5-7-2018

Arellano v. State Respondent's Brief Dckt. 45179

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUAN MANUEL ARELLANO,	)	
	)	**No. 45179**
Petitioner-Appellant,	)	
	)	**Cassia County Case No.**
v.	)	**CV-2013-390**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Juan Manuel Arellano appeals from the judgment of the district court, entered after an evidentiary hearing, dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

Arellano took a handgun and went to a bar to wait for his wife, Ramona Monica Arellano Nanez. (R., p. 77.) When Ms. Nanez arrived and went out onto the dance floor with another man, Arellano walked towards her, pointed his handgun and fired a single shot that killed her. (R., pp. 77-78.) The bullet that killed Ms. Nanez exited her body and struck another person standing nearby. (R., p. 78, n. 2.) Another individual attempted to intervene and Arellano threatened and attempted to shoot him. (Id.) Arellano was arrested. (R., p. 78.) During his initial interview with the police, Arellano admitted that he had planned to kill Ms. Nanez. (Id.)

The state charged Arellano with murder in the first degree, aggravated battery for the bullet that struck the bystander and attempted murder for the attempt to shoot the person who tried to intervene. (41995 R., pp. 21-24[1]; R., p. 78, n. 2.) All three of the charges included a deadly weapon enhancement. (Id.) Kent Jensen represented Arellano. (R., p. 78.) To defend against the first degree murder charge, Mr. Jensen focused on Arellano's mental state at the time of the killing. (Id.) Arelleno told Mr. Jensen that he

[1] The Idaho Supreme Court ordered this record be augmented by the record in the prior appeal, No. 41995, Arellano v. State. (R., p. 2.) References to the prior record will be labeled "41995."

had a tumultuous relationship with Ms. Nanez. (Id.) Mr. Jensen initially believed there was evidence to potentially show the murder was committed in the heat of passion and thus would constitute a reduced charge of voluntary manslaughter. (See id.) Subsequently, during discovery, the state produced evidence that approximately three or four hours before he murdered Ms. Nanez Arellano sent a friend a text message, which said, "I'm going to kill that whore." (R., pp. 78-79.)

After Mr. Jensen saw the text message it changed the nature of his proposed defense. (R., pp. 78-79.) The text message made it very difficult to establish that the murder occurred without premeditation or malice aforethought. (See id.) Mr. Jensen and Arellano discussed the strength of the evidence regarding the first degree murder charge. (See R., pp. 79-80.)

Eventually the parties negotiated a plea agreement. (R., p. 80.) In a written agreement, Arellano agreed to plead guilty to murder in the first degree with the deadly weapon enhancement. (41995 R., pp. 50-53.) The state dismissed the remaining charges and agreed to recommend twenty-two years fixed and life indeterminate. (Id.) Arellano was free to make his own recommendation. (Id.)

At the change of plea hearing, Mr. Jensen explained that Arellano would be pleading guilty to first degree murder, but Arellano would enter an Alford[2] plea as to the premeditation and malice aforethought elements because, despite the text message and

[2] North Carolina v. Alford, 400 U.S. 25 (1970).

other evidence, Arellano did not believe he had the requisite mental state. (12/30/10 Tr., p. 12, L. 14 – p. 13, L. 5.[3])

> MR. JENSEN: Yes, Your Honor. There is some question – or we have some concern about one of the elements, which is the premediated element of the crime. The state has a text message which they would have presented into evidence sent by Mr. Arellano earlier in the day making reference to killing an individual, which we took to be [Ms. Nanez] in this case, and, consequently, there is some question about – in Mr. Arellano's mind he believed that was more of a conversation, but, anyway, the state would use that to establish the premediated malice aforethought part of that; however, Mr. Arellano had a different take on why that was written. So, consequently, what we've agreed to do is enter a North Carolina v. Alford plea with regard to that particular element of the first degree murder charge.

