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Andrus v. State Appellant's Brief Dckt. 47805

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SCOTT ANDRUS, PETITIONER-APPELLANT, vs. STATE OF IDAHO, RESPONDENT.	Supreme Court No. 47805-2020 Twin Falls County No. CV42-16-0720

OPENING BRIEF OF APPELLANT LAWRENCE SCOTT ANDRUS

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE ERIC WILDMAN
District Judge

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A. Nature of the Case

This is an appeal from the district court's judgment denying Appellant Lawrence Scott Andrus' petition for post-conviction relief after an evidentiary hearing. Because Mr. Andrus established that he received ineffective assistance of counsel, this Court should vacate the judgment and remand.

B. General Course of Proceedings

1. Facts relevant to underlying criminal proceedings

On March 15, 2014, Mr. Andrus spoke with his bishop by phone and expressed he was deeply depressed and intended to end his life. Transcript, Docket 42878 ("Trial Tr."),[1] p. 236, ln. 11 - p. 237, ln. 22. The bishop called 911 and police dispatched to a local bridge historically used for suicide. *Id.* at p. 189, ln. 13 - p. 190, ln. 8. Officers found Mr. Andrus walking on the bridge and took him to a local hospital where he showed signs of intoxication. *See id.* at p. 131-163. No one witnessed Mr. Andrus drinking or driving and no one knew when he drove to the bridge in relation to when he consumed alcohol. *See id* at p. 269, ln. 22 - p. 270, ln. 5. Police arrested Mr. Andrus for driving under the influence (DUI).

The state provided counsel with a plea offer on April 23, 2014, which proposed that Mr. Andrus plead guilty to a misdemeanor charge of an excessive DUI conditioned on Mr. Andrus' acceptance before April 29 and his entry of a guilty plea on the day of the scheduled pre-trial

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[1] The transcript from Mr. Andrus' direct appeal was admitted as an exhibit during the evidentiary hearing and is an exhibit in this appeal. R. 98.

conference. Ex. 3. At the evidentiary hearing, trial counsel testified that he did not see the plea offer until just before it was revoked and would not have had time to review it with Mr. Andrus, as he was very busy with a larger-than-normal workload. Tr. p. 17-18; p. 21, ln. 19 - p. 22, ln. 1. Counsel testified that he would have counseled Mr. Andrus to immediately accept the plea offer because the state's discovery response reflected that Mr. Andrus had two prior DUI convictions. Tr. p. 20-21. However, the state withdrew the offer on April 25, 2014 before trial counsel conveyed the offer to Mr. Andrus. *Id.* at. 17-18. The state thereafter charged Mr. Andrus with a felony based on prior convictions.

At trial, the state introduced the results of the breath tests conducted approximately ninety minutes after Mr. Andrus reached the bridge and presented expert testimony regarding the Widmark Equation opining that Mr. Andrus started drinking before arriving at the bridge. Trial Tr. p. 230, ln. 3-6. In closing argument, the prosecutor opined that Mr. Andrus was the "best" manipulator she had "ever seen" and that he was trying to manipulate the jurors. The prosecutor warned the jurors: "Don't be manipulated. . . find the defendant guilty." Trial Tr. p. 590, ln. 20 - p. 591, ln. 6. The jury found Mr. Andrus guilty of DUI. The district court sentenced Mr. Andrus to a unified term of ten years with a minimum period of confinement of two years.

2. Post-conviction relief proceedings

On March 2, 2016, Mr. Andrus filed a pro se petition for post-conviction relief and requested counsel. *Andrus v. State*, 164 Idaho 565, 566, 433 P.3d 665, 666 (Ct. App. 2019) The district court granted Mr. Andrus' request for counsel and assigned a special conflict attorney on April 21, 2016. *Id.* The state answered on June 15, 2016 and the district court issued a notice

of intent to dismiss on July 11, 2016, providing Mr. Andrus with twenty-days to respond. R. 75-97. Fifteen days after the deadline expired, on July 26, 2016, conflict counsel requested an extension of time to amend the petition and sent his only letter to Mr. Andrus. *Id.* The district court granted a thirty-day extension but counsel filed no other motions, documents, amendments, or pleadings in the case. *Id.* at 566–67, 433 P.3d at 666–67. The district court dismissed Mr. Andrus's petition for post-conviction relief with prejudice. *Id.* at 567, 433 P.3d at 667. Mr. Andrus appealed upon discovering the case had been dismissed and the Court of Appeals affirmed the judgment. *Andrus v. State*, Docket No. 44686 (Ct. App. 2018) (*unpublished opinion*).

