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Herrera v. State Appellant's Brief Dckt. 47097

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RAUL EDGAR HERRERA, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court Docket No. 47097-2019 Canyon Co. CV14-18-00763

OPENING BRIEF OF APPELLANT

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

HONORABLE DAVIS F. VANDERVELDE
District Judge

Dennis Benjamin
ISB #4199
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
P.O. Box 2772
Boise, ID 83702
(208) 343-1000

ATTORNEYS FOR APPELLANT

Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4534

ATTORNEY FOR REPONDENT

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A. *Introduction*

This is an appeal from the summary dismissal of a post-conviction petition. The judgment should be vacated, at least in part, for an evidentiary hearing because Petitioner Raul Herrera pleaded a prima facie case of ineffective assistance of trial counsel.

Mr. Herrera was convicted of the first-degree murder of Jeffrey Dyer after a jury trial and was sentenced to indeterminate life, with a 35-year determinate sentence. R 100. He was also convicted of Robbery, Burglary, Kidnapping in the Second Degree and Aggravated Battery. *Id.* Mr. Herrera was represented at trial by attorney John Bujak.[1]

The state's theory of the case was that two masked men entered the home of Ronald Ghostwolf and Mr. Dyer. One of the masked men battered Mr. Ghostwolf, while the second entered a different room and killed Mr. Dyer. T pg. 270, ln. 15-19. Mr. Ghostwolf testified that it was the smaller masked man who battered him while the taller man was the killer. T pg. 264, ln. 10 – pg. 266, ln. 17. According to the state, the men then placed the body in the trunk of Mr. Dyer's Cadillac, drove two cars to Ontario, Oregon, and left the Cadillac there. R 246, ln. 6-17. (State's opening statement).

[1] On the fourth day of the jury trial, Bar Counsel filed a complaint against defense counsel seeking his disbarment. R 144. Mr. Bujak later resigned his bar membership in lieu of discipline by this Court. https://isb.idaho.gov/wp-content/uploads/bujak2015_0917.pdf.

Angelo Cervantes testified in align with the state's theory, *i.e*, that he attacked Mr. Ghostwolf while Mr. Herrera left the living room and killed Mr. Dyer. According to Mr. Cervantes, he and Mr. Herrera sold drugs. He was "the scary guy . . . the bad guy," while Mr. Herrera was "[t]he brains." T pg. 685, ln. 13-17. Mr. Cervantes testified that Mr. Dyer owed some money to Mr. Herrera. T pg. 688, ln. 21-23. On Halloween, there was meeting with him, Mr. Herrera, Chris Ross, and a tall, skinny black guy. T pg. 787, 2-18. It was decided then to rob Mr. Dyer because of the drug debt. T pg. 696, ln. 6-23.

Mr. Cervantes said it was he and Mr. Herrera who stole the items from the house and took the body to Ontario. T pg. 706, ln 4 – pg. 729, ln. 22. However, the evidence showed that Mr. Cervantes is taller than Mr. Herrera and thus would have been the killer according to Mr. Ghostwolf. See State's Exhibit 114 and 115. Mr. Cervantes also testified that the skinny black guy was taller than him. T pg. 787, ln. 15-23. The defense theory was that Mr. Cervantes robbed and killed Mr. Dyer and was assisted by an unknown third party, possibly the skinny black guy. See T pg. 1226, ln. 14 – pg. 1229, ln. 3.

Mr. Herrera testified at trial that he did not participate in the killing. Mr. Cervantes came to his home about 9:30 a.m., after Mr. Dyer has been murdered. Mr. Cervantes was driving Mr. Dyer's Cadillac. He followed Mr. Cervantes in his car to Ontario and then drove Mr. Cervantes back to Idaho. T pg. 1089, ln. 6 – pg. 1091, ln. 22.