(Id.) Arellano pled guilty. (12/30/10 Tr., p. 13, L. 15 – p. 30, L. 16.) During the plea colloquy the state presented a factual basis for first degree murder with a deadly weapon enhancement. (12/30/10 Tr., p. 27, L. 4 – p. 29, L. 21.) The state represented that, in addition to the text message threatening to kill Ms. Nanez, Arellano admitted to the police that he was planning to kill Ms. Nanez, that he was embarrassed that Ms. Nanez would dance with other men, and that he took a loaded handgun to the bar and waited at the bar for Ms. Nanez to arrive. (Id.)

The district court entered judgment and sentenced Arellano to life in prison with twenty-two years fixed. (41995 Tr., pp. 70-73.) Arellano appealed. (41995 R., pp. 124-125.) On appeal Arellano argued the district court abused its discretion by imposing an excessive sentence. (Id.) The Idaho Court of Appeals affirmed the judgment. (Id.)

[3] The December 30, 2010 change of plea hearing is located at 41995 R., pp. 83-88.

Arellano filed a petition for post-conviction relief. (41995 R., pp. 5-19.) Arellano's pro se petition contained sixty-four assertions. (See id.) see also Arellano v. State, 158 Idaho 708, 709, 351 P.3d 636, 637 (Ct. App. 2015). The district court consolidated the sixty-four assertions into fourteen claims of ineffective assistance of defense counsel. Arellano, 158 Idaho at 709, 351 P.3d at 637. The district court summarily dismissed Arellano's petition. See id. Arellano appealed. See id.

On appeal, Arellano argued the district court erred in dismissing his claim that Mr. Jensen purportedly told Arellano that his mental state was not relevant. Id. at 709-710, 351 P.3d at 637-638. The Court of Appeals interpreted the claim at issue as alleging that "Arellano informed defense counsel about his mental state when he killed his wife and that defense counsel informed him that facts concerning his mental state were irrelevant." Id. at 711, 351 P.3d at 639. The Court of Appeals determined that Arellano provided sufficient evidence to support a prima facie case of deficient performance and prejudice as to this claim. Id. at 711-712, 351 P.3d at 639-640. The Court of Appeals therefore remanded the case. See id. at 712, 351 P.3d at 639.

On remand, the district court held an evidentiary hearing. (R., pp. 38-41.) Mr. Jensen and Arellano both testified. (1/13/17 Tr., p. 10, L. 3 – p. 118, L. 13, p. 120, L. 8 – p. 137, L. 7.) After the hearing the parties filed post-hearing briefs. (R., pp. 42-56, 57-67, 68-75.)

Arellano's post-hearing brief redefined the scope of his claim. (R., p. 81.) Arellano no longer contended that Mr. Jensen told him that facts regarding his mental state were irrelevant. (Id.) Instead Arellano now contended that Mr. Jensen failed to give

him advice regarding the elements of second degree murder and the application of the facts to those elements. (Id.)

The district court entered Findings of Fact and Conclusions of Law. (R., pp. 76-87.) As an initial matter, the district court determined that Arellano waived the claim that the Court of Appeals remanded for a hearing because Arellano did not make any arguments or identify any evidence to support this claim. (R., p. 81, n. 3.) However, the district court decided to "simply address[] the new argument that Mr. Arellano raised in his post-trial briefing." (R., p. 81.)

Arellano's new claim alleged that Mr. Jensen failed to give him advice regarding the elements and facts related to second degree murder. (See R., p. 81.) The district court analyzed both prongs of the Strickland[4] ineffective assistance of counsel test. (R., pp. 81-86.) The district court found that Arellano failed to prove, by a preponderance of the evidence, either prong of the Strickland test. (Id.)

First, the district court determined that Arellano failed to prove, by a preponderance of the evidence, that his counsel's performance was deficient. (R., pp. 83-84.) Mr. Jensen spoke to Arellano regarding the first degree murder charge and understood that the state had substantial evidence to support the malice aforethought and premeditation elements.

> In this case, Mr. Jensen spoke with Mr. Arellano and understood his version of the events. Mr. Jensen was aware that Mr. Arellano and Ms. Nanez had a tumultuous relationship, that Mr. Arellano stated he did not know Ms. Nanez would be at El Paralito on the night in question, that Mr. Arellano denied that he had intended to kill Ms. Nanez, and that Mr.