While the appeal remained pending, Mr. Andrus filed a motion for relief from judgment pursuant to I.R.C.P. 60(b)(6). *Andrus*, 164 Idaho at 567, 433 P.3d at 667. Mr. Andrus explained that post-conviction counsel's only communication was to notify him that counsel filed a motion seeking additional time to respond to the Notice of Intent to Dismiss; that counsel failed to respond to Mr. Andrus' inquiries and that counsel completely failed to provide any meaningful representation. *Id.* The district court found that Mr. Andrus did not present a unique and compelling circumstance and denied the motion. *Id.*

On appeal, the Court of Appeals found that Mr. Andrus had alleged a complete lack of meaningful representation, which the record did not dispel, and the district court therefore abused its discretion in dismissing the claims on the merits without establishing a record of some meaningful representation on those claims. *Id.* at 570, 433 P.3d at 670.

On remand, Mr. Andrus filed an Amended Motion for Relief from Judgment under Rule 60(b)(6) and a Motion to Amend his Petition for Post-Conviction Relief, which the district court granted. R. 72, 170. In the amended petition, Mr. Andrus alleged that he received ineffective assistance of counsel on several grounds, including counsel's failure to object to prosecutorial misconduct, counsel's failure to convey the plea offer before it was revoked and counsel's failure to move in limine to preclude evidence regarding the breath testing result. R. 74-90; 107-27. The state answered on June 19, 2019 and the district court held an evidentiary hearing on September 26, 2019. R. 169-70. The district court thereafter denied Mr. Andrus's petition and entered judgment. R. 169-184, 187. This appeal follows. R. 189-94.

III. ISSUE PRESENTED ON APPEAL

Did the district court err in denying Mr. Andrus's petition for post-conviction relief because he established that he received ineffective assistance of counsel by a preponderance of the evidence?

IV. MR. ANDRUS ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT HE IS ENTITLED TO POST-CONVICTION RELIEF

A petition for post-conviction relief is civil in nature and an applicant is entitled to relief when he proves his claims by a preponderance of evidence. *Marsalis v. State*, 166 Idaho 334, 458 P.3d 203, 208 (2020); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007). Ineffective assistance of counsel presents a mixed question of law and fact: this Court defers to the district court's factual findings if supported by substantial evidence and exercises free review

over the application of the relevant law to those facts. *Wurdemann v. State*, 161 Idaho 713, 717, 390 P.3d 439, 443 (2017); *Booth v. State,* 151 Idaho 612, 617, 262 P.3d 255, 260 (2011).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Garza v. Idaho*, 139 S. Ct. 738, 743 (2019); *Marsalis*, 166 Idaho at 340, 458 P.3d at 209. A post-conviction applicant establishes an ineffective assistance of counsel claim by proving: (1) the attorney performed deficiently and (2) the deficiency prejudiced the applicant. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

A post-conviction petitioner establishes the deficient performance prong by proving his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688; *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443. Counsel's strategic and tactical decisions can justify relief when the petitioner shows the decisions resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443; *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). Ultimately, "the standard for evaluating attorney performance is objective reasonableness under prevailing professional norms." *Wurdemann*, 161 Idaho at 717, 390 P.3d at 443.

With respect to prejudice, the post-conviction applicant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Andrus*, 140 S. Ct. at 1881; *Harrington v. Richter*, 562 U.S. 86, 104 (2011); *McKay*, 148 Idaho at 570, 225 P.3d at 703. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694; *McKay*, 148 Idaho at 570,

225 P.3d at 703. That is, the likelihood of a different result must be substantial, not just conceivable. *Harrington*, 562 U.S. at 104; *Strickland,* 466 U.S. at 693.

