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Herrera v. State Appellant's Reply Brief Dckt. 47097

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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

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

Mr. Herrera alleged his attorney's performance was deficient under *Strickland* because he failed to investigate and then call eyewitnesses to the offenses. The state responds that he did not present admissible evidence to support that claim. Brief of Respondent ("State's Brief") pg. 7. That assertion is incorrect.

First, this Court "must evaluate the petitioner's claim, 'if true,'" and is required to "liberally construe the facts and draw reasonable inferences in favor of the petitioner." *Stanfield v. State*, 454 P.3d 531, 536 (Idaho 2019), *quoting Wheeler v. State*, 162 Idaho 357, 359 (2017). "Additionally, it means that '[a] court is required to accept the petitioner's unrebutted allegations as true...'" *Id*, *quoting Baldwin v. State*, 145 Idaho 148, 153 (2008).

Second, Mr. Herrera did present admissible evidence which, when taken as true and with reasonable inferences drawn in his favor, created a material issue of fact. As noted previously, the police report (R 139) was admissible under for the purposes of the summary disposition proceedings under I.R.E. 803(8). *Stanfield v. State*, 454 P.3d 531, 538 n.1 (Idaho 2019). To this, the state argues the report was not admissible because it was proffered "as substantive evidence in lieu of witness testimony," and thus beyond the scope of the hearsay exception. State's Brief, pg. 8. The state, however, does not support its assertion with citation to caselaw

interpreting the rule. Further, the Supreme Court in *Stanfield* considered the hearsay content of the police report as substantive evidence. The Court wrote:

> Stanfield submitted evidence to the district court from two sources that W.F.'s father had abused W.F. on prior occasions. There was a police report detailing a conversation with W.F.'s mother, Valerie Thorpe, in which she stated W.F.'s father had abused W.F. in the past.

Id., 454 P.3d at 538. The Court considered this evidence as some proof that W.F.'s father had abused W.F., writing,

> Assuming 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 Stanfield's lawyers 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.

Id. (internal quotation marks omitted).

The same situation occurs here. Like Ms. Stanfield, Mr. Herrera presented evidence from the police report of an alternative perpetrator. Here, a large black man and a man wearing a hoodie were near Mr. Ghostwolf's home near the time of the home invasion. The man in the hoodie could have been Angel Cervantes, who admitted committing the home invasion, but the large black man could not have been Mr. Herrera, who is Hispanic and shorter than Mr. Cervantes. [1]

In addition, Mr. Cervantes testified there was a black man present at the meeting where the robbery was planned. Trial Transcript pg. 787, ln. 2. Of note,

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[1] The state "[i]magine[s] how embarrassing it would have been" if the witnesses had been called to testify and did not testify consistently with the statements in the police report. State's Brief, pg. 17 n. 3. But the state has let its imagination run away with itself. Part of reasonably competent trial preparation is interviewing your witnesses prior to their testimony. And at this point, we assume Mr. Herrera's allegations to be true. *Stanfield*, *supra*.

this man was taller than both Mr. Herrera and Mr. Cervantes. *Id.*, ln. 16 ("[H]e was taller than us.") Thus, Mr. Herrera has made a prima facie showing that there was material and favorable evidence which was not presented by trial counsel.

Mr. Herrera has also presented evidence that trial counsel's failure to present testimony was not strategic. The trial record shows that counsel wanted the alternative perpetrator evidence before the jury because he questioned Detective Peck about the report even though he was not the author. TT pg. 867, ln. 14 – pg. 868, ln. 8. Further, trial counsel's closing argument focused upon the alternative perpetrator. T pg. 1216, ln. 19-23. To this point the state writes, "On its face, the decision to utilize the report to impeach the adequacy of the police investigation was a tactical decision." State's Brief, pg. 8. But that response is inadequate. First, the trial strategy was not "to impeach the adequacy of the police investigation," it was to establish that Mr. Herrera was not the second man to enter the house. Trial counsel told the jury during his opening statement that Mr. Herrera was not with Mr. Cervantes during the home invasion and that his girlfriend, Sophia Sanchez, would testify he was with her. TT pg. 248, ln. 21 -pg. 249, ln. 1. (It turns out that she did not testify. TT pg. 17-24.) Second, while the use of the police report was "tactical," *i.e.*, an action aimed to gain a specific end, it does not follow that trial counsel made a strategic decision to not call the person who saw the black man. If trial counsel had decided in advance of trial to not call the eyewitness and instead attempt to get the evidence in through the police report, he would have called its author to testify, instead of cross-examining Detective Peck about it. A reasonable

inference from this evidence is that the failure to call the eyewitness was the result of inadequate preparation, such as the failure to locate, interview and subpoena the witness. Without the eyewitness, trial counsel was left only with the questionable tactic of cross-examining one police officer about the report of a second officer.

Thus, as was the case in *Stanfield*, there is a genuine issue of material fact as to whether trial counsel "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 v. State,* 454 P.3d at 538 (internal citations omitted).

