1-30-2018

Thumm v. State Appellant's Brief Dckt. 45290

IN THE SUPREME COURT OF THE STATE OF IDAHO

VANCE E. THUMM,	)	
	)	
Petitioner-Appellant,	)	**NO. 45290**
	)	
v.	)	**Ada Co. CV-PC-2013-14688**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S BRIEF

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

HONORABLE SAMUEL A. HOAGLAND
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Appellant/Petitioner Vance Thumm (referred hereinafter as Vance, Mr. Thumm, or Appellant) appeals from the summary dismissal of his petition for post-conviction relief. He raises many errors with the first two being the most significant and the rest having a more cumulative effect.

First, trial counsel failed to object to (or move to sever) a classic *Bruton*[1] confrontation clause violation when a non-testifying co-defendant's statements, which were inadmissible against Vance, were nevertheless admitted without limitation at their joint trial.

In response, the post-conviction court held that the statements were actually admissible as excited utterances even though the two witnesses that related those statements both testified the declarant co-defendant was not excited. The post-conviction court further held that one statement made by the non-testifying co-defendant was also admissible as a statement against interest of the witness testifying about it because it inculpated him.

These are obviously wrong rulings, and the court's ultimate conclusion based on them, that the cases could be joined because the evidence would have been admissible in Vance's separate trial, was erroneous as well.

[1] *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1970).

The second issue involved a *Brady*[2] claim. A fingerprint report was tardily disclosed prior to trial. The trial court ruled it was too late for the defense to have an expert look at it and excluded it from evidence. After trial the exculpatory nature of the report was discovered by the defendant.

The post-conviction court held, *inter alia*, that *Brady* requires suppression of evidence and, since the report was disclosed prior to trial (albeit late), that there is no evidence the state suppressed such evidence. Appellant asserts that while the test is somewhat different, delayed disclosure can also be a *Brady* violation and suggests the test used by the First Circuit is instructive and should be adopted.

Statement of the Facts and Course of Proceedings

The facts as they appear in Appellant's opening brief in the direct appeal (Supreme Court No. 37512) of this case set forth in a succinct manner relevant evidence presented at the jury trial in this matter with precise citations to the trial transcript.[3] Where they are necessary, additional facts will be provided below at the appropriate time.

On the night of April 10, 2009, Jeremy Steinmetz bought three Olde English "forties" and a bottle of Tequila and took them over to Paris Davis' house for an informal party with friends before going out to the bars for the night. (Tr., p. 696, Ls. 2-13, p. 697,

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[2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

[3] The district court took judicial notice of the trial transcripts, so Appellant is contemporaneously herewith moving this Court to take judicial notice of the trial transcripts contained in Supreme Court No. 37512. (R. p. 350.)

A citation to "R" will always refer to the instant Clerk's Record and a citation to "Tr." will always refer to the trial transcript.

Ls. 1-3.) When Steinmetz arrived with Helen Fisher, Ms. Davis and Kaylan Speers were already at the house. (Tr., p. 693, Ls. 18-25.) Soon thereafter, Vance Thumm, Ms. Davis' boyfriend, arrived purportedly wearing a light blue shirt with a design on the front. (Tr., p. 697, L. 12 – p. 698, L. 5.) Prior to going to The Office, a Boise bar, Steinmetz had a shot of Tequila with Mr. Thumm.[4] (Tr., p. 804, Ls. 11-14.) At about 10:30 p.m., everyone loaded into Steinmetz's 1994 Cadillac STS and headed to The Office. (Tr., p. 698, Ls. 13-25.) While at the bar, Steinmetz consumed approximately three AMF's: a blue alcoholic beverage between six and eight inches tall.[5] (Tr., p. 461, L. 7 – p. 462, L. 21.) At about 1:30 a.m., Steinmetz, Ms. Davis, and Ms. Fisher left The Office and went back to Paris' place. (Tr., p. 700, L. 6 – p. 702, L. 17.)

Upon arriving at Paris' residence, Steinmetz discovered that the alcohol he had purchased and left there was missing. (Tr., p. 716, Ls. 9-17.) Steinmetz then learned that Mr. Thumm had rented a motel room at the Budget Inn and now had to drive the girls over to the motel so that Ms. Davis could be with her boyfriend.[6] (Tr., p. 705, L. 2 – p. 708, L. 19.) Once at the motel, Steinmetz discovered his bottle of Tequila and Olde English forties and indicated he suspected Mr. Thumm had taken his alcohol and was "mad" about it. (Tr., p. 716, Ls. 3-17, p. 787, L. 8 – p. 788, L. 10.)

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[4] On direct examination, Steinmetz had testified that only Ms. Fisher was drinking before going to The Office and then admitted on cross examination that he committed perjury by stating he had not consumed alcohol prior to going to the bar. (*See* Tr., p. 698, Ls. 6-8, p. 804, Ls. 8-24.)

[5] AMF stands for "Adios Motherfucker" and is described as a very strong alcoholic drink consisting of a number of different liquors. (Tr., p. 461, Ls. 7-11, p. 803, Ls. 3-23.)

[6] Steinmetz and Ms. Davis had a prior short sexual relationship that ended when Paris broke up with him. (Tr., p. 788, L. 18 – p. 789, L. 17.)

At around 3:00 or 3:30 a.m., Deven Ohls arrived at the Budget Inn with Ms. Speers and his girlfriend, Brooke Everhart. (Tr., p. 493, L. 19 – p. 495, L. 1.) Mr. Ohls testified that there were at least 15 people inside the hotel room. (Tr., p. 497, Ls. 5-8.) After being at the party for a short time, Mr. Ohls was sucker punched from the side. (Tr., p. 501, Ls. 1-10.) Mr. Ohls described the person that punched him as a Hispanic male, about his height, with longer hair, and no noticeable tattoos. (Tr., p. 503, L. 12 – p. 504, L. 25.) After the first punch, Mr. Ohls indicated that he was attacked by maybe four or five guys. (Tr., p. 506, Ls. 1-17.) At one point during the altercation, one of the attackers pulled out a knife and stabbed Mr. Ohls in the buttocks. (Tr., p. 507, L. 19 – p. 509, L. 11.) Mr. Ohls testified that he did not recall seeing Mr. Thumm at the motel that night, but he did see who was punching him, and wanted to testify because he was "100 percent" sure Mr. Thumm did not participate in the attack. (Tr., p. 515, L. 10 – p. 516, L. 10, p. 529, L. 3 – p. 531, L. 7, p. 534, Ls. 5-10.) In fact, Mr. Ohls testified that in May he asked the prosecutors to come and talk to him, and he told the investigator and deputy prosecutor that Mr. Thumm was not involved in the attack. (Tr., p. 532, L. 17 – p. 533, L. 1.) When Officer Jesiah Ransom arrived on the scene and asked Mr. Ohls what happened, Mr. Ohls told him that he was jumped by a "black motherfucking nigger." (Tr., p. 372, L. 10 – p. 373, L. 3.)