[4] Strickland v. Washington, 466 U.S. 688 (1984).

> Arellano was unwilling to admit to the malice aforethought and premeditation elements of first degree murder. However, Mr. Jensen was also aware that the State had evidence to support the malice aforethought and premeditation elements of first degree murder. The State had Mr. Arellano's text message and his statements to law enforcement officers regarding his intent to kill Ms. Nanez. Additionally, the State had evidence that Mr. Arellano took his handgun, went to El Paralito, waited for a period of time, and then approached and shot Ms. Nanez.

(R., p. 83.)

The district court found that "Mr. Jensen reviewed, analyzed, and weighed the evidence in the underlying case, and he discussed it with Mr. Arellano. Even though Mr. Arellano denied that he intended to kill Ms. Nanez, Mr. Jensen negotiated a plea agreement for Mr. Arellano due to the strength of the State's evidence." (R., p. 83.) Arellano agreed to plead guilty to first degree murder with an Alford plea "as to the elements of malice aforethought and premeditation." (R., pp. 83-84.) The Alford plea allowed Arellano "to maintain his position that he lacked the requisite mental intent." (R., p. 84.)

Further, the district court found that Arellano was not charged with second degree murder and there was no evidence that the state intended to amend the charge to second degree murder. (R., p. 84.) Nor did Arellano cite any legal authority that requires a defense attorney, when negotiating a plea deal, to give specific advice regarding an uncharged included offense. (Id.) Nor did Arellano provide any evidence that such advice regarding an uncharged offense would be required under an objective standard of reasonableness. (Id.)

The district court also determined that Arellano failed to show prejudice as required by the second prong of the Strickland test. (R., pp. 84-86.) Arellano failed to

provide evidence that had he been advised regarding second degree murder he would not have pled guilty and would have insisted on going to trial. (Id.)

> Mr. Arellano did not provide evidence or testify at trial in this case regarding the specific reasons for his decision to plead guilty to first degree murder. In the absence of such evidence, it is not possible to evaluate a potential causal connection between Mr. Jensen's failure to advise Mr. Arellano regarding second degree murder and Mr. Arellano's decision to plead guilty.

(R., pp. 84-85.)

The district court entered judgment dismissing Arellano's claims for post-conviction relief. (R., pp. 88-89.) Arellano timely appealed. (R., pp. 90-92.)

ISSUE

Arellano states the issue on appeal as:

> Did the district court err when [it] denied Mr. Arellano's petition for post-conviction relief?

(Appellant's brief, p. 6.)

The state rephrase the issue as:

Has Arellano failed to show the district court erred when it denied his petition for post-conviction relief?

ARGUMENT

The District Court Did Not Err When It Denied Arellano's Petition For Post-Conviction Relief

A. Introduction

After remand, the sole remaining issue to be determined at the evidentiary hearing was whether Mr. Jensen told Arellano that facts concerning his mental state were irrelevant to a first degree murder charge. See Arellano, 158 Idaho at 711, 351 P.3d at 639. At the evidentiary hearing, Mr. Jensen testified that he and Arellano discussed that Arellano's mental state was relevant, and was in fact the crux of the case. (See 1/13/17 Tr., p. 18, L. 19 – p. 25, L. 20, p. 40, L. 19 – p. 43, L. 13, p. 60, Ls. 4-14, p. 85, Ls. 4-9; see also R., pp. 78-80.)

In post-hearing briefing Arellano changed his claim and argued that Mr. Jensen was ineffective because he had not discussed the uncharged offense of second degree murder. (See R., p. 81.) The state objected to Arellano's post-hearing "attempt to refine, amend, or change" his ineffective assistance of counsel claim, arguing that the amendment was not permitted under the Idaho Rules of Civil Procedure and that the state "would be prejudiced for lack of notice." (R., p. 67.)

The district court found that Arellano abandoned his original claim. (R., p. 81, n. 6.) The court declined to determine whether Arellano's "new post-trial argument constitute[d] an unpled claim" and elected instead to "simply address[] the new argument that Mr. Arellano raised in his post-trial briefing." (R., p. 81.) Addressing that argument, the district court found that Arellano failed to present sufficient evidence on both of the Strickland prongs and denied Arellano's post-conviction claim. (See R., pp. 81-86.)