In closing argument, the prosecutor personally opined that Mr. Andrus was one of the most manipulative criminals she had encountered and that the jury would be manipulated if it found him not guilty. Had counsel objected to this misconduct, there is a reasonable probability that the district court would have sustained the objection, thereby curing the misconduct with an instruction or mistrial declaration, or that Mr. Andrus' conviction would have been reversed on appeal. Further, counsel performed deficiently in failing to timely convey the misdemeanor offer, which Mr. Andrus would have accepted prior to revocation. Finally, had counsel moved in limine to preclude expert evidence regarding Mr. Andrus' blood alcohol content, the jury likely would have acquitted him of driving under the influence. Accordingly, this Court should reverse and remand with instruction to grant Mr. Andrus' post-conviction relief petition.

A. Counsel's Failure to Object to the Prosecutor's Prejudicial Misconduct During Closing Argument Was Objectively Unreasonable and Prejudiced Mr. Andrus

The prosecutor opined that Mr. Andrus was the "best" manipulator she had "ever seen" and that he was trying to manipulate the jurors. Trial Tr. p. 590, ln. 20 - p. 591, ln. 6. The prosecutor cautioned: "Don't be manipulated. . . find the defendant guilty." This argument bolstered the state's evidence with the prosecutor's opinion of Mr. Andrus's manipulative ability against her experience with other conmen and was calculated to invoke fear and anger by urging that a not guilty verdict would mean the jury had fallen victim to Mr. Andrus' scam. Had trial counsel objected, the district court should have sustained the objection and either provided a

curative instruction or declared a mistrial. Had the trial court refused to do so, the state would have been required to prove that the misconduct was harmless beyond a reasonable doubt on appeal. The district court erred in applying the law and in denying post-conviction relief.

1. Deficient performance

At trial, Mr. Andrus testified that he began drinking vodka after arriving at the bridge and, thus, that he did not drive while under the influence. *See* Trial Tr. p. 283-339; p. 355-551. In closing, the prosecutor argued that Mr. Andrus "hasn't told the truth to anyone, anyone, and his story changes whenever it is convenient for him." *Id.* at p. 576. The prosecutor claimed that Mr. Andrus "manipulated" hospital staff, the sheriff's deputies and dispatch by claiming to be suicidal when he really wanted treatment for his hip, which caused him extreme pain. The prosecutor warned the jury:

> *now he's trying to manipulate you*. He's good at it. One of the best *I've ever seen*. He knows how to speak. He knows how to present, and he's so good he's won an Emmy. He also told you that what he really wanted that day was human contact, a friend. He wouldn't tell his friends where he was. He was manipulating them; *now he's trying to manipulate you. Don't be manipulated.* Please find the defendant guilty. Thank you.

Id. at p. 590, ln. 20 - p. 591, ln. 6 (emphasis added).

The considerable latitude traditionally afforded in closing argument to the jury is limited to the ability to fully discuss the evidence from the party's respective standpoint and the inferences that the jury could reasonably draw from that evidence. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). A prosecutor exceeds the scope of this considerable latitude if she attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence

admitted during trial, including reasonable inferences that may be drawn from that evidence. *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); *State v. Marmentini*, 152 Idaho 269, 271, 270 P.3d 1054, 1056 (Ct. App. 2011).

Further, at the evidentiary hearing, trial counsel testified that he should have objected to the prosecutor's statements, as they were surely prejudicial. Tr. 49-51. Trial counsel also testified that had he moved for a mistrial, such motion should have been granted or, at the least, the district court should have provided a curative instruction advising the jury to disregard the statements and not let them influence them. Tr. 50-51. Accordingly, trial counsel's failure to object was neither strategic nor tactical.

The district court nonetheless found the prosecutor's statements proper because Mr. Andrus had admitted lying to the Bishop and others on the evening in question and admitted indicating that he was suicidal when he in actually wanted treatment for his hip, which was painful. R. 177-79. The district court found that the prosecutor's arguments regarding Mr. Andrus' manipulative ability were "simply restatements of uncontested fact" and pointed "out a pattern of manipulative conduct and behavior on the part of [Mr. Andrus] that was supported by evidence in the record." R. 178-79.

However, the prosecutor's argument was not limited to pointing out that evidence supported a pattern of manipulative conduct or asking the jury to conclude that Mr. Andrus' testimony was untruthful. Rather, she added her opinion that Mr. Andrus was the most proficient conman who she had encountered and that the jurors should not allow Mr. Andrus to manipulate them by returning a not guilty verdict.