Approximately a week after the incident, Christopher Smith admitted to stabbing Mr. Ohls and participating in the attack. (Tr., p. 956, L. 13 – p. 957, L. 4, p. 990, L. 1 – p. 991, L. 15.) In fact, Mr. Smith voluntarily turned himself in following the altercation, admitted punching and stabbing Mr. Ohls, and told officers that he felt Mr. Thumm was being unfairly implicated in the offense because he paid for the motel room. (Tr., p. 989,

L. 23 – p. 990, L. 6.) Mr. Smith was arrested and charged with aggravated battery. (Tr., p. 957, Ls. 3-16.) Mr. Thumm was also arrested and charged with aggravated battery, and a third person, Frankie Hughes, was also later arrested and charged with two counts of aggravated battery.[7] (Tr., p. 959, L. 23 – p. 964, L. 11.) Hughes was actually the last person arrested for the attack on Mr. Ohls as he fled to Utah after the fight. (Tr., p. 907, L. 11 – p. 908, L. 6.) From the beginning of the investigation, Hughes was uncooperative and untruthful with police. (Tr., p. 987, L. 20 – p. 988, L. 12.) However, following his preliminary hearing wherein he was bound over for one count of felony aggravated battery on Mr. Ohls, and Officer Brian Holland convinced him he would have a "good chance" at probation if he helped officers out, Hughes agreed to provide police with his version of the events occurring on April 11th. (Tr., p. 908, L. 17 – p. 909, L. 9, p. 987, L. 16 – p. 988, L. 17.)

Hughes testified that on the morning of April 11th, Mr. Thumm invited him over to a party at the Budget Inn. (Tr., p. 850, L. 17 – p. 851, L. 13.) When he got there, he observed Mr. Thumm, Mr. Smith, and Ariel Carpenter all in the room, with Mr. Thumm wearing a "white tannish shirt." (Tr., p. 851, L. 18 – p. 852, L. 9, p. 853, Ls. 22-25.) According to Hughes, he overheard Mr. Thumm tell Ms. Davis over the phone, "[d]on't bring any fuckin' lames over because I don't feel like beating anyone up tonight." (Tr., p. 857, Ls. 3-11.) Later, when Mr. Ohls arrived at the party, Hughes told the jury that Mr. Thumm purportedly asked him "Who the fuck is this[?]" (Tr., p. 860, Ls. 10-16.) Hughes testified that Mr. Thumm and Mr. Ohls were relaxed, talking at first, then

[7] One of the aggravated battery charges was related to Hughes breaking a beer bottle over Ms. Everhart's head during the altercation. (Tr., p. 884, Ls. 23-25, p. 908, Ls. 2-16.)

Mr. Thumm took a drink of the Tequila and "then I look over and I look back up, and Deven Ohls is sitting in the corner of that wall. And that's when I seen [sic] Vance was punching him in the face." (Tr., p. 864, L. 1 – p. 867, L. 25.) Hughes continued to describe his purported observations of the fight, identifying only Mr. Thumm and Mr. Smith as the combatants of Mr. Ohls. (*See* Tr., p. 868, L. 1 – p. 886, L. 4.) According to Hughes he was just an innocent observer to the battery on Mr. Ohls and even told the jury he tried to stop the fight on two occasions. (*See* Tr., p. 868, L. 1 – p. 888, L. 13.)

The only other person that testified that he saw part of the altercation at the Budget Inn was Steinmetz. Steinmetz said that soon after he arrived at the motel and discovered his missing alcohol, he felt Mr. Thumm's body bump against him. (Tr., p. 715, L. 22 – p. 716, L. 21, p. 723, Ls. 12-17.) Steinmetz told the jury that Mr. Ohls was "[s]tanding in a fetal position, holding, covering his head, while Mr. Thumm was throwing upper cuts and the Hispanic male was stomping at Mr. Ohls head." (Tr., p. 723, L. 18 – p. 724, L. 16.) Steinmetz ran out of the room to his car to find Ms. Davis by the passenger side door "clearly freaking out." (Tr., p. 726, L. 14 – p. 727, L. 22.) Steinmetz then ran over to Mr. Ohls' car to find Ms. Everhart, Ms. Speers, and Ms. Fisher sitting inside. (Tr., p. 731, Ls. 1-18.) Steinmetz testified that he went back into the motel room to get Ms. Speers' purse and identified two individuals holding Mr. Ohls on the bed and "one was in front of him holding a bottle." (Tr., p. 731, L. 19 – p. 732, L. 19.) Steinmetz told the jury that he saw the person, whom he could not identify, swing the bottle toward Mr. Ohls' face. (Tr., p. 732, L. 23 – p. 733, L. 5.) Steinmetz grabbed the purse, left the room, gave it to Ms. Speers, and went to his car. (Tr., p. 733, L. 9 – p. 735, L. 25.)

Steinmetz testified that he was in the motel room during the fight for only up to 30 seconds. (Tr., p. 772, Ls. 16-25, p. 774, Ls. 6-10.) Eventually Hughes, the Hispanic male, and Mr. Thumm got into Steinmetz's car, and he drove them to Ms. Davis' residence. (Tr., p. 736, L. 1 – p. 737, L. 22.) While in the car, Steinmetz alleged that he heard Ms. Davis tell the occupants to get rid of their clothing that had blood stains on it.[8] (Tr., p. 739, L. 18 – p. 740, L. 17.)

Steinmetz dropped everyone in his car off at Paris' residence and returned to the Budget Inn. (Tr., p. 756, L. 19, p. 757, L. 12.) He was stopped and questioned by police, but failed to provide officers with any of the significant information he disclosed during his testimony in trial. (Tr., p. 759, L. 4 – p. 761, L. 22.) Steinmetz attempted to excuse his inconsistent statements and uncooperative behavior because he was afraid of being charged with aiding and abetting[9] and answered "yes" to the prosecutor's leading question that the reason he failed to identify Mr. Thumm in the first photo lineup "was because of fear." (Tr., p. 763, L. 12 – p. 765, L. 10, p. 784, Ls. 18-24.) A few days later, Steinmetz told the jury that Mr. Thumm purportedly told him to "just don't say nothing." (Tr., p. 762, L. 20 – p. 763, L. 4.)

Mr. Thumm was charged with Aggravated Battery and Persistent Violator and his case with joined with that of Paris Davis, who was charged with the felony offenses of solicitation of destruction, alteration or concealment of evidence and accessory to aggravated battery.

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[8] According to Steinmetz, Ms. Davis also said "Vance, you're going to prison." (Tr., p. 755, Ls. 18-21.)