B. *Post-Conviction Proceedings*

Mr. Herrera timely filed a pro se Petition for Post-Conviction Relief. R 7. Counsel was appointed and an Amended Petition was filed. R 99. One of the claims in the Amended Petition was that trial counsel, John Bujak, failed to provide the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). R 102-105. A Second Amended Petition for Post-Conviction Relief was filed. The Second Amended Petition realleged the IAC claims above. R 131-134.

The state filed a motion for summary dismissal. R 149. Mr. Herrera filed a Memorandum in Opposition to the Motion and a Declaration of Post-Conviction Counsel, which attached numerous documents from the criminal case record. R 174-194. At the Motion Hearing, the state introduced a CD of the criminal case trial transcripts. R 338.

The court granted the state's motion and summarily dismissed all the claims. R 342. Judgment was entered. R 374. A timely Notice of Appeal and then Amended Notice of Appeal were filed. R 368, 379.

III. ISSUES PRESENTED ON APPEAL

A. Did Mr. Herrera present a prima facie case of deficient performance of counsel under the Sixth Amendment, due to counsel's failure to investigate, interview, and present testimony of eyewitnesses?

B. Did Mr. Herrera present a prima facie case of deficient performance of counsel under the Sixth Amendment, due to counsel's failure to request an instruction on the law of accessory after the fact?

C. Did Mr. Herrera present a prima facie case of deficient performance of counsel under the Sixth Amendment, due to counsel's failure to file a timely motion to suppress statements and for failing to raise meritorious bases to suppress them?

D. Did Mr. Herrera present a prima facie case of prejudice under the Sixth Amendment when the cumulative effective of all the deficient performance is considered?

IV. ARGUMENT

Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Roman v. State*, 125 Idaho 644, 647 (Ct. App. 1994). Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521 (2010); *DeRushe v. State*, 146 Idaho 599, 603 (2009).

In general, on appeal from an order of summary dismissal, this Court will apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Over questions of

law, the Court exercises free review. *Downing v. State*, 136 Idaho 367, 370 (Ct. App. 2001).

A. *Mr. Herrera presented a prima facie case of deficient performance of counsel under the Sixth Amendment, due to the failure to investigate, interview, and present testimony of eyewitnesses.*

1. Facts pertinent to claim.

Mr. Herrera alleged his attorney's performance was deficient under *Strickland* because he failed to investigate and then call eyewitnesses to the offenses. Specifically, law enforcement obtained information regarding two witnesses who observed persons leaving the area of Ronald Ghostwolf's residence on the morning of November 8, 2014. The first reportedly observed a man in a black hoodie walking to the back of Mr. Ghostwolf's house around 7:30 a.m. R 139. Specifically, the witness reported seeing "a large black man and another man in a hoodie walking away from the residence." *Id.* The second witness, Joseph Maurer, reported that at approximately 7:55 a.m., he observed "a white male with a white hoodie with red on it walking away from the front door between the cars and the garage door." R 143. These reports contradicted the testimony of Mr. Ghostwolf and Mr. Cervantes as to the physical attributes and clothing of the persons involved in the crimes. "Had Mr. Bujak investigated and interviewed these witnesses and called them to testify at trial, their testimony would have cast reasonable doubt on the identification of Petitioner as a person who was involved in the crimes." R 131.

The trial court dismissed this claim writing:

> It is not enough to allege that a witness would have testified to certain events or would have rebutted certain statements made at trial without providing,