The use of disfavored phrases such as "I think" and "I believe" are misconduct when the prosecutor attempts to use her official position or personal knowledge of the case as a means of inducing the jury to vote for conviction. *Phillips*, 144 Idaho at 86 n. 1, 156 P.3d at 587 n. 1; *State v. Rosencrantz*, 110 Idaho 124, 131, 714 P.2d 93, 100 (Ct. App. 1986). A prosecutor may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when the opinion is based upon the evidence but the prosecutor must avoid interjecting her personal belief. *Marmentini*, 152 Idaho at 272, 270 P.3d at1057; *Phillips*, 144 Idaho at 86-87, 156 P.3d at 587-88 (closing argument should neither include counsel's personal opinions about the credibility of a witness or the accused's guilt nor appeal to the jury's emotion, passion or prejudice through use of inflammatory tactics).

In warning the jurors against Mr. Andrus' attempts to manipulate them, the prosecutor suggested to more than untruthfulness and, instead, implied an intent to victimize or "exploit." Further, she used her experience as a prosecutor to bolster her personal opinion that Mr. Andrus was the most skilled manipulator she had encountered. The argument constituted misconduct and counsel was deficient in failing to object.

2. Prejudice

Had trial counsel objected to the misconduct, the district court's refusal to sustain the objection would have been reviewed for harmless error in accordance with *Chapman v. California*, 386 U.S. 18 (1967). *Perry*, 150 Idaho at 227, 245 P.3d at 979; *Marmentini*, 152 Idaho at 271, 270 P.3d at 1056. Further, the comments were highly prejudicial and, in case dependent

on Mr. Andrus' credibility, there is a reasonable probability that the misconduct effected the verdict.

The district court concluded that the comments did not prejudice Mr. Andrus' right to a fair trial because he admitted lying on the night in question and manipulating circumstances to obtain treatment for his painful hip. However, the district court applied the standard applicable to review unobjected to misconduct under the fundamental error standard. R. 175-76. If trial counsel had objected to the prosecutorial misconduct (and the district court overruled the objection), the error would have been reviewed for harmless error in accordance with *Chapman. Perry*, 150 Idaho at 227, 245 P.3d at 979. Once a defendant appealing from an objected-to error establishes that the error occurred, the state must demonstrate that the error is harmless beyond a reasonable doubt. *Perry*, 150 Idaho at 222, 245 P.3d at 974. An error is harmless if the reviewing court is able to declare beyond a reasonable doubt that the error did not contribute to the verdict. *Perry*, 150 Idaho at 219–20, 245 P.3d at 971–72; *Marmentini*, 152 Idaho at 272, 270 P.3d at 1057.

No one witnessed Mr. Andrus drinking or driving and and whether the jury concluded that he drove under the influence was highly dependent on whether the jury believed his testimony. The prosecutor personally opined that Mr. Andrus was one of the most manipulative criminals she had encountered and that the jury would be falling victim to his latest con if it found him not guilty. Had counsel objected to this misconduct, there is a reasonable probability that the district court would have sustained the objection, thereby curing the misconduct with an instruction or mistrial declaration, or that Mr. Andrus' conviction would have been reversed on

appeal. Accordingly, the district court erred in denying Mr. Andrus petition for post-conviction relief.

B. Counsel's Failure to Timely Convey the Plea Offer Was Objectively Unreasonable and Prejudiced Mr. Andrus

The state provided counsel with a plea offer on April 23, 2014, which proposed that Mr. Andrus plead guilty to a misdemeanor charge of an excessive DUI conditioned on Mr. Andrus' acceptance before April 29 and his entry of a guilty plea on the day of the scheduled pre-trial conference. Ex. 3. At the evidentiary hearing, trial counsel testified that he did not see the initial plea offer, as he was very busy with a larger-than-normal workload. Tr. p. 17-18; p. 21, ln. 19 - p. 22, ln. 1. Counsel testified that he would have counseled Mr. Andrus to immediately accept the plea offer because the state's discovery response reflected that Mr. Andrus had two prior DUI convictions. Tr. p. 20-21. However, the state withdrew the offer on April 25, 2014, before trial counsel conveyed the offer to Mr. Andrus. *Id.* at. 17-18.