[9] Steinmetz has never been charged with anything associated with this case. (Tr., p. 784, L. 25 – p. 785, L. 2.)

Mr. Thumm was originally represented by Ada County Public Defender Nicolas "Nick" Wollen. (R. p. 351.) Due to his dissatisfaction with his public defender, he hired retained counsel, Virginia Bond, approximately two months before trial. (R. p. 351.) She characterized the public defender as having done absolutely nothing.

> There was really not a thing done by the public defenders. No discussion about response to request for discovery, no witness list. Absolutely nothing.

Tr. p. 21, lns. 2-5.

Mr. Thumm and Paris Davis were tried together to a jury and both were found guilty as charged. Virginia Bond withdrew as counsel prior to sentencing due to a conflict of interest that made it impossible to communicate and a different public defender was appointed. (R. p. 146, 351.) Mr. Thumm was sentenced to 40 years in prison with the first 40 years fixed. (R. p. 351) The Court of Appeals affirmed his conviction and judgment in a published opinion. *State v. Thumm*, 153 Idaho 533, 285 P.3d 348 (Ct.App. 2012.)

Mr. Thumm timely brought a verified petition for post-conviction relief with exhibits. (R. p. 7-65.) The state filed an answer to the petition and a motion for summary disposition and brief in support. (R. p. 102-103; 104-128; 129-130.) The state filed an objection to Petitioner's exhibits, which the court overruled. (R. p. 350.)

With leave of court, Petitioner filed an amended verified petition that was identical to the original petition up until the end where new claims, paragraphs, and exhibits were added. (R. p. 138-211.) The state filed a supplemental brief in support of motion for summary disposition of additional claims to address the additional claims. (R. p. 214-218.) Appellant filed Petitioner's response to Respondent's motion for summary

disposition with exhibits. (R. p. 223-343.) The state filed a notification of citations and authority. (R. p. 344-346.)

A hearing on the motion for summary disposition was held and the court took he matter under advisement . (R. p. 347.)

The court issued a written order granting state's motion for summary disposition and dismissing petitioner's petition for post-conviction relief. (R. p. 350-393.) The court did note that it had taken judicial notice in response to the various parties requests including the information in the criminal case, the jury instructions, and the trial transcripts. (R. p. 350.)

A separate judgment was entered. (R. p. 348-349.)

Appellant timely appeals. (R. p. 409-411.)

ISSUE

WHETHER THE COURT ERRED IN SUMMARILY DISMISSING THE PETITION FOR POST CONVICITON RELIEF

ARGUMENT

THE COURT ERRED BY SUMMMARILY DISMISSING THE PETITION FOR POST-CONVICITON RELIEF

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id*.

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id*.

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*. at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

More specifically as to allegations of ineffective assistance of counsel based on tactical decisions, the Court of Appeals explained in *Stevens v. State*, 156 Idaho 396 (Ct. App. 2013):

> This Court has long adhered to the proposition that tactical or strategic decisions of 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. There is a strong presumption that counsel's performance fell within the wide range of professional assistance.

Id., p. 385-386 (internal citations omitted).

C. Cumulative Error

"Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Bias v. State*, 159 Idaho 696, 705 (Ct. App. 2015).

D. The Claims and the Court's Rulings

The court issued a lengthy Order Granting State's Motion for Summary Disposition and Dismissing Petition for Post-Conviction Relief (hereinafter Order) which grouped Petitioner's claims into six broad claims for post-conviction relief with sub-issues within each claim. Most of the claims alleged ineffective assistance of counsel, but there was also a *Brady* claim as well as prosecutorial misconduct.

Given the number of claims and length of the materials and rulings, Appellant will focus on the most important claims. However, Appellant is expressly appealing the dismissal of the entire petition and all claims.

E. Ineffective Assistance of Counsel Regarding Joinder

i) District court's ruling

The post-conviction court summarized this claim as follows:

> Petitioner contends his counsel was ineffective for failing to oppose the State's Motion for Joinder, or for failing to move to sever the cases. Petitioner contends such opposition or motion would have been successful, because joinder with Paris Davis's case violated the rule set forth in *Bruton v. United States*, 391 U.S. 123 (1970). Petitioner also contends his trial counsel was ineffective for failing to object to hearsay statements made by co-defendant at trial. Petitioner also contends his appellate counsel was ineffective for failing to raise this issue as a fundamental error on appeal. (footnote omitted)
>
> . . .
>
> At Petitioner's trial, both Jeremy Steinmetz and Frankie Hughes testified that Davis told Petitioner that he was going to prison. Hughes also testified that Davis told Petitioner and Hughes that they needed to burn their clothes. Hughes testified that this statement was obviously due to the fact that they had blood on their clothes. Petitioner contends that these statements (i.e. "Vance, you're going to prison" and that they need to get rid of the clothing) would not have been admissible had Petitioner been tried separate from Davis.

Order, p. 7-8. (R. p. 356-357.)

The Order explained that Jeremy Steinmetz testified that after the fight started, he ran out of the motel room and to his car and saw Paris Davis there, and she was freaking out and told him to get in the car. After the fight, which was at least a few minutes later, when he was driving them to Paris' house she was still freaking out and told them they had to get rid of their clothing because it was evidence and she was speaking kind of loud and also said "Vance, you're going to prison." (R. p. 357-358.)

The Order went on to state that Frankie Hughes' testimony aligned with Steimetz', that in the car Paris Davis was animated and crying and told Vance he was going to prison and she told them they needed to burn their clothes. (R. p. 358.)

The post-conviction court held that joinder was proper because Paris Davis' statements would have been admissible against Vance in a separate trial as excited utterances. (R. p. 358, 360-361.) According to the Order, the beating that took place was an event sufficiently startling to render inoperative the normal reflective thought process of an observer, Davis had a stressed and animated demeanor and her statements were made not long after the altercation. (R. p. 360.) The Order concluded that she was clearly stressed and agitated by the situation and made the statements in the heat of the moment, so the statements were accordingly admissible as excited utterances. (R. p. 361.) The Order continued:

> The Court also finds the statement regarding burning the clothes qualifies as a statement against interest, but only as to Hughes.9
>
> > FN 9
> > Hughes' testimony regarding Davis's statement that they needed to burn their clothes clearly inculpates Hughes; however, the statement that Petitioner is going to prison does not clearly inculpate Hughes or Steinmetz.

Order, p. 11. (R. p. 360.)

The post-conviction court then considered whether the statements violated the Confrontation Clause of the Sixth Amendment by determining whether they were inadmissible against Petitioner as a "testimonial statement" under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and its progeny including *Davis v. Washington*, 547 U.S. 813 (2006). The Order ultimately determined they were nontestimonial statements and so *Bruton* did not apply. (R. p. 365.)