Arellano now challenges the denial of his ineffective assistance of counsel claim, arguing that "he demonstrated both deficient performance and prejudice." (Appellant's brief, p. 7.) Arellano's appellate challenge fails for two reasons. First, Arellano waived the only claim that was before the trial court on remand, and his new claim – that counsel was ineffective for not advising Arellano regarding the elements of second degree murder – was not alleged in his petition and was therefore not properly before the district court or this Court on appeal. Second, even assuming this Court considers the merits of Arellano's unpled claim, Arellano failed to show error in the district court's conclusion that Arellano failed to prove deficient performance and prejudice.

B. Standard Of Review

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

The appellate court will not disturb the district court's factual findings unless they are clearly erroneous. Icanovic v. State, 159 Idaho 524, 528, 363 P.3d 365, 369 (2015) (citing Murray v. State, 156 Idaho 159, 163-164, 321 P.3d 709, 713-714 (2014)).

However, the appellate court exercises free review of the district court's application of the relevant law to the facts. Id. (citing Murray, 156 Idaho at 163-164, 321 P.3d at 713-714). If the district court reaches the correct result by an erroneous theory, the appellate court will affirm the order upon the correct theory. Id. (citing Murray, 156 Idaho at 163-164, 321 P.3d at 713-714).

C. Arellano Has Failed To Show The District Court Erred When It Denied His Petition For Post-Conviction Relief

1. Arellano Waived His Sole Remaining Claim That His Counsel Gave Him Incorrect Advice Regarding The Relevancy Of His Mental State To The First Degree Murder Charge And His New Claim Was Not Properly Before The District Court And Should Not Be Considered On Appeal

A post-conviction applicant is required to raise "[a]ll grounds for relief available" in his "original, supplemental or amended application." I.C. § 19-4908. "[W]hen the defendant fails to raise an issue in the petition or in an amended petition, that issue is not raised before the district court and this Court will not consider the issue on appeal." Dunlap v. State, 159 Idaho 280, 293-294, 360 P.3d 289, 302-303 (2015) (citing McKinney v. State, 133 Idaho 695, 708, 992 P.2d 144, 157 (1999); Cowger v. State, 132 Idaho 681, 686-687, 978 P.2d 241, 246-247 (Ct. App. 1999)).

The Idaho Court of Appeals remanded Arellano's first post-conviction appeal for an evidentiary hearing on Arellano's remaining claim, that his defense counsel told him that his mental state was irrelevant to a first degree murder charge. See Arellano, 158 Idaho at 711, 351 P.3d at 639. The Court of Appeals interpreted that claim as alleging that "Arellano informed defense counsel about this mental state when he killed his wife and that defense counsel informed him that facts concerning his mental state were

irrelevant." Id. However, during the evidentiary hearing Arellano did not make any arguments or present any evidence to support this claim. (R., p. 81, n. 6.) Mr. Jensen testified that he told Arellano that his mental state was relevant, and was the "crux" of the case:

> Q. And specifically when you had conversations with Mr. Arellano about these charges, you had discussions about the relevance of the mental requirements for each charge?
>
> A. Correct, because that is the crux of establishing the voluntary manslaughter defense as opposed to something like a first degree murder charge.

(1/13/17 Tr., p. 85, Ls. 4-9.)

After the hearing Arellano "redefined" the scope of his claim and argued that "Mr. Jensen failed to give [Arellano] advice regarding the elements of second degree murder, the application of the facts to the elements of second degree murder, and the impact of a second degree murder conviction." (R., p. 81 (citing Petitioner's Post-Trial Brief. 2[5]).) The district court determined that this was a "new argument" and that Arellano waived the ineffective assistance of counsel claim that was remanded by the Court of Appeals. (Id.)