The Sixth Amendment right to effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Fortin v. State*, 160 Idaho 437, 445, 374 P.3d 600, 608 (Ct. App. 2016). Where deficient performance led to the plea offer's rejection, the petitioner is required to show that, but for the ineffective assistance of counsel, there is a reasonable probability that: (1) the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer's terms

would have been less severe than under the judgment and sentence that in fact were imposed. *Lafler*, 566 U.S. at 170; *Fortin*, 160 Idaho at 446, 374 P.3d at 609.

Here, the district court found that trial counsel did not perform deficiently by failing to convey the offer to Mr. Andrus before it was revoked two days later. R. 171-72. However, counsel's heavy caseload prevented him from reviewing the offer before it was revoked. Thus, the question is not whether counsel could have reasonably decided to delay conveying the offer and, instead, the question is whether it was objectively reasonable to not review the state's offer before it was revoked.

Further, the American Bar Association recommends defense counsel promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney. *Frye*, 566 U.S. at 145. Counsel's timing on jail visits necessarily depends on many circumstances including counsel's schedule and whether the information is time-sensitive. For instance, a three-day delay would be unreasonable if an offer was contingent on a drug defendant's willingness to testify against his dealer before the grand jury in two days time. Conversely, a three-day delay would be appropriate for a run of the mill offer that expired in three weeks.

Here, the state's offer for a misdemeanor resolution was highly valuable in light of the discovery response's indication that Mr. Andrus could potentially face a felony based on two prior convictions and scheduled to quickly expire. It was objectively unreasonable for counsel to fail to review the offer before it was revoked.

The district court found that it was unlikely Mr. Andrus would have accepted the misdemeanor offer because he twice tried the felony, the first time ending in mistrial and the

second in the instant conviction. R. 172-74. However, Mr. Andrus' decision to hold the state to its burden of proof on a felony charge does not signify that he would have rejected the opportunity to plead to a misdemeanor.

Had counsel immediately reviewed the offer, his testimony at the evidentiary hearing reflects that he would have immediately conveyed it to Mr. Andrus and strongly advised that it be immediately accepted. Had that occurred, the offer would have been accepted before the state revoked it on April 25.

The district court also found that it would have declined to accept the plea agreement. trial courts have the freedom to accept or reject proposed plea agreements. *See* I.C.R. 11; *State v. Fertig*, 126 Idaho 364, 366–67, 883 P.2d 722, 724–25 (Ct. App. 1994); *Fortin*, 160 Idaho at 447, 374 P.3d at 610. However, the court's ability to reject a plea agreement does not extend to control over the state's charging decisions and it could not compel the state to pursue felony charges.

To the contrary, the prosecution's breach of a plea agreement would have violated Mr. Andrus' rights and entitled him to a remedy. *See Santobello v. New York*, 404 U.S. 257, 262–63 (1971); *McAmis v. State*, 155 Idaho 796, 797, 317 P.3d 49, 50 (Ct. App. 2013). If Mr. Andrus accepted the offer before its revocation on April 25, the state should have been precluded from seeking a felony conviction and Mr. Andrus should have been allowed to plead to the misdemeanor offense. *See Puckett v. United States*, 556 U.S. 129, 137 (2009) (specific performance can be required if Government breaches the agreement).

It was objectively unreasonable for trial counsel to fail to review the state's offer before it was revoked two days later. Had counsel timely reviewed the offer, Mr. Andrus would have taken

his advice to accept it and been permitted to resolve the case as a misdemeanor. Accordingly, the district court erred in denying Mr. Andrus' petition for post-conviction relief and this Court should reverse and remand.

C. Counsel's Failure to File a Motion in Limine to Exclude the Breath Test Results and the Widmark Equation Was Objectively Unreasonable and Prejudiced Mr. Andrus

Officers found Mr. Andrus walking on the bridge and took him to a local hospital where he showed signs of intoxication. *See* Trial Tr. p. 131-163. No one witnessed Mr. Andrus drinking or driving and no one knew when he drove to the bridge in relation to when he consumed alcohol. *See id.* at p. 269, ln. 22 - p. 270, ln. 5. At trial, the state introduced the results of the breath tests conducted approximately ninety minutes after Mr. Andrus reached the bridge. *Id.* at p. 230, ln.3-6. The state argued that these results, which were .247/.248 BAC, established that Mr. Andrus' BAC was over .08 when he was driving and used the results as necessary data points for the Widmark Equation. *Id.*

Trial counsel admitted that he had not researched the caselaw surrounding exclusion of breath test results based on failure to comply with the required observation period or regarding exclusion of the expert's testimony regarding the Widmark Equation. Had counsel done so, he would have sought to exclude the evidence in limine and the jury would not have found Mr. Andrus of driving after he started drinking.