There is also a genuine issue of material fact regarding prejudice. The jury did not hear eyewitness testimony about how there was an alternative suspect near the home at the time of the murder. All it heard was Detective Peck's testimony that he had heard about a report being made. TT pg. 867, ln. 14 – pg. 868, ln. 8.[2] The value of the eyewitness evidence is a matter which should be determined at an evidentiary hearing where the witness's credibility can be assessed. At this point, there is a genuine question about whether the jury would have concluded that Mr. Cervantes was the shorter man in the hoodie, and the large black man, possibly the man who participated in the planning of the robbery, were the ones who committed

[2] The totality of the evidence was:

> 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.

the murder, had it heard from the eyewitness. Thus, this claim should be remanded for an evidentiary hearing.

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

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'" CR 133. The state argues that Mr. Herrera's theory of the case was not that he was an accessory, but that he was not present at the scene of the crime. State's Brief, pg. 11. However, both theories could be true. Mr. Herrera could be not guilty of the murder while being guilty of being an accessory after the fact. And while the state later contends that Mr. Herrera was not an accessory under I.C. § 18-205(1), State's Brief, pg. 11, its argument ignores subsection (2) of the statute which states that all persons who, having knowledge that a felony has been committed, "[h]arbor and protect a person who committed such felony" are also accessories. *Id.* see also ICJI 310 (alternative method). This second definition was the one presented to the jury by trial counsel. TT pg. 250, ln. 6-16 (Opening Statement); pg. 1220, ln. 2-13 (Closing Argument); pg. 1226, ln. 3-13 (same). Consequently, the state's arguments are without force.

As previously argued, the failure to request an Accessory Instruction prejudiced Mr. Herrera. He testified that he did not know about the killing until after the fact. The presence of an instruction definition of an accomplice after the fact instruction would have aided trial counsel's presentation of the defense because

trial counsel could have directed the jury to the trusted source of law in support of its theory of the case. While the state responds that the instructions were adequate to describe the state's theory of the case, State's Brief, pg. 18, that is no answer to the problem that the instructions did not address an important aspect of the defense theory of the case.

C. *Mr. Herrera presented a prima facie case of ineffective assistance 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.*

The state writes that "[t]he district court's decision" dismissing this claim "is supported by the record and the law." State's Brief, pg. 12. The state is mistaken.

The record shows Mr. Herrera was in "custody" for purposes of *Miranda*. Detective Peck had Mr. Herrera "picked up and brought into the Nampa Police Department for questioning." TT pg. 851, ln. 1-2. After he was read his *Miranda* rights, Mr. Herrera asserted his right to counsel. TT pg. 852, ln. 11-12; TT pg. 1081, ln. 20 – pg. 1082, ln. 1. He was then released but rearrested that same day.

The district court was wrong when it concluded "there is simply no evidence about whether Mr. Herrera had invoked his Fifth Amendment right to remain silent." R 360. Mr. Herrera testified at that that he told Detective Doney "I want a lawyer" at the police station when he was first arrested. TT pg. 1081, ln. 20 – pg. 1082, ln. 1. The detective's contemporaneous report corroborates Mr. Herrera's testimony. Confidential Exhibits, pg. 200.

The record also shows that Mr. Herrera was then interrogated by Det. Peck without Mr. Herrera being re-*Mirandized* or waiving his previous assertion of

counsel. During the interview, Detective Peck allowed Mr. Cervantes into the interview room with Mr. Herrera. TT pg. 857, ln. 6-14. Mr. Cervantes told Mr. Herrera "that he just needed to tell what had happened." TT pg. 858, ln. 7-9. Mr. Herrera engaged in conversation with Mr. Cervantes. Mr. Cervantes also asked Mr. Herrera some questions. R 359 -360. Detective Peck returned to the interview room and continued his interrogation, which -- according to the detective -- led to Mr. Herrera making the statement "dude, you don't know how hard I tried not to kill him." TT pg. 861, ln. 1-9. (Mr. Herrera testified that what he said was, "dude, I didn't try to kill anybody." TT pg. 1083, ln. 14-18.)

The law is that these statements should have been suppressed and would have been suppressed, had a proper and timely motion to suppress been made. Mr. Herrera's statement "I want a lawyer" shows he invoked his right to counsel. After such an invocation, all interrogation must stop, *Patterson v. Illinois*, 487 U.S. 285 (1988), and the police have no right to reinitiate contact with him. *Davis v. United States*, 512 U.S. 452, 458 (1994). Mr. Herrera could not be further questioned until his attorney was present. *Edwards v. Arizona*, 451 U.S. 477 (1981). 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 *Patterson-Davis-Edwards* violation. *See United States v. Crews*, 445 U.S. 463, 471 (1980).

The state's argument (State's Brief, pg. 13) that Mr. Herrera's Amended Petition only asserted that his right to remain silent was violated and did not raise

a right to counsel claim is facile. There is no Sixth Amendment right to counsel, prior to the formal initiation of judicial proceedings. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The right to counsel during custodial interrogation derives from the Fifth Amendment right to remain silent. *Miranda v. Arizona,* 384 U.S. 436, 467 (1966). An invocation of the right to counsel after *Miranda* warnings is an assertion of the right to remain silent.

Contrary to the district court's statement (R 359-360), there is evidence that Mr. Herrera asserted his right to remain silent, *i.e.*, when he asserted his right to counsel to Detective Doney. This assertion was prior to his second arrest, second interrogation and being placed with Mr. Cervantes. Consequently, the district court's attempt to distinguish this case from *United States v. Lafferty*, 503 F.3d 293 (3rd Cir. 2007) and *Nelson v. Fulcomer*, 911 F.2d 928 (3rd Cir. 1990) fails. The police failed to scrupulously honor Mr. Herrera's assertion of his right to remain silent when they interrogated him after his assertion and when they placed him with Mr. Cervantes. *Id.*

The state's citation to *State v. Adamcik*, 152 Idaho 445, 470 (2012), is not apposite. There, a juvenile and his father voluntarily came to the police station together. The police cut off questioning of the juvenile once they asked for counsel. The police came back and made a statement to the juvenile. The father asked the juvenile a question which referred to the police statement. The Supreme Court held that the police officer's statement was not the functional equivalent of interrogation and that the father's question was not caused by state action. *Adamcik*, 152 Idaho

at 472. Here, the police did not cut off questioning after Mr. Herrera asked for a lawyer. And the action of placing him with Mr. Cervantes violated the state's duty to scrupulously honor Mr. Herrera's Fifth Amendment rights. *Nelson v. Fulcomer*, 911 F.2d at 940. Unlike here, Mr. Adamcik's assertion of his right to remain silent (by invoking his right to counsel) was scrupulously honored by the police, who immediately cut of questioning and did not place him in the same room as his co-defendant.

Finally, the state writes that "the record in this case shows that trial counsel in fact filed the very motion Herrera claims on appeal counsel was ineffective for not filing." State's Brief, pg. 14. Mr. Herrera, however, alleged that the motion to suppress was denied because it was untimely, not that it was never made. R 134. In support of his allegation, Mr. Herrera referred to the Court Minutes of July 2, 2015. *Id.* Further, the record shows a Motion to Suppress was filed on June 24, 2015 (R 242), only 13 days before the trial began on July 7, 2015. T pg. 4. Since the case was charged in 2014, the July 2015 motion was untimely under I.C.R. 12(b). While the state asserted that the trial judge ruled on the merits of the motion, R 158, it did not provide a copy of the July 2, 2015 Court Minutes or a transcript of that hearing to demonstrate the accuracy of its allegation. Thus, in the absence of any contrary evidence, Mr. Herrera's allegation that the motion was denied as untimely must be deemed to be true. *Stanfield v. State*, 454 P.3d at 536.

In sum, 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.

There is also a prima facie showing of *Strickland* prejudice. The state does not attempt to argue that the admission of Mr. Herrera's purported confession was not prejudicial. State's Brief, pg. 16-19, Nor could it have, given its heavy reliance upon it in closing argument. TT pg. 1211, ln. 17-20. TT pg. 1211, ln. 17-20. TT pg. 1211, ln. 17-20. ("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.") As previously noted, confession evidence is particularly powerful. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

As to the state's argument that any voluntary statements could have been used to impeach Mr. Herrera's testimony (State's Brief. 18-19), it overlooks the obvious fact that Mr. Herrera would not have needed to testify to explain away the confession or the conversation with Mr. Cervantes had that evidence been suppressed. In addition, the state's argument that "[h]earing the evidence to impeach [Mr.] Herrera's claims would not reduced their impact" (State's Brief, pg. 19) is simply an assertion that the jury would not have followed the inevitable pattern jury instructions which would have limited their consideration of impeachment evidence not made under oath. ICJI 318 . However, as the state well knows, courts "presume that the jury followed the jury instructions given by the trial court in reaching its verdict." *State v. Lankford*, 162 Idaho 477, 488 (2017).

(And the state has consistently argued that position before this Court, at least until now.)

Considering there was no forensic evidence linking Mr. Herrera to the crime and that Mr. Cervantes's credibility is suspect as a matter of law,[3] the confession evidence was central to the state's case. A prima facies case of *Strickland* prejudice was established.

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

The state does not dispute that 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). No further reply is needed as Mr. Herrera has discussed above how the three instances of deficient performance prejudiced him.

III. 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 9th day of June, 2020.

/s/Dennis Benjamin
Dennis Benjamin
Attorney for Raul Herrera

[3] See ICJI 313 ("A person may not be found guilty based solely on the testimony of an accomplice."); I.C. § 19-2117

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted follows 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):

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Dated and certified this 9th day of June, 2020.

/s/Dennis Benjamin
Dennis Benjamin