On appeal, Arellano argues "that the claim raised in the post-trial briefing is not a new claim, but rather a refinement of his initial claim[.]" (Appellant's brief, p. 8.) Arellano argues that his initial claim was "that his counsel told him that his mental state was irrelevant, but after the hearing he simply claimed that his counsel did not explain the

[5] This cited page in Petitioner's Post-Trial Brief can be found in the record at page 43.

difference in the mental state required for first or second degree murder." (Id.) Arellano's attempt to characterize his new claim as a "refinement" fails.

The Idaho Court of Appeals' decision characterized the only claim it remanded for an evidentiary hearing as alleging that "Arellano informed defense counsel about his mental state when he killed his wife and that defense counsel informed him that facts concerning his mental state were irrelevant." Arellano, 158 Idaho at 711, 351 P.3d at 639. The Court of Appeals reasoned that, if Arellano's assertions that he was in "a blind rage" when he killed his wife were true, then his mental state was relevant to the first degree murder charge. Id. at 711-712, 351 P.3d at 639-40.

> Arellano's pro se claim is not artfully pled, yet the assertions listed above do add up to a claim asserting that defense counsel provided deficient performance by advising him that facts concerning Arellano's mental state when he killed his wife were irrelevant. Taking the other factual assertions offered by Arellano as true about the circumstances leading up to his wife's death, Arellano's mental state was relevant, as Arellano explained that he was in "a blind rage" after seeing his wife return to the bar and that his rage was "overwhelming." Indeed, evidence challenging the premeditation element of first degree murder might lead a jury to convict of the lesser charge of second degree murder, I.C. § 18–4003(a) and (g), and the unlawful killing of a human being in the heat of passion is voluntary manslaughter, not murder, I.C. § 18–4006. Therefore, Arellano's assertions support a prima facie case of deficient performance by defense counsel when, as Arellano alleges, counsel insisted that facts concerning Arellano's mental state when Arellano killed his wife were irrelevant.

Id. at 711, 351 P.3d at 639.

However, this was not the claim Arellano pursued on remand. Instead of presenting evidence and argument that Mr. Jensen told him that his mental state was irrelevant to a first degree murder charge, Arellano contended for the first time in his post-hearing briefing, that Mr. Jensen was ineffective because he did not give Arellano

advice regarding the elements of second degree murder. This is a new claim. Claiming that counsel incorrectly told him that his mental state was irrelevant to a first degree murder charge is a very different claim than counsel failing to give detailed advice regarding an uncharged lesser included offense. While first and second degree murder require different mental states, a claim that counsel advised Arellano that his mental state was irrelevant is very different from a claim that counsel failed to advise Arellano regarding the elements of second degree murder.

On appeal Arellano also argues that even if it is a new claim the court may grant relief even if it has not been specifically requested.[6] (Appellant's brief, pp. 8-9 (citing Cady v. Pitts, 102 Idaho 86, 90, 625 P.2d 1089, 1093 (1981); O'Connor v. Harger Constr., Inc., 145 Idaho 904, 911, 188 P.3d 846, 853 (2008); Child v. Blaser, 111 Idaho 702, 704, 727 P.2d 893, 895 (Ct. App. 1986).) None of the cases cited by Arellano applied this rule to a post-conviction relief. While the Idaho Rules of Civil Procedure generally apply to post-conviction proceedings, the rules governing an application for post-conviction relief differ from a complaint in a civil action. See I.C. § 19-4903; McKinney v. State, 162 Idaho 286, 290, 396 P.3d 1168, 1172 (2017). However, Idaho Code § 19-4908 specifically requires "[a]ll grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application."

[6] Idaho Rule of Civil Procedure 15(b) also permits a trial court to amend a pleading to conform to the evidence if the amendment would not prejudice the other party. See I.R.C.P. 15(b). However, Arellano did not move to amend his pleadings before the district court. Nor does Arellano contend on appeal that Rule 15(b) applies.

"[W]hen the defendant fails to raise an issue in the petition or in an amended petition, that issue is not raised before the district court and this Court will not consider the issue on appeal." Dunlap, 159 Idaho at 293-294, 360 P.3d at 302-303 (citations omitted). The district court correctly ruled that Arellano waived his sole remaining claim by not presenting any evidence or argument to support it at the evidentiary hearing. (See R., p. 81.) Even though the district court considered the merits of Arellano's new claim, this Court should decline to do so because the claim was never pled. Like the district court, this Court should consider Arellano's remaining claim waived and affirm the judgment of the district court on this alternative basis.