> through affidavit, nonhearsay evidence of the substance of the witness's testimony. *Adams v. State*, 161 Idaho 485, 499, 387 P.3d 153, 167 (Ct. App. 2016). Here, the only evidence presented is hearsay, and multiple layers of hearsay as to the first, unidentified, witness. Further, an argument that witnesses, at least one of which is unnamed, would have testified consistent with the police report is speculative and therefore inadmissible. *See Id.* at 500. Herrera has failed to provide admissible evidence in support of his claim that trial counsel was ineffective for failure to investigate and present the testimony of these two witnesses at trial. Herrera also failed to provide required evidence that the witnesses would have been available to testify and that they would have testified consistently with the information in the police reports. *See Id.* Given these deficiencies, Herrera has not demonstrated either deficient performance or prejudice.
>
> In addition to the failure to support this claim with admissible evidence, the decision about whether to call a witness is a strategic decision by trial counsel which will not be second guessed unless those decisions were shown to be made upon the basis of inadequate preparation, ignorance of the relative law, or other shortcomings capable of objective evaluation. *State v. Roles*, 122 Idaho 138, 145, 832 P.2d 311, 318 (Ct.App.1992); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App.1989). No such showing has been made in this case. For these reasons, claim 1(a) is dismissed.

R 347-348.

In fact, Mr. Herrera did provide sufficient admissible evidence to support his claim. Further, the evidence shows that the decision not to present these witnesses was objectively unreasonable.

2. Why relief should be granted.

(a) *Mr. Herrera provided sufficient admissible evidence to support his claim.*

First, Detective Doney's Officer Report contains information that a large black man and another man in a hoodie were seen walking away from the residence. R 139. That report states that Cathie Jo Ritchie told Detective Doney

"that there is a 'large colored guy' who knows Jeff [Dyer] in the neighborhood." R 139. The report goes on to say:

> Nancy "Crosby or Beales" told [Ms. Ritchie] that her boyfriend saw something on Saturday morning. Nancy told Cathie that her boyfriend saw around 0730hrs, a man in a black hoodie walking to the back of Ron's [Mr. Ghostwolf] house. He observed a large black man and another man in a hoodie walking away from the front of the residence.

Id. This police report is admissible evidence for the purposes of the summary disposition proceedings under I.R.E. 803(8) (allowing the admission of a police report by an accused in a criminal case). *Stanfield v. State*, No. 46252, 2019 Ida. LEXIS 215, at *13 n. 1 (Dec. 3, 2019). In addition, trial counsel elicited some testimony about that report during trial.

> Q. Did you talk with -- well, first of all, you were the lead investigator in this case?
>
> A. Yes.
>
> Q. So had you reviewed the reports that had come in from the other officers and detectives related to the investigation?
>
> A. Yes.
>
> Q. So you were aware that the area around the scene of the crime had been canvassed?
>
> A. Yes.
>
> Q. And you were aware that officers had received information related to other people who had been seen around the scene?
>
> A. Yes.
>
> Q. So you knew that there had been a report that there was a large black man and a person wearing a hoodie that had been seen leaving the scene?
>
> A. I -- I was aware that somebody had made that allegation, yes.

Trial Transcript (Respondent's Exhibit A) pg. 867, ln. 14 – pg. 868, ln. 8.

Thus, '[a]ssuming these statements to be true as required by the procedural posture of this matter, there is a genuine issue of material fact as to whether [Mr. Herrera's] lawyer[] made a strategic decision to not present the evidence of an alternate perpetrator, or whether such strategy was based on 'inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.'" *Stanfield*, *supra.*

At this point, the Court must assume that Mr. Herrera's evidence is true. *Griffin v. State*, 142 Idaho 438, 442 (Ct. App. 2006). Thus, he has shown there is a witness, albeit unknown at this point, who saw "a large black man and another man in a hoodie walking away from the front of the residence" around the time of the killing. Liberally construed in favor of Mr. Herrera and drawing all reasonable inferences in his favor, this is sufficient evidence to raise a material question of fact. Thus, summary disposition should not have been granted.

(b) *The evidence shows that the decision not to present these witnesses was objectively unreasonable.*

The post-conviction court also found that the decision whether to call witnesses is a matter of trial strategy and Mr. Herrera had not made a prima facie showing that the failure to call the eyewitnesses "was the result of inadequate preparation, ignorance of the relative law, or other shortcomings capable of objective evaluation." R 348. To the contrary, there is substantial evidence that trial counsel did not make a strategic decision to fail to call the witnesses.