The Order went on to hold that the initial joinder of the cases was proper given the allegations that Vance committed the aggravated battery and Paris Davis denied knowledge of it and solicited the destruction of evidence of it. (R. p. 366.)

> The next issue is whether the cases should have been severed because the joinder was prejudicial to Petitioner. Petitioner's sole contention is that Davis's statements unfairly prejudiced him at trial.
>
> The Court concludes that Petitioner was not prejudiced by a joint trial. The statements at issue would have been admissible in a separate trial against Petitioner. Thus, it does not matter whether the trials were joint or separate. Accordingly, the Court finds that Petitioner's first claim for relief fails to raise a genuine issue of material fact and must be dismissed. Petitioner's attorneys were not ineffective for failing to oppose joinder of the cases or for moving for severance. Bond was not ineffective for objecting to the hearsay statements and appellate counsel was not ineffective for failing to raise this issue on appeal. Therefore, the State's Motion for Summary Disposition is GRANTED on this claim.

Order, p. 18 (emphasis added). (R. p. 367.)

ii) The district court erred in dismissing the joinder claim

First of all, the witnesses testified that Paris Davis was not excited so the district court is simply incorrect in its ruling that the hearsay statements were admissible as excited utterances. Conspicuously absent from the Order is the express evidence from the state's two witnesses who related Paris' statements, both of whom testified she was not excited.

Jeremy Steinmetz testified as follows:

Q. How do you know the individuals in the backseat heard Paris' statement?

A. She was speaking kind of loud.

Q. Okay. She excited?

A. Not excited. Freaked out about it.

Q. Okay. Freaked out about it?

A. Yeah.

Tr. p. 740, lns. 21-25 p. 741, lns. 102 (emphasis added).

Likewise Frankie Hughes testified as follows about when Paris was in the car:

Q. Did she appear excited?

A. No.

Q. Okay. Did she appear animated?

A. What's that?

Q. Was she speaking loudly?

A. Yes.

Tr. p. 899, lns. 8-13 (emphasis added).

Since the declarant was not excited, it should go without saying that the excited utterance exception to the hearsay rule cannot apply.[10]

[10] Since no objection was made below (which is the very problem), no inquiry was made into the distinctions between being excited, being animated, and freaking out. Nor were the other components of the hearsay exception addressed, such as just when in the 20 minute trip the statements occurred. (Tr. p. 739.)

Even if the absence of the titular prerequisite for the excited utterance exception is ignored, its basis cannot be. Said exception is based on the premise that an event is so startling as to render inoperative the normal reflective thought process and so the witness must be speaking the truth.

That is not what was happening here. One can be freaking out or animated and nevertheless be using a reflective thought process. Paris was trying to control the situation and was ordering the others around from the beginning to the end of the car trip. She ordered them to get in the car, for Jeremy to go, for them to get rid of their clothes, and for Jeremy to go home after they got to her house. (Tr. p. 737, 739-740, 756.) There is nothing about this that mandates that a person must be speaking the truth, rather, the person is simply trying to get people to do what she wants. In addition to ordering people around, Paris also physically took matters into her own hands. When Jeremy's phone rang with a call from Kaylan Speers (another witness at the party) Paris took the phone away from him and would not let him answer it. (Tr. p. 756.) In short, regardless of her demeanor, Paris was acting logically and calculatingly, not reflexively and thus truthfully.

Next, the court strangely holds that Frankie Hughes' testimony regarding Paris' statement about burning the clothes is somehow admissible as a statement against interest because it inculpates him. The Order states:

> In order to qualify as a statement against interest, the statement, at the time of its making, must be so far contrary to the declarant's interest, that a reasonable man in the declarant's position would not have made the statement unless the declarant believed it to be true. I.R.E. 804(b)(3).
>
> . . . The Court also finds the statement regarding burning the clothes qualifies as a statement against interest, but only as to Hughes.9 . . .

> FN 9
> Hughes' testimony regarding Davis's statement that they needed to burn their clothes clearly inculpates Hughes; however, the statement that Petitioner is going to prison does not clearly inculpate Hughes or Steinmetz.

Order, p. 11. (R. p. 360.)

This makes no sense. While the statement does inculpate Frankie Hughes, he is not the declarant of the statement (even if he is testifying about it) so the court clearly errs in holding it admissible as a statement against his interest.

To summarize, the statements of Paris Davis, to wit, "Vance, you are going to prison" and "you need to get rid of/burn those clothes" are not admissible for the reasons held by the court, to wit, as excited utterances or statements against interest. The statements would not have been admissible in Vance's separate trial. Thus, his case should not have been joined with that of Paris Davis or, if joined, it should have been severed, or if not severed, the inadmissible hearsay statements should have been objected to. The failure to do any of this was ineffective assistance of counsel, and the Order should be reversed and remanded on the joinder issue on this basis alone.

The Order's next conclusion, *to wit*, that *Bruton* does not apply to nontestimonial statements, is not even reached. That is because it begins with the faulty premise that Paris Davis' statements were admissible as excited utterances or statements against interest. Since they were not, the Order's analysis of the interplay of *Crawford* and *Bruton* is beside the point.

Next as to the joinder/severance issue, the post-conviction court could not have been more wrong when it held that "Petitioner's sole contention is that Davis's statements unfairly prejudiced him at trial." (R. p. 367.) The amended petition contained

several pages devoted to the non-statement related prejudice of the joint trial, and it was discussed in Petitioner's Response as well. (R. p. 155-157, 229.)

For example, evidence was introduced at trial regarding the high-risk felony traffic stop three days after the fight in which Vance was arrested. The evidence included Detective Holland's estimate that there were at least six undercover police vehicles as well as another five or six patrol vehicles involved, and officers had their weapons deployed. (Tr. p. 960-963.) The evidence of the traffic stop was admitted solely for the purpose of establishing Paris Davis' knowledge of the battery. In short, after Vance was arrested Detective Holland spoke to Paris Davis about the incident at the motel and she said she didn't know what he was talking about. (Tr. p. 964-966.) This was the basis of her accessory to aggravated battery charge.

Obviously, it was prejudicial to Vance for the jury to learn about the lengths to which the police went for his arrest and the level of threat and dangerousness from him they perceived. However, if he was not being tried with Paris Davis, evidence of the felony stop and arrest of Vance would not be otherwise relevant, because nothing about that stop or arrest would make any fact of consequence any more or less probable. It was not an arrest contemporaneous with the offense nor did he make any admissions. To the contrary, he actually invoked his right to silence during his arrest which was then disclosed to the jury by Officer Holland: "He invoked his rights a couple times stating I got rights." (Tr. p. 1020, lns. 19-20.)