2. Arellano Has Failed To Show The District Court Erred When It Found That He Failed To Prove His Newly Argued Ineffective Assistance Of Counsel Claim

Even if the merits of Arellano's new claim are considered, his argument on appeal fails. While the district court determined that Arellano waived his remaining claim, the district court still considered the merits of his new claim and found that Arellano failed to prove, by a preponderance of the evidence, that Mr. Jensen provided ineffective assistance of counsel by failing to advise Arellano regarding the facts and elements of the uncharged offense of second degree murder. (R., pp. 81-87.) Application of the law to the facts supports the district court's determination.

a. Arellano Has Failed To Show The District Court Erred When It Found Arellano Failed To Prove Mr. Jensen's Performance Was Deficient

"A post-conviction relief proceeding is a civil action, and thus the 'applicant must prove by a preponderance of evidence the allegations upon which the request for post-

conviction relief is based.'" Adamcik v. State, 163 Idaho 114, 408 P.3d 474, 482 (2017) (quoting State v. Payne, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008)). "The Idaho Supreme Court 'has adopted the *Strickland* two-prong test to evaluate whether a criminal defendant received effective assistance of counsel.'" Id. (citing Dunlap v. State, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004); Strickland v. Washington, 466 U.S. 668 (1984)). "A defendant must prove both that (1) counsel's performance was deficient and (2) the deficiency prejudiced the defense." Id. (citing Strickland, 466 U.S. at 687). "An appellant must demonstrate 'that the attorney's representation fell below an objective standard of reasonableness' in order to prove deficient performance." Id. (citing Gilpin-Grubb v. State, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002)).

Here, the district court found that Arellano failed to prove that Mr. Jensen's performance was deficient. (See R., pp. 83-84.) The court found that "Mr. Jensen reviewed, analyzed, and weighed the evidence in the underlying case, and he discussed it with Mr. Arellano." (Id.) Even though Arellano claimed he did not intend to kill Ms. Nanez, Mr. Jensen negotiated a plea agreement due to the strength of the state's evidence. (Id.) The Alford plea allowed Arellano to maintain his new position, that he did not intend to kill Ms. Nanez, while at the same time taking advantage of the state's plea offer. (Id.) The district court went on to determine that Arellano was not charged with second degree murder and there was nothing about the case that would require Mr. Jensen to provide details of the elements of an uncharged lesser included offense.

> Although Mr. Arellano now contends that Mr. Jensen should have advised him regarding the offense of second degree murder, Mr. Arellano was not charged with second degree murder. The State did not express any intention to amend the charge to second degree murder or make a plea

> offer for second degree murder. Further, Mr. Jensen correctly perceived that the State had evidence of premeditation to support the first degree murder charge if the case went to trial.
>
> Mr. Arellano did not cite to any rule, statute, or case law that requires a defense attorney, in negotiating a plea deal, to give advice to a criminal defendant regarding an uncharged included offense. Further, he did not provide any specific evidence, in the form of testimony from an expert witness or otherwise, to establish that such advice would be required under an objective standard of reasonableness.

(R., p. 84.) The district court found that Arellano failed to provide evidence that Mr. Jensen's performance fell below an objectively reasonable standard. (Id.)

On appeal, Arellano claims that the district court erred, contending Mr. Jensen had a duty to advise Arellano regarding the elements of second degree murder because, "without advice on the difference between first and second degree murder, where he contested the requisite mental intent, his plea was not knowingly and voluntarily made." (Appellant's brief, pp. 9-10.) Arellano also argues he received no benefit from his Alford plea because "the district court was free to treat Mr. Arellano as though he admitted to malice aforethought and premeditation." (Id.) Both of Arellano's arguments are without support in the record.