Pursuant to LC. § 18-8004(4), the Idaho State Police (ISP) is charged with promulgating standards for administering tests for breath alcohol content. *State v. DeFranco*, 143 Idaho 335,

337, 144 P.3d 40, 42 (Ct. App. 2006). To carry out the authority conferred by that statute, the ISP issued operating manuals as well as Standard Operating Procedure (SOP) establishing procedures for the maintenance and operation of breath testing equipment. *In re Mahurin*, 140 Idaho 656, 658, 99 P.3d 125, 127 (Ct. App. 2004).

Here, the officer testified at trial, "I did not have eyes on the person for 15 minutes." Trial Tr. p. 264, ln.10-12. However, "during the monitoring period, the Operator must be alert for any event that might influence the accuracy of the breath alcohol test." *Id.* at 6.1.4. Non-compliance with the fifteen minute observation period is grounds for exclusion of the breath test results. *See State v. Carson*, 133 Idaho 451, 453, 988 P.2d 225, 227 (Ct. App. 1999) (holding that the arresting officer's ability to supplement his visual monitoring of Carson with his other senses was substantially impaired by numerous sources of noise, the officer's own hearing impairment, and his position facing away from Carson while transporting him during the monitoring period).

And while an expert testified regarding the breath testing machine, his primary explanation as to why there must not have been any mouth alcohol present when Mr. Andrus blew was because the machine worked. Trial Tr. 299, ln. 23 - p. 302, ln. 21. *See State v. Healy*, 151 Idaho 734, 737, 264 P.3d 75, 78 (Ct. App. 2011) (breath test results can be allowed into evidence despite lack of strict compliance with the administrative procedures where state presents expert testimony that explains why procedural defects did not affect the reliability of test results in the particular case at issue).

Had counsel investigated this issue prior to trial by speaking with his client and/or by doing research into relevant case law, he would likely have been able to exclude the results of the

breath test. Without the breath test results, the state would not have been able to provide the jury with a BAC, which would have made it nearly impossible for the state to carry its burden of proof at trial. Accordingly, Mr. Andrus demonstrated deficient performance and sufficient prejudice to warrant his conviction being vacated.

Trial counsel's performance also fell below an objective standard when he failed to file a motion in limine to exclude testimony regarding the application of the Widmark Equation. At trial, the state introduced the Widmark Equation through an expert, who testified that if Mr. Andrus had consumed alcohol only after reaching the bridge, which the state estimated to be approximately ninety minutes prior to the breath test, the BAC would have been .175, not the measured .247 and .248. Trial Tr. p. 372, p. 381, ln.1-4.

Trial counsel testified that he did not consider filing a motion in limine to exclude application of the Widmark Equation, did not conduct any legal research regarding whether the Widmark Equation and whether I.R.E. 702 was applicable to the state's use of the Widmark Equation. Tr. p. ln. Because a motion in limine would likely have succeeded and because the state's case rested on being able to prove that Mr. Andrus' BAC was over .08 while driving to the bridge, Mr. Andrus established deficient performance and prejudice.

Under Idaho Rule of Evidence 702, a qualified expert witness may testify to scientific knowledge that will assist the trier of fact to understand the evidence or to determine a factual issue. In determining the admissibility of expert testimony, the district court must consider two factors: (1) whether the expert is qualified, and if so, (2) whether the expert's testimony will assistthe trier of fact. *State v. Caliz-Bautista*, 162 Idaho 833, 835-36, 405 P.3d 618, 620-21 (Ct.

App. 2017). This latter inquiry requires a preliminary assessment of whether the expert's reasoning or methodology underlying his testimony is scientifically valid and can properly be applied to the facts at issue. *State v. Perry*, 139 Idaho 520, 523, 81 P.3d 1230, 1233 (2003). "In other words, for scientific evidence to be admitted, it must be supported by appropriate validation, establishing a standard of evidentiary reliability, and must assist the trier of fact to understand the evidence or to determine a fact in issue." *See State v. Trevino*, 132 Idaho 888, 893, 980 P.3d 552, 557 (1999); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-91 (1993) (explaining that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"). An expert's opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact."*Caliz-Bautista*, 162 Idaho at 836, 405 P.3d at 621. Furthermore, courts should consider whether the methodology utilized by the expert can properly be applied to the facts at issue. D. Craig Lewis, IDAHO TRIAL HANDBOOK2D, § 23:2.

Here, application of the Widmark Equation was unreliable because the expert lacked the necessary facts and the BAC used as a starting point was acquired at least 90 minutes after the time of consumption. The expert required additional data such as Mr. Andrus' whether Mr. Andrus was dehydrated, had Celiac's or Crohn's disease, and had any food in his system. Trial Tr. p. 372, ln. 24 - p. 373, ln.1; p. 407, ln. 22 - p. 408, ln.17; p. 432, ln. 21-24. In light of the unreliable facts on which the data points in this case were based, the district court should have excluded the state's application of the Widmark Equation at trial.

Trial counsel should have filed a motion in limine under I.R.E. 702 and if he had, the jury would not have been exposed to this unreliable and highly prejudicial testimony. The facts in this case closely mirror those in *Mata v. State*, 46 S.W.3d 902, 909-17 (Tex. Crim. App. 2001), one of only a few cases directly addressing the admissibility of the Widmark Equation. In *Mata*, defense counsel argued that the expert was only qualified to testify about the "average" or "normal" person, but that he could not apply his calculations to the defendant, because he did not whether the defendant engaged in "normal" drinking patterns, how much he had been eating, how much he had to drink, or his weight. *Id.* at 906. The Court first observed "that even those who believe retrograde extrapolation is a reliable technique have utilized it only if certain factors are known, such as the length of the drinking spree, the time of the last drink, and the person's weight." *Id.* at 915. The Court then noted that there was only one test of the defendant's BAC and that it occurred over two hours after the alleged offense, which the Court recognized was a significant length of time that seriously affects the reliability of any extrapolation and that the expert did not know the defendant's personal characteristics. *Id.* at 916.

Similarly, in Idaho, trial courts should consider "the extent to which the basic data are verifiable by the court and jury." *State v. Konechny*, 134 Idaho 410, 418, 3 P.3d 535, 543 (Ct. App. 2000). Here, the data points were entirely unreliable and case law was readily accessible to an attorney researching the admissibility of the Widmark Equation back in 2014. Accordingly, counsel performed deficiently by not filing a motion in limine.

Further, precluding evidence of the Widmark Equation would have deprived the state of the mechanism that the state relied on to prove its case. The prosecutor's statements during

closing argument further show how the state used this formula to give the jurors something ostensibly mathematically accurate to base their decision on. Trial Tr. p. 574-76. And trial counsel's failure to file a motion in limine cannot be deemed tactical in light of his testimony that he had not researched I.R.E. 702 or the Widmark Equation, nor even considered filing a motion in limine, all of which constitutes inadequate preparation on the issue.

Had trial counsel moved to exclude evidence of the BAC and of the Widmark equation, those motions should have been granted. Moreover, the expert evidence rebutted Mr. Andrus' testimony that he did not start drinking until after parking his vehicle on the bridge and, had the jury not heard this evidence, there if a reasonable probability the jury would not have found Mr. Andrus guilty of driving under the influence. Accordingly, the district court erred in concluding that Mr. Andrus failed to establish ineffective assistance of counsel and this Court should reverse and remand.

IV. CONCLUSION

For all the reasons set forth above, the district court erred in denying Mr. Andrus' petition for post-conviction relief and this Court should reverse the final judgment and remand with instruction that (i) Mr. Andrus' judgment of conviction be vacated and/or (ii) that he be given the opportunity to accept the state's initial plea offer.

Respectfully submitted this 31st day of August 2020

FYFFE LAW LLC

/s/ Robyn Fyffe
ROBYN FYFFE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an electronic copy was served on Criminal Law Division of the Idaho Attorney General at ecf@ag.idaho.gov on September 1, 2020.

/s/ Robyn Fyffe
ROBYN FYFFE