First, as set forth above, trial counsel did elicit some evidence at the trial. T pg. 867, ln. 14 – pg. 868, ln. 8. In addition, trial counsel said in closing argument:

> You remember he admitted that he was told that they had information that there was a large black man and someone in a hoodie seen coming away from the murder scene at the time it occurred. A large black man. Could –
>
> MR. WOLFF [Prosecutor] Judge, I'm going to object. That's not what the testimony was. It was a tall, skinny black man in a black hoodie [sic].
>
> THE COURT: All right. I think the point's been made. Mr. Bujak?
>
> MR. BUJAK: Thank you, Judge. And certainly, ladies and gentlemen of the jury, what you remember is what become the facts.
>
> Also, Chris Ross -- Chris Ross or Angelo Cervantes testified that there was some other black individual in the garage during the meeting, someone who was described as a friend of Chris Ross's. Somebody the prosecution never even introduced or identified or named for you. Somebody, don't you think, that they should have followed up on if they had information that there was a black man involved potentially.
>
> But Mr. Wolff doesn't even reference that second black individual during his closing argument. He wants you to forget about the other black individual. He wants you to forget about everything that was involved. Forget that little piece of the evidence that doesn't fit his theory of the case.

T pg. 1216, ln. 19-23.

Considering the above, there is prima facie evidence that trial counsel did not make a strategic decision to not elicit testimony that was there was a "large black man and a person wearing a hoodie" who could have committed the murder. Thus, the post-conviction court's conclusion that the decision not to present witnesses about the alternative perpetrators was a strategic decision by counsel is not supported by the record. Moreover, such a decision would have been unreasonable considering trial counsel's defense theory that Mr. Cervantes and an accomplice

killed Mr. Dyer and that Mr. Herrera was only an accessory after the fact. T pg. 1225, ln. 9 – pg. 1226, ln. 13. (Defense closing argument). At least, there is a reasonable inference that trial counsel did not call the eyewitnesses because he did not attempt to locate them, that is: he was inadequately prepared for the trial.

In either case, the summary dismissal of this claim should be reversed, and the matter remanded for an evidentiary hearing.

B. *Mr. Herrera presented a prima facie case of deficient performance of counsel under the Sixth Amendment, due to counsel's failure to request an instruction regarding accessory after the fact.*

1. Facts pertinent to claim.

Mr. Herrera alleged that "Mr. Bujak was ineffective for failing to request that the Court give ICJI 310, the pattern jury instruction defining an 'accessory'. . .. At trial, Petitioner testified regarding his involvement with Mr. Cervantes after the crimes were committed. [Trial Tr. at 824-65]." R 133. He continued:

> Due to Mr. Bujak's failure to request an instruction regarding accessory after the fact, the jury was left with an "all or nothing" decision. Considering Petitioner's frank admissions regarding his involvement after the crimes were committed - during the time frame in which the decedent's body and evidence of the crimes were disposed of - the jury was not likely to simply acquit Petitioner of all charges. Mr. Bujak's failure to request ICJI 310 was not a tactical decision. But for Mr. Bujak's deficient performance, there is a reasonable probability, sufficient to undermine confidence in the jury's verdict, that the outcome of the trial would have been different.

R 133.

The post-conviction court dismissed this claim. Mr. "Herrera was not charged with being an accessory, nor is that crime an included offense of any of the

charged offenses. It would therefore have been error for the trial court to give such an instruction. Claim 3(c) is therefore dismissed." R 355.

2. Why relief should be granted

During closing arguments, trial counsel argued that Mr. Herrera was not guilty of murder or the other charges, but only of being an accessory after the fact. T pg. 250, ln. 6-16 (Opening Statement); pg. 1220, ln. 2-13 (Closing Argument); pg. 1226, ln. 3-13 (same). However, he did not have a jury instruction to support his argument. It was deficient performance under *Strickland* for trial counsel to fail to request the Court give ICJI 310 (Accessory Defined).

Idaho Code § 19-2132(a) requires that the trial court must provide to the jury "all matters of law necessary for their information" and must give a requested jury instruction if it determines that instruction to be correct and pertinent. Whether the jury has been properly instructed is a question of law over which this Court exercises free review. *State v. Severson*, 147 Idaho 694, 710 (2009). When reviewing jury instructions, the Court asks whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman,* 124 Idaho 936, 942 (Ct. App. 1993).

A requested instruction must be given where: (1) it properly states the governing law; (2) a reasonable view of the evidence would support the defendant's legal theory[2]; (3) it is not addressed adequately by other jury instructions; and (4) it

[2] To meet the second prong of this test, the defendant must present at least some evidence supporting his or her theory, and any support will suffice if his or her theory comports with a reasonable view of the evidence. *Fetterly*, 126 Idaho at 476-77; *State v. Kodesh*, 122 Idaho 756, 758 (Ct. App. 1992).

does not constitute an impermissible comment as to the evidence. *State v. Fetterly*, 126 Idaho 475, 476-77 (Ct. App. 1994). Here, ICJI 310 correctly sets forth the law, Mr. Herrera's testimony supported the giving of the instruction, it was not addressed by other jury instructions, and it was not a comment on the evidence. Thus, it would have been given, had it been requested.

The post-conviction court's analysis of the claim misses the mark. Idaho Code § 19-2132(a) requires that the trial court must provide to the jury "all matters of law necessary for their information." It does not matter whether Mr. Herrera was not charged with being an Accessory after the Fact, or even if that was an included offense. Information regarding what constitutes being an accessory after the fact was necessary for the jury's information because that was the defense theory of the case. "A defendant in a criminal action is entitled to have his theory of the case submitted to the jury under proper instructions." *State v. Olsen*, 103 Idaho 278, 285 (1982), *citing State v. Beason*, 95 Idaho 267 (1973); *and State v. Richardson*, 95 Idaho 446 (1973); see *State v. Miller*, 130 Idaho 550, 553 (Ct. App. 1997). See also *McKay v. State*, 148 Idaho 567, 571 (2010) (Trial counsel's performance was deficient when he failed to object to a jury instruction which omitted the only disputed element in the case).

In sum, Mr. Herrera made a prima facie case of deficient performance in this regard. As discussed below, the cumulative effect of all the deficient performance was prejudicial under *Strickland*.

C. *Mr. Herrera presented a prima facie case of deficient performance of counsel under the Sixth Amendment, due to counsel's failure to file a timely motion to suppress statements and to raise meritorious bases for suppression.*

1. Facts pertinent to claim.

0n June 24, 2015, Mr. Bujak filed a motion to suppress Petitioner's statements to Detective Peck, on the grounds that such statements were made in response to police-initiated custodial interrogation after Petitioner had invoked his Fifth Amendment right to counsel. R 242-245. Mr. Herrera alleged that the trial court denied the motion on the basis that it was untimely. R 134 (citing to July 2, 2015 Court Minutes).

In addition to his deficient performance in failing to timely file the motion to suppress, Mr. Bujak failed to raise as grounds for the motion the violation of Petitioner's Fifth Amendment rights based upon law enforcement allowing Mr. Cervantes to be placed in the interview room with Petitioner after Mr. Herrera had asserted his right to counsel.

Mr. Herrera alleged that on December 3, 2014, law enforcement allowed Mr. Cervantes to be placed in an interview room with Petitioner for approximately two hours while law enforcement recorded their interactions on video. T pg. 1160, ln. 1-22. At trial, the State admitted and published those video recordings to the jury, without objection by Mr. Bujak. T pg. 1161, ln. 4-23; State's Ex. 114 and 115. He further alleged that but for Mr. Bujak's deficient performance, the jury would not have been permitted to view the videos and would not have received improper

testimony by Detective Peck concerning his belief that Mr. Cervantes was attempting to "protect" Petitioner during the recorded interactions. R 133-134.

The court dismissed this claim writing:

> Petitioner has presented very few facts in support of this claim. The facts in the record reflect that on December 3, 2014, law enforcement was interviewing both Angelo Cervantes and Herrera at the police station. During these interviews, Mr. Cervantes asked police if he could meet with Herrera to help him, to get Herrera to tell the truth. State's Exhibits 114 and 115 reflect Angelo Cervantes being led into a room with Herrera, and the subsequent discussion between the two. The only time any other person was in the room was when detectives brought in food and then immediately left. There was no conversation relating to the case between that detective and either Herrera or Mr. Cervantes at that time. There were very few statements made by Herrera in response to statements or questions by Mr. Cervantes. Though Mr. Cervantes did ask a couple of questions of Herrera, most of Herrera's statements appeared to be simply him telling Mr. Cervantes about his experiences, what he thought Mr. Cervantes should do, and what was likely going to happen to them. The entirety of their discussion took approximately two hours. Though Herrera argued that Mr. Cervantes was acting as an agent of the State, there is no evidence that this is was the case. At best, the evidence demonstrates that the police allowed Herrera and Mr. Cervantes to talk in the hopes that Herrera would make incriminating statements.
> . . . .
> In sum, there is simply insufficient evidence to demonstrate that either Herrera invoked his Fifth Amendment rights or that the conversation between himself and Mr. Cervantes was a custodial 'interrogation' or its functional equivalent. As in *Arizona v. Mauro*, *supra*, there is no evidence that Herrera would have felt he was being coerced to incriminate himself in any way. The Court therefore cannot find that had a motion to suppress been filed on this issue, that it would have been granted. This claim is therefore dismissed.

R 359 -360.

2. Why relief should be granted.

(a) *Mr. Herrera provided sufficient admissible evidence to support his claim.*

Nampa Detective Donald Peck testified that on December 3, 2014, he had Mr.

Herrera "picked up and brought into the Nampa Police Department for questioning." T pg 851, ln. 1-2. Mr. Herrera testified that he was pulled over while driving, ordered out of the car, hand-cuffed, placed in the back of a patrol car, and driven to the police station. R 1078, ln. 2-21. Once there, Mr. Herrera was read his *Miranda* rights. T pg. 852, ln. 11-12. Mr. Herrera testified about what happened at this first interview:

> And [Detective Doney] she's like, okay, and do you know Jeffrey Dyer? And I was like, no. She's all, well, there's a homicide investigation going on. I was like, okay, you know? And she's all, do you know Red? And then at that point *I was like, you know what, I want a lawyer.* I told her, call Sophia [his sister] so she can call me a lawyer.

T pg. 1081, ln. 20 – pg. 1082, ln. 1 (emphasis added).

Shortly after his assertion of his right to counsel, Mr. Herrera was released. T pg. 853, ln. 4-5. However, he was detained again later that same day and was re-*Mirandized*. *Id*.

> Q. When you were arrested and taken into the police station, was that the first time and only time you were interrogated by the police?
>
> A. No.
>
> Q. How many times were you arrested?
>
> A. I was arrested twice in the same day within three hours.

T pg. 1079, ln. 13-19. In addition, the detective noted in her report that "Edgar asked to call Sophia so she could call a lawyer for him. I exited the interview room at that time." Confidential Exhibits, pg. 200. This too was admissible evidence showing that Mr. Herrera asserted his right to counsel. *Stanfield*, *supra*.

The second time he was interviewed by Det. Peck. During the interview, Detective Peck allowed Angelo Cervantes into the interview room with Mr. Herrera. T pg. 857, ln. 6-14. Mr. Cervantes told Mr. Herrera "that he just needed to tell what had happened." T pg. 858, ln. 7-9. Mr. Herrera responded by saying "about not wanting to be a snitch" and that the state's evidence "was circumstantial." *Id.*, ln. 9-16. During this conversation Mr. Herrera never accused Mr. Cervantes of lying to the police about what happened. T pg. 859, ln. 13-16. State's Exhibits 114 and 115.

Detective Peck, who left during when Mr. Cervantes and Mr. Herrera were talking, returned to the interview room. Detective Peck testified that:

> Q. During the course of your discussion with Mr. Herrera about the baton, did he make any statements to you?
>
> A. Yes, he did.
>
> Q. What was the statement Mr. Herrera made to you when you pressed him on where the metal baton came from?
>
> A. He said dude, you don't know how hard I tried not to kill him.

T pg. 861, ln. 1-9. (Mr. Herrera testified that what he said was, "dude, I didn't try to kill anybody." T pg. 1083, ln. 14-18.)

(b) *The evidence shows that the motion to suppress had it been made would have been granted.*

Mr. Herrera's testimony that he told the police "I want a lawyer," is prima facie evidence that he invoked his right to counsel. After that, the police had no right to reinitiate contact with him.

> [I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. This second layer of prophylaxis

> for the *Miranda* right to counsel is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights[.] To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present.

Davis v. United States, 512 U.S. 452, 458 (1994) (internal quotations and citations omitted).

The law governing a renewed attempt at interrogation after a suspect invokes the right to counsel differs from the rules governing a second interrogation after invocation of the right to remain silent. Once the suspect has clearly invoked the right to counsel, all interrogation must immediately stop. *Patterson v. Illinois*, 487 U.S. 285 (1988). The officers cannot question the suspect until the suspect's attorney is present. *Edwards v. Arizona*, 451 U.S. 477 (1981).

It was deficient performance for trial counsel to fail to file a timely motion to suppress the statements Mr. Herrera made to Det. Peck during the second interview. If he had done so, the motion would have been granted under *Davis*.

In addition, trial counsel failed to move to suppress the statements made to Mr. Cervantes in the untimely motion. That motion would also have been granted. *See United States v. Lafferty*, 503 F.3d 293 (3rd Cir. 2007) (trial court erred in failing to suppress statements made while alleged accomplice was placed in interrogation room with defendant, even where this was done at the request of the accomplice and not as part of a "police ploy" to induce defendant to change her mind). *See also Nelson v. Fulcomer*, 911 F.2d 928 (3rd Cir. 1990) (superseded by statute, Antiterrorism and Effective Death Penalty Act of 1996).

The post-conviction court's reliance upon *Arizona v. Mauro*, 481 U.S. 520 (1987), is misplaced as it is easily distinguishable from this case. In *Mauro,* the defendant asserted his right to counsel. All questioning then ceased. As no secure detention area was available, Mauro was held in the office of the police captain. In this case, Mr. Herrera was released from custody after his invocation of his right to counsel and unlike *Mauro*, the police never reinitiated interrogation.

Mrs. Mauro, who was present at the station, insisted upon speaking to her husband. Both Mr. and Mrs. Mauro were told that they could speak together only if an officer were present in the room to observe and hear what was going on. The detective entered the room, seated himself at a desk, and placed a tape recorder in plain sight on the desk. He did not ask any questions. 481 U.S., at 522. Here, by contrast, Det. Peck had Mr. Herrera re-arrested and transported back to the police station. He then placed Mr. Herrera in an interview room and began to interrogate him about the murder, notwithstanding Mr. Herrera's earlier assertion of the right to counsel. T pg. 853, ln. 4-12. Mr. Herrera was at the police station the second time for over five hours. T pg. 854, ln. 7-10. When Mr. Cervantes entered the interview room, the detective left the room. Further, there was no clear indication that their interview was being recording, as there was in *Mauro*.

Thus, the statements made to Det. Peck during the second interrogation were suppressible under *Davis*. And the statements made to Mr. Cervantes were suppressible as the fruit of the poisonous tree, *i.e.,* the reinitiation of questioning in violation of *Davis. See United States v. Crews*, 445 U.S. 463, 471 (1980) (In the

typical "fruit of the poisonous tree" case the challenged evidence was acquired by the police after some initial constitutional violation.). Here, the placing of Mr. Cervantes occurred during the illegal reinterrogation of Mr. Herrera and the discussion between them would not have occurred but for the *Davis* violation.

Had trial counsel made a timely motion to suppress this evidence and raised the proper bases for suppression, that motion would have been granted and the evidence would have been suppressed. Thus, a prima facie case of deficient performance was established as to this cause.

D. *The cumulative effect of counsel's deficient performance presents a prima facie case of Sixth Amendment prejudice.*

In analyzing a claim of ineffective assistance of counsel, the Court should not look to each example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *See Boman v. State,* 129 Idaho 520, 527 (Ct. App. 1996) and *Reynolds v. State*, 126 Idaho 24, 32 (Ct. App. 1994). As the Ninth Circuit has explained, "Separate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003). *See also Adamcik v. State*, 163 Idaho 114, 127 (2017).

Here, the three instances of deficient performance prejudiced Mr. Herrera. First, the jury did not hear about how independent witnesses saw an alternative

suspect near the home at the time of the murder. This evidence would have supported the defense theory of the case. As noted above, the defense argued that Mr. Cervantes was the shorter intruder, *i.e.*, the one who killed Mr. Dyer. A taller man, possibly the tall, skinny black man who was present at the Halloween meeting, was his accomplice. Mr. Herrera is shorter than both Mr. Cervantes and the third man.

Further, Mr. Herrera testified that he did not know about the killing until after the fact. Thus, the absence of the accomplice after the fact instruction was detrimental to the defense because trial counsel could not direct the jury to the trusted source of law in support of its theory of the case.

Finally, the statements made by Mr. Herrera, including the purported confession, and the evidence obtained when he was left alone with Mr. Cervantes should have been suppressed. Not only was the purported confession admitted into evidence, the state relied upon it in closing argument: "And that man's statement: 'You don't know how hard I tried not to kill him.' Convict him. First-degree murder, premeditation, malice aforethought." T pg. 1211, ln. 17-20. As the Supreme Court has written, confession evidence is uniquely powerful:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . .. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Arizona v. Fulminante, 499 U.S. 279, 296 (1991), quoting *Bruton* v. *United States*, 391 U.S., at 139-140 (White, J., dissenting); see also, Kassin, Saul & Neumann, Katherine. (1997). On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis. Law and human behavior. 21. 469-84. (Confessions found to be the most incriminating type of evidence, followed by eyewitness and then character testimony.) In addition, the state suggested that Mr. Herrera's failure to contradict Mr. Cervantes's incriminating statements were also an admission of guilt. See T pg. 755, ln. 14-18; pg. 859, ln. 13-15; pg. 875, ln. 3-7; pg. 1124, ln. 6 – pg. 1125, ln. 25. As there was no forensic evidence linking Mr. Herrera to the crime, the confession evidence was central to the state's case.

Taken together, the erroneous admission of the purported confession and the Cervantes testimony, along with the absence of testimony from eyewitness and the absence of a theory of the case instruction for trial counsel to rely upon in closing arguments, established a prima facie case of prejudice under *Strickland*.

V. CONCLUSION

The post-conviction court erred in dismissing in total the Ineffective Assistance of Trial Counsel Claim in the Amended Petition for Post-Conviction Relief. The Order should be vacated in part and the case remanded for further proceedings.

Respectfully submitted this 28th day of January, 2020.

/s/Dennis Benjamin
Dennis Benjamin
Attorney for Raul Herrera

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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

Dated and certified this 28th day of January, 2020.

/s/Dennis Benjamin
Dennis Benjamin