"The *Strickland* standard applies to advice regarding plea bargains as defendants are entitled to 'the effective assistance of competent counsel' in considering a plea deal." Icanovic, 159 Idaho at 529, 363 P.3d at 370 (citing Padilla v. Kentucky, 559 U.S. 356, 364 (2010)). "To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness." Arellano, 158 Idaho at 710, 351 P.3d at 638 (citing Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). The tactical or strategic decisions of trial counsel will not be second-

guessed on appeal "unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Id. (citing Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994)).

Arellano fails to establish that the district court erred when it determined that Mr. Jensen's representation did not fall below an objective standard of reasonableness. (See R., pp. 83-84.) Mr. Jensen made the appropriate tactical decision to pursue voluntary manslaughter until more evidence came to light, at which point he focused on getting a good plea agreement for Arellano. It was reasonable, and not a sign of ignorance of the law, to not discuss in detail the differences between first and second degree murder. As found by the district court, "Mr. Arellano was not charged with second degree murder[]" and "[t]he State did not express any intention to amend the charge to second degree murder or make a plea offer for second degree murder." (R., p. 84.)

The implication of Arellano's argument, that he would not have pled guilty to first degree murder if Mr. Jensen had advised him regarding the elements of second degree murder, does not logically track. Not advising Arellano regarding the elements of an uncharged, potentially lesser included crime, does not make his plea to the charged offense any less knowing or voluntary.

Mr. Jensen testified that he did not see much advantage in going to trial on a second degree murder charge, as opposed to a first degree murder charge, especially considering the state's offer of 22 years. (1/13/17 Tr., p. 103, Ls. 2-11.)

> Q. Okay, whether or not you had discussion between first degree murder or second degree murder, the discussion of the mental intent still occurred, either way?
>
> A. In my – I guess in my calculation I didn't know how much of an advantage there was by going to trial on a second degree as opposed to the first, especially when we got the offer for the 22 years under the circumstances, with the provision that we could argue for less. And so I didn't know that I really saw how much of an advantage that would really be to Mr. Arellano under the circumstances.

(1/13/17 Tr., p. 103, Ls. 2-11.)

Mr. Jensen appropriately determined there was no real advantage for Arellano to go to trial and try for a second degree murder lesser included offense. Since the state was not pursuing the death penalty, the punishment for first and second degree murder are similar. See I.C. § 18-4004. For first degree murder, if the death penalty is not sought, the punishment is a mandatory minimum ten years in prison with a maximum of life in prison. See Id. The punishment for second degree murder is ten years to life. See id. ("Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.") Thus, there was very little benefit for Arellano to go to trial and hope for a potentially lesser included offense of second degree murder.

Contrary to his argument on appeal, Arellano also clearly received a benefit as a result of his Alford plea. As found by the district court, the Alford plea allowed Arellano to maintain his new position, that he did not intend to kill his wife, and still take advantage of the state's plea offer. (See R., pp. 84-85.) If he had insisted on going to trial on first degree murder to challenge only premeditation, the state would have proceeded and likely secured convictions on the aggravated battery, and attempted murder

charges, as well as the weapons enhancements, to which Arellano had no known defense. The Alford plea provided a benefit to Arellano.

The district court properly determined that Arellano failed to prove by a preponderance of the evidence that Mr. Jensen's performance was deficient because he did not discuss an uncharged, potentially lesser included offense.

b. Arellano Has Failed To Show The District Court Clearly Erred When It Determined That He Failed To Prove A Causal Connection Between Any Claimed Deficient Performance And His Decision To Plead Guilty

The district court found that Arellano failed to provide evidence that had Mr. Jensen advised him in detail regarding the elements of an uncharged second degree murder offense he would not have pled guilty and would have insisted on going to trial. (See R., pp. 84-86.) On appeal, Arellano claims that "he established a sufficient causal connection between the lack of advice as to second degree murder and his decision to plead." (Appellant's brief, p. 13.) Arellano has failed to show the district court's factual finding regarding a lack of causal connection was clearly erroneous.