While the Court of Appeals in the direct appeal refers to this as an unsolicited blurt and held it did not constitute fundamental error (there was no objection), the only

reason this was an issue at all was because the traffic stop and arrest came in as evidence against Paris Davis. None of this would have happened had Vance been tried alone.

Further prejudice resulted from the antagonistic defenses in the joint trial, because defense counsel for Paris Davis conceded during closing argument that she was guilty (albeit of misdemeanors) and specifically requested the jury to convict her of misdemeanor solicitation of destruction, alteration or concealment of evidence, and misdemeanor accessory to (aggravated) battery. (Tr. p. 1127, 1147, 1150.)

Additionally, Vance was prejudiced by Paris Davis' jury instructions regarding her charges because the instructions assume the truth of the charges against Vance. For example, one of the elements provide as follows:

> The defendant PARIS MARIE DAVIS did solicit and/or encourage Vance Thumm and/or others to engage in conduct which could constitute the crime of Destruction and/or Concealment of Evidence, to wit-: by encouraging and/or soliciting those involved in an Aggravated Battery to destroy the clothing that they wore at the time of the incident; . . .

Even if her crime should be considered separately, such an instruction unfairly instructs the jury that Vance is in fact guilty of the aggravated battery. Petitioner was relatedly prejudiced because he had to split his preemptory challenges with Paris Davis (which he obviously would not have to do if tried alone). Since the two co-defendants were charged with different kinds of crimes, they were looking for different kinds of jurors.

Finally as to this issue, the district court acknowledged the claim of ineffective assistance of appellate counsel for failure to raise the joinder/severance issue as fundamental error on direct appeal, but simply referred this to the ineffective assistance of appellate counsel section of the Order. (R. p. 356.) However, the Order did not

address the alternatively pled claim of ineffective assistance of counsel for failure to raise the *Bruton* issue as preserved error because Paris Davis' counsel actually made the *Bruton* objection which the district court denied because there was not a confession involved. (Tr. p. 744.) Appellant asserts that while this was the right result because the objection was not Paris Davis' to make, it showed the district court would have overruled the *Bruton* objection had Vance's attorney made it, so it could be considered to have been preserved error.

F. *Brady* Violation-fingerprint report

i) The court's description of the claim and ruling

The prosecution made a late disclosure of an exculpatory fingerprint report which defense counsel kept out of evidence without knowing what was in it. The claims in the Amended Petition included a *Brady* claim, an allegation of ineffective assistance of counsel, and prosecutorial misconduct in closing argument. The Order's discussion of them is as follows in full:

> Petitioner's fifth claim for post-conviction relief is a due process violation under *Brady v. Maryland*, based on the State's failure to timely disclose a fingerprint report. Petitioner also alleges ineffective assistance of counsel and appellate counsel for failure to raise this issue. Petitioner also alleges prosecutorial misconduct on this basis.
>
> The State contends this claim fails, because the fingerprint report was disclosed (albeit untimely) prior to trial. The State contends that it was a tactical decision to not present the fingerprint evidence, because the State could have easily countered the evidence with presentation of testimony of the likelihood that fingerprints would not appear on an item. The State contends the presentation of such evidence would not have changed the outcome of the trial given the overwhelming evidence of Petitioner's guilt, and that Petitioner was not charged with beating Deven Ohls with any bottles.

> The fingerprint report showed that Petitioner's fingerprints showed up only on a bottle of tequila and not on the beer and liquor bottles that were actually used as weapons during the fight.
>
> The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Subsequent to *Brady*, the Supreme Court expanded the duty to include volunteering exculpatory evidence never requested, or requested only in a general way. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–84 (1985). To prove a *Brady* violation, three components must be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *State v. Shackelford*, 150 Idaho 355, 380, 247 P.3d 582, 607 (2010).
>
> Here, Petitioner cannot meet the requirements to prove a *Brady* violation. First, the fingerprint report was produced prior to trial. Thus, there is no evidence the State suppressed such evidence. Second, Petitioner has failed to show how production of the report would have changed the outcome of the trial. There is no genuine issue of material fact that Bond was not deficient in this regard, because the decision to introduce such evidence was a tactical call. As the State points out, such evidence could have been easily countered by the State and such evidence was not relevant in light of the overwhelming testimony from Hughes regarding Petitioner beating Deven Ohls (nor was Petitioner charged with using any bottles in the aggravated battery of Ohls). On appeal, there is no evidence that Petitioner was prejudiced in this regard, because there is no reasonable probability that Petitioner would have prevailed on this claim. Finally, there is no evidence the prosecutor committed prosecutorial misconduct by the late disclosure.
>
> Accordingly, the Court finds this claim fails to raise a genuine issue of material fact and must be dismissed.

Order, p. 38-40 (emphasis added). (R. p. 387-389.)

ii) The court erred in its ruling

This is a perfect example of the post-conviction court just ignoring the actual claim as well as the argument and evidence. To explain what actually happened, during trial but outside the presence of the jury, retained counsel objected to the late disclosure

of a fingerprint report. (Tr. p. 750.) The district court ruled:

> THE COURT: Okay, well, let me tell you, I don't want to mousetrap anybody. The State cannot present that evidence. It was not produced in a timely manner. There is no way the Defense can get another expert to look at it to refute if there is any refutation. It can't come in.
>
> I am going to advise the Defense, if you get up there and make a statement to that jury that there was absolutely no fingerprint evidence presented in this case, they didn't check for fingerprints, I will stop the closing argument right then, and I will allow the State to respond and call its expert.

Tr. p. 751, lns. 1-13.

First, the report was both exculpatory and material because it showed Mr. Thumm's fingerprint only on a bottle of Jose Cuervo tequila that was never alleged to have been a weapon, but excluded him from being the source of the fingerprints on the beer and malt liquor bottles that were actually used as weapons. This evidence supports Mr. Thumm's defense two ways. First, it shows there is no physical evidence tying Vance to the attack. Second, it impeached the state's primary witness (Frankie Hughes) who testified that Vance used the beer and malt liquor bottles as weapons.

Second, the post-conviction court goes too far when it apparently draws a bright line for *Brady* violations and holds the suppression requirement cannot be met if the evidence is disclosed prior to trial even if late. This is incorrect because while there is a different test for prejudice, many courts, both state and federal, consider that delayed disclosure can be a *Brady* violation. Appellant is unware of any Idaho cases on point, and while different courts explain it in different ways, the First Circuit in the often cited case of *United States v. Ingraldi,* 793 F.2d 408 (1st Cir. 1986), put it in a way that is instructive here and Appellant suggests should be adopted:

> Where, as here, defendant has made a specific pretrial request for exculpatory information, reversal is required if nondisclosure "might have affected the outcome of the trial." When the issue is one of delayed disclosure rather than of nondisclosure, however, the test is whether defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.

Id. p. 411-412 (emphasis added, internal citations omitted).

That is exactly what happened in our case. The report was disclosed too late for the defense attorney to determine its exculpatory nature in order to use it at trial, so it was not used. Had it been used, it would have been very effective.

Again, the report would have provided Vance with a form of strong evidence, *to wit*, scientific evidence which does not put in his hands the bottles used as weapons in the fight. Not incidentally, while the state said that it could have easily countered this evidence, it provided no proof of this.

As to the value of the absence of fingerprint evidence, interestingly, the Ninth Circuit has reversed a conviction where the district court did not allow the defendant to argue the lack of fingerprint evidence to the jury. In *United States v. Thompson*, 37 F.3d 450 (9th Cir. 1994), the Ninth Circuit explained:

> Because evidence comes in various forms, some stronger and some weaker, a defendant is entitled to argue to the jury that the government's failure to present a particular type of strong evidence against her - e.g., fingerprints - weakens its case.

Id. p. 454.

Secondly, the fingerprint report would have been extremely effective in impeaching the state's primary witness Frankie Hughes. Hughes testified that Vance used both the beer and malt liquor bottles as weapons, neither of which had Vance's fingerprints on them. It does not matter that Vance was not charged with using the

bottles as weapons, the scientific evidence does not support the claims of the state's witness who, which will be discussed below, had great incentive to place blame on Vance.

While on the topic of Frankie Hughes, the Order uses circular logic to conclude that the fingerprint evidence would be countered by the overwhelming eyewitness evidence of Frankie Hughes. But it was the eyewitness evidence of Frankie Hughes that was impeached with the fingerprint evidence.[11]

The Order is also wrong about the failure to use the report being a tactical decision. While it was ignored, there is definitive proof that it was not. Vance filed a bar complaint against retained counsel Virginia Bond to which she filed a response. That response shows she did not understand, even after trial, what the results really were. She thought Vance's fingerprints were on a 44-oz. beer bottle (the malt liquor bottle) that had been used as a weapon and was proud of herself for successfully getting them suppressed:

> The prosecutor threw some very important evidence out late, even in trial. Video/Audio of yet another aggravated battery they had never disclosed, and evidence of Vance Thumm's fingerprint on a 44oz beer bottle that had been used as a weapon. I managed to keep all the evidence out.

Response, p. 7. (R. p. 252.)

Of course, Vance's fingerprints were not found on any 44-oz. bottle and were only found on one bottle that had not been used as a weapon.

[11] As an aside, throughout the Order the fallback position of the post-conviction court is that the claimed errors of trial counsel did not matter because of the eye witness testimony of co-defendant Frankie Hughes. But many of trial counsel's errors were failures to impeach Frankie Hughes or evidence that corroborated Frankie Hughes. Thus, anything that shows he lies, is wrong, is biased, or takes away his corroboration, is very important impeachment in and of itself and also has a cumulative effect.

Alternatively, Petitioner asserts that even though the disclosure of the fingerprint evidence was late, retained counsel was ineffective for failing to recognize the exculpatory nature of the report. Retained counsel successfully excluded the fingerprint report without having seen it and/or considering it. Keeping the fingerprint evidence out without knowing if it was good or bad for Vance was ineffective assistance of counsel.

The exculpatory nature of the report is apparent from the face, and it does not require expert testimony to ascertain that the report is good for Vance. The report did not hurt Vance in any way. Thus, retained counsel was ineffective for failing to use the exculpatory fingerprint report at trial to defend Vance, or alternatively, by failing to obtain a continuance to give her time to be able to use the report to its best effect.

To summarize, the district court erred because late disclosure can be a *Brady* violation, counsel's suppression of exculpatory evidence was not a tactical decision, and Vance suffered prejudice because he was deprived of a scientific defense and powerful impeachment of the main witness against him.

Further regarding the fingerprints, the prosecutor violated Mr. Thumm's due process right to a fair trial by committing prosecutorial misconduct during closing argument. The prosecutor described the relevant scene as follows:

> Vance is getting tired. Hey, give me that bottle. He needs something else to finish the job. He is getting tired. He needs something else. Give me that bottle. Hits him in the head a couple times, the forty ounce bottle. Then a beer bottle.

Tr. p. 1089, lns. 8-12.

However, during that argument, the prosecutor knew that he was alone in knowing that the physical evidence did not support his theory, to wit, Vance's fingerprints had not been found on any bottle that he was claiming Vance used as a

weapon. In other words, the state took advantage of its own delay in disclosing by making an argument which would have been severely weakened had it timely disclosed the report. Further, the prosecutor knew that he was safe from any sort of responsive argument from defense counsel about the fingerprints given the court's warnings about her closing argument.[12]

G. Ineffective Assistance of Counsel at Trial

i) Court's descriptions of the claims and rulings

> Petitioner's third claim for post-conviction relief is that Bond provided ineffective assistance of counsel by (a) failing to oppose the trial court's ruling that evidence of gang membership could be used to impeach on the issue of credibility and to show a common scheme or plan, (b) failing to call as witnesses Ariel Carpenter, Chris Smith, Heather Barr, Petitioner, and Dr. Wasielewski, (c) failing to object to and impeach Jeremy Steinmetz's testimony, (d) failing to object to Paris Davis's use of the word "prison" as a legal conclusion, (e) failing to impeach Frankie Hughes with evidence of bias, and (f) failing to impeach/refresh Detectives or follow up. Each claim will be addressed in turn.

Order, p. 27. (R. p. 376.)

ii) Failure to renew an objection to and impeach Jeremy Steinmetz' testimony

On the first day of trial, the prosecution brought up an I.R.E. 404(b) notice stating that four days after the fight, Vance Thumm and Paris Davis arrived at Jeremy Steinmetz' house and Vance told him "don't say nothing." (Tr. p. 36-37.) Retained counsel objected to admission of the statement, inter alia, because it was too prejudicial. (Tr. p. 38.) The trial court ruled:

> Well, once again, I am not going to rule on this until I hear the circumstances and all the background of the conversation. At first blush, it

[12] This instance of prosecutorial misconduct in closing argument could not be raised on direct appeal because the fingerprint report was not part of the record.

would appear to be overly prejudicial. But I can't do a balancing test unless I know all the facts.

Tr. p. 38, ln. 25--p. 39, ln. 5 (emphasis added).

Later at trial, outside the presence of the jury, the prosecutor advised the court that they are getting close to that testimony (Tr. p. 748-749.) The court stated the evidence was clearly relevant to the defendant's consciousness of guilt and invited objection, to which there was none, and the statement came in later. (Tr. p. 749, 763.)

Next, Jeremy Steinmetz testified that the police showed him a line-up from which he did not (but supposedly could have) identify Vance Thumm because he was scared of him. (Tr. p. 764-765.) However, Jeremy had testified differently at Vance Thumm's preliminary hearing, testifying there that he didn't identify Vance the first time because he was "just trying to protect [Vance]." (Tr. 5/21/2009, p. 21, ln. 13.) He then testified that he changed his story with the police after Vance had come to his house "[o]nly after the police had told me his name. They knew him." (Tr. 5/9/2009, p. 23, lns. 9-10.) He then said that Vance did not threaten him. (Tr. 5/9/2009, p. 23).

Later at the preliminary hearing, in regard to the charge of intimidation of a witness (dismissed), the magistrate court carefully questioned Jeremy Steinmetz regarding his statement not to say anything:

THE COURT: Did you feel intimidated by Mr. Thumm?

THE WITNESS: No.

THE COURT: Did you feel threatened by him?

THE WITNESS: No.

THE COURT: Did you feel he was harassing you in any way?

THE WITNESS: No.

> THE COURT: Well, explain to the Court again what exactly was said.
>
> THE WITNESS: Just, hey, man, don't say nothing.
>
> THE COURT: That's it?
>
> THE WITNESS: Basically causal-like manner.
>
> THE COURT: You never felt threatened, intimidated or harassed in any way?
>
> THE WITNESS: No.

Tr. Prelim. 5/21/2009, p. 36, lns. 5-21.

At trial, retained counsel incredibly did not impeach his trial testimony that he did not initially identify Vance because of fear with his testimony at the preliminary hearing which indicated that it was not because he was scared of him, but rather it was to protect him. Nor did retained counsel use the detailed exchange between the magistrate and the witness which further confirmed that Jeremy was not scared of Vance. This failure then allowed the prosecutor to argue in closing that Jeremy is afraid of Vance. (Tr. p. 1178.)

The post-conviction court held that the decision to not object to the "don't say nothing" testimony was not deficient and concluded it was admissible. (R. p. 382.) This ignores that the trial court had initially thought it unduly prejudicial and finally ruled without doing a balancing test and nothing had happened in trial up to that point which made it any less prejudicial. In short, it is objectively unreasonable to not renew the unduly prejudicial objection and to instead allow the court to rule without a balancing test where the court initially indicates it is inadmissible and nothing has changed.

As to the failure to impeach Steinmetz with his preliminary hearing testimony establishing that he was not afraid of Vance, the post-conviction court found that it was a strategic call and:

> Had Bond impeached Steinmetz on his preliminary hearing statements, it is very likely that Steinmetz would have testified that he was so afraid of Petitioner he made the opposite statements at his preliminary hearing. It was a strategic decision to not dig the hole any further in this regard.

Order, p. 33. (R. p. 382.)

This is pure conjecture on the part of the court. Regardless of how Steinmetz answered he was established as a perjurer, with the only question being how big of one.

iii) Failure to impeach Frankie Hughes

Mr. Thumm alleged that retained counsel was ineffective because she failed to impeach Frankie Hughes with the long exposure to prison he was facing and thus his great motivation to provide biased testimony against Vance. At the time he was testifying, he was currently charged with crimes with a maximum of 30 years in prison. At trial he admitted to hitting Brooke Eberhardt over the head with a beer bottle which could have given rise to him being charged and facing up to 30 more years for a total of 60 years. (R. p. 191.)

The post-conviction court's ruling was that the failure to impeach allegation was clearly disproved by the record because the "state elicited testimony on direct examination regarding Hughes' charges and the exposure he faced." (R. p. 383.) Also, co-counsel had questioned him about the police indicating to him that if he cooperated and they put in a good word for him he could maybe get probation. (R. p. 384.)

The Order does not provide citations, but at the place in the trial transcript where the state elicits testimony from Hughes about his aggravated battery charges, there is absolutely no mention of what sort of a sentence those charges can entail. (Tr. p. 908.)

Nor does the Order explain why co-counsel's discussion regarding probation would alert the jury as to the potential of 30 or up to 60 years that Frankie Hughes was facing, and thus his real motivation to lie.

iv) Failure to renew objection to Paris Davis' use of "prison"

While it may seem a small thing, this is again a situation where retained counsel preliminarily objected to something so it is known she understood the evidence and the problem with it, but then failed to renew the objection at the right time.

Here, well prior to the testimony about Paris Davis saying "Vance you are going to prison," retained counsel objected to it as an improper legal conclusion. (Tr. p. 31-33.) The prosecutor responded that the jury just considers jail and prison to be one and the same and that the state was not eliciting a legal conclusion. (Tr. p. 35.) Then, the prosecutor did just that, establishing through Detective Holland that one cannot go to prison for a misdemeanor, but that Paris told Vance he was going to prison to show he had committed a felony. Retained counsel failed to renew her objection.

The post-conviction court held that whether to object or not is a tactical decision, there is no evidence that an objection would have been sustained, and, as previously discussed, Paris' statement is admissible as an excited utterance. (R. p. 383.)

Of course, the district court misses the point, which is that retained counsel failed to call the prosecutor out when he did the exact thing he claimed he was not going to do, to wit, use Paris' choice of the word "prison" as a legal conclusion.

v) Counsel failed to oppose the proposed impeachment of witnesses by gang membership (*Abel* issue)

Retained counsel just conceded a ruling that had been made in Paris' case and then simply applied to Vance's, to wit, that pursuant to *United States v. Abel*, 469 U.S. 445 (1984), evidence of gang membership would be admissible to impeach on the issue of credibility and the possibility that it could show common scheme, plan or identity depending on how the evidence developed. (Tr. p. 12-13.)

Petitioner made several claims regarding this issue. First, *Abel* was decided only by reference to the rules of evidence. Thus, trial counsel was ineffective for not challenging the impeachment evidence ruling as a violation of Mr. Thumm's Fifth, Sixth, and Fourteenth Amendment rights to testify and present a complete defense.[13]

Second, retained counsel did not oppose the expansion of the original *Abel* ruling beyond Vance Thumm, Paris Davis, and Heather Barr to include Chris Smith (the admitted stabber of Deven Ohls) nor Ariel Carpenter, another person at the party.

Ariel Carpenter was never shown to be a close associate of the gang and therefore could be impeached if she were to testify, the state never mentioned her or claimed to have information regarding her. In other words, retained counsel never obtained a ruling

[13] The relevant caselaw includes *Rock v. Arkansas*, 483 U.S. 44 (1987), where the United States Supreme Court explained that the right to testify on one's own behalf stems from the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's privilege against self incrimination. The Sixth Amendment also guarantees a criminal defendant the right to have compulsory process for obtaining witnesses. *Washington v. Texas*, 388 U.S. 14 (1967). The Sixth Amendment's Confrontation Clause guarantees a criminal defendant an opportunity for effective cross-examination. *See e.g., Delaware v. Fensterer*, 474 U.S. 15 (1985). The right to present a complete and meaningful defense is grounded in the Sixth Amendment's Compulsory Process Clause and the Fourteenth Amendment's Due Process Clause. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973).

as to Ariel Carpenter, she was just never mentioned again. She certainly did not testify, and the state did not have to even claim anything about her, much less prove it.

Ariel Carpenter was interviewed by Detective Leavitt and told him that Deven Ohls was talking with Frankie Hughes and a fight broke out between them for no apparent reason and another male jumped in. She continued by stating that when the fight broke out, she, Vance and Paris all ran from the room. (R. p. 259, Police report of Detective Leavitt dated 7/24/2009, p. 1.)

The second problem is that while retained counsel inquired as to what the trial court's ruling would be as to Chris Smith since he was not a member of the same gang, she did not in any way argue that *Abel* should not apply because *Abel* was based on the witness and parties "common membership in an organization." Retained counsel should have argued that other courts which have addressed this issue have reached a similar conclusion based upon facts similar to those present in the instant case.[14]

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[14] For example, in *United States v. Keys,* 899 F.2d 983 (10th Cir. 1990), the Tenth Circuit followed *Abel* in observing that in specific contexts, evidence of gang membership may be admissible. *Id.,* 899 F.2d at 986-987. However, it is essential that the State must establish "that the defendant and the witness to be impeached belong to the same gang." *Id.* at 986. *See also United States v. Elkins*, 70 F.3d 81 (10th Cir. 1995) (holding that evidence that the parties were members of *some* gang is an insufficient basis for admission because the prosecutor is required to show more than "membership in *any gang* but rather the *same gang*.") (emphasis added). *United States v. Takasashi*, 205 F.3d 1161 (9th Cir. 2000) (recognizing that in order to admit evidence of gang membership for bias, both the defendant and witness must be members of the same gang); and *State v. Brown*, 739 N.W.2d 716 (Minn. 2007) (recognizing that common gang membership may be sufficiently probative to show bias if the attributes of the gang have a direct bearing on the fact of bias and "for gang membership to be admissible to show bias, the proponent of the evidence must establish a foundation showing common membership.") In *United States v. Gonzalez*, 155 Fed. Appx. 580 (3rd Cir. 2004), the Third Circuit reached the same conclusion in an unpublished opinion. In *Gonzalez*, the prosecutor even acknowledged that parties must be members of the same gang.

Petitioner acknowledges that the Idaho Court of Appeals disagreed and upheld the trial court's ruling that "the evidence may be admissible even if the witness and defendant are members of different gangs, provided that the evidence is relevant and the probative value is not substantially outweighed by the risk of unfair prejudice." *Thumm*, 153 Idaho at 541-542. However, had some argument been made in the trial court and the persuasive caselaw above provided, there is a reasonable probability that the ruling would have gone the other way.[15]

Christopher Smith had told police they had the wrong suspect (Vance) arrested. (R. p. 262, Holland report 4/17/2009, p. 1.) Smith also told police that he had started the fight after Deven Ohls said something he didn't like and punched him. (*Id.*) Smith said the fight continued and ultimately he "put steel in him." (*Id*., p. 1-2.)

The post-conviction court ruled as followed:

> The Court finds that this claim must be dismissed for several reasons. First, the Court of Appeals has already determined that the Trial Court properly determined that the State could impeach witnesses who were in a gang with evidence of their gang membership to attack their credibility. Second, Petitioner has failed to provide affidavits showing that any of these witnesses would have in fact testified in accordance with the exculpatory statements made in the police reports. *See Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011) ("A claim for post-conviction relief will be subject to summary dismissal the applicant has not presented evidence making a *prima facie* case as to each essential element of the claims upon which the applicant bears the burden of proof."). Finally, the Court finds that Petitioner has failed to create a

[15] As a related claim of ineffective assistance of appellate counsel that will be simply noted here, in his Opening brief in the direct appeal, appellate counsel cited only to *Abel* and *Keys*, *supra.* Appellate counsel failed to cite to the other existing relevant and persuasive authority above regarding the limitations on the *Abel* ruling in Appellant's Opening brief or reply brief. Instead, appellate counsel only cited to the additional cases in his brief in support of petition for review (not granted) after the issue had been lost in the Court of Appeals.

> genuine issue of material fact that counsel was deficient for challenging the Trial Court's ruling given the clear status of the law in this regard. Accordingly, the Court finds that there is no genuine issue of material fact that, at a minimum, the prejudice prong of *Strickland* was not violated.

Order, p. 30. (R. p. 379.)

Again, the post-conviction court misses the point. First, the ruling does not address the complete and utter lack of showing that Carpenter was a gang member or associate. Second, in light of the many contrary cases cited, the law is not as clear as suggested. Third, the ruling does not address the failure to raise the issue as one of constitutional proportions, rather than of mere evidentiary error. Finally, for this stage of the case, the police reports of the witness statements provided by the state in discovery should suffice.

vi) Failing to impeach/refresh detectives or follow up

The court characterized the claims as follows:

> Petitioner contends Bond was ineffective for failing to refresh Detectives Leavitt and Holland with a report regarding a photo lineup that was shown to Ohls and his girlfriend, Brooke Eberhardt, and for failing to impeach Detective Holland about lying to Hughes about fingerprints on a bottle.
>
> . . .
>
> Petitioner fails to identify how Bond was deficient for failing to impeach the detectives or for failing to "follow up." Petitioner has provided no evidence that the outcome of the trial would have been different had counsel refreshed the detectives' recollection or impeached Detective Holland. Accordingly, the Court finds that, at a minimum, there is no genuine issue of material fact implicating the prejudice prong of *Strickland*.

Order, p. 35-36. (R. p. 384-385.)

The court gave these claims short shrift, as is shown by what actually happened. First, retained counsel questioned Detective Leavitt about his and Detective Holland's meeting with Deven Ohls (victim) and his girlfriend Brooke Everhart at her apartment. (Tr. p. 308.) When asked whether Detective Holland showed Deven Ohls a lineup, Detective Leavitt said he couldn't recall without refreshing his memory with the report. (Tr. p. 308-309.) Retained counsel did not refresh his memory with the report, but instead said:

> That's kind of important, so I will retain you, you know, on your subpoena and let you come back, so we can talk about that later.

Tr. p. 309, lns. 3-5.

Detective Leavitt was not recalled and that lineup was never mentioned again. Retained counsel also failed to ask Holland about it when he testified later. However, the report by Detective Holland which stated he and Detective Leavitt met with the victim Deven Ohls and his girlfriend Brooke Eberhardt stated they both viewed lineups, including one that included Vance, and neither were able to identify a subject. (R. 206.)

Second, retained counsel asked Detective Leavitt the