulse rate was normal," which Meneely thought showed Diaz was not "under the influence of a combination of citalopram, alcohol, [and] marijuana" (R., p.316), so what? There was still Diaz's own admissions to taking drugs and alcohol, the eyewitness testimony and impaired driving pattern, the failed sobriety tests, the failed DRE investigation, Dr. Dawson's testimony[4], and all of the other evidence to surmount. Dueling expert testimony on one or two trifling points would have had little, if any, effect on anything.

[4] Dr. Dawson had a substantive comeback to Meneely's pupil-and-pulse claim: "the absence of a particular autonomic sign, like constriction of pupils, is not itself an indication of impairment"—"[i]mpairment can still be there even though the pupils are normal because the acute phase is gone but the impairing phase is still persistent." (1/31/19 Tr., p.60, L.16 – p.63, L.18.) At any rate, this purported "contradiction" in Dr. Dawson's report is a red herring. (R., p.316.) Whatever aggregate effects "citalopram, alcohol, *[and] marijuana*" would have had are inconsequential, insofar as Dr. Dawson "concluded in … [his] preliminary memo in this case" that Diaz "was *not* under the influence of cannabis," and testified to the same. (R., p.316; 1/31/19 Tr., p.63, L.25 – p.64, L.4; 4/27/16 Tr., p.349, Ls.4-16.)

So this case is nothing like Marr. As the district court put it, even if "Kenn Meneely or another expert testified at trial for the defense, there's nothing to say that the testimony would have produced a reasonable probability of acquittal in light of the overwhelming evidence of guilt that … had little to do with" toxicology. (1/31/19 Tr., p.102, L.23 – p.103, L.5.) Because Diaz fails to show a reasonable probability that, but for the decision not to consult with or retain a toxicology expert, the result of trial would have been different, he fails to show Strickland prejudice.

CONCLUSION

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

DATED this 27th day of November, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of November, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

PAUL E. RIGGINS
RIGGINS LAW, P.A.
rigginslaw@gmail.com

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

KDG/dd