"To establish prejudice, a petitioner must show a reasonable probability that, but for the attorney's deficient performance, the result of the proceeding would have been different." Cosio-Nava v. State, 161 Idaho 44, 48, 383 P.3d 1214, 1218 (2016) (citing Strickland, 466 U.S. at 694). "To show prejudice, a petitioner must demonstrate a reasonable probability that 'but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'" Id. (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). "The petitioner must show that counsel's deficient performance

'affected the outcome of the plea process.'" Id. (citing Hill, 474 U.S. at 59). The petitioner must convince the district court that a decision to reject the plea bargain would have been rational under the circumstances. Id. (citing Padilla, 559 U.S. at 372). The petitioner is required to draw a causal connection between his attorney's alleged deficient performance and the petitioner's decision to plead guilty. See Ridgley v. State, 148 Idaho 671, 677, 227 P.3d 925, 931 (2010).

The district court found no causal connection because Arellano failed to present any evidence regarding the reasons he chose to plead guilty to first degree murder. (See R., pp. 84-86.)

> Mr. Arellano did not provide evidence or testify at trial in this case regarding the specific reasons for his decision to plead guilty to first degree murder. In the absence of such evidence, it is not possible to evaluate a potential causal connection between Mr. Jensen's failure to advise Mr. Arellano regarding second degree murder and Mr. Arellano's decision to pled guilty.

(R., pp. 84-85.) On appeal, Arellano argues that his repeated assertions that he did not have the "intention" to kill Ms. Nanez (despite the significant evidence otherwise) is enough to show a causal connection. (See Appellant's brief, pp. 12-13.) This argument does not establish a causal connection. He does not cite to any evidence or testimony showing that, had he been advised regarding second degree murder, he would have insisted on going to trial on the first degree murder charge in the hopes of getting convicted of second degree murder, which carries the same maximum punishment as first degree murder.

In addition to lack of evidence, Arellano's argument also fails when it is logically examined. He argues on appeal that he would have insisted on going to trial in the hopes

of getting convicted on the uncharged second degree murder charge. (See Appellant's brief, pp. 12-13.) However, Arellano testified that he wanted to go to trial because he did not have the intention to kill Ms. Nanez:

> Q. At some point did you want to go to a trial?
>
> A. Yes.
>
> Q. What was the theory that you wanted to go to trial on to put in front of the jury?
>
> A. Well, because I didn't have the intention to kill my wife. I didn't have the intention to kill my wife, but well, he was my attorney.

(1/13/17 Tr., p. 127, Ls. 7-13.) An element of second degree murder is "intent." I.C. §§ 18-4002, 18-4003; ICJI 702, 705. Second degree murder requires "malice aforethought." I.C. § 18-4003; ICJI 705. Express malice requires "a deliberate intention" and implied malice requires "an intentional act." ICJI 702; I.C. § 18-4002. Thus Arellano's testimony was not that he wanted to go to trial and try for the lesser included offense of second degree murder (which requires intent), but rather, he wanted to go to trial because he now claims he did not have the intent to kill Ms. Nanez. Thus, Arellano's own testimony contradicts his argument on appeal.

Further, continuing to assert his lack of intent does causally lead to a trial. Continuing to assert a lack of intention could also lead to an Alford guilty plea on the intent elements of first degree murder in order to take advantage of the plea agreement, which included a favorable sentencing recommendation and the dismissal of other charges.

The district court also found that, even had Arellano been advised regarding the uncharged second degree murder crime, it would not have been rational for him to reject the state's plea offer under the circumstances. (See R., pp. 85-86.) Nor did Arellano provide evidence that there was a real potential for a jury to convict of second degree murder if it were offered as a lesser included offense. (Id.)

> However, Mr. Arellano did not provide sufficient evidence to support this conclusion. Although Mr. Arellano testified that he did not expect Ms. Nanez to be at [the bar] on the night in question, the State's evidence of premeditation consisted of Mr. Arellano's own statements that he intended and planned to kill Ms. Nanez, as shown in his text message to Ms. Castaneda and in his statement in his initial interview with law enforcement.

(R., p. 85.) On appeal Arellano has failed to show the district court erred. Arellano failed to prove, by a preponderance of the evidence, that he was prejudiced by any claimed deficient performance. The district court properly denied Arellano's post-conviction claim.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 7th day of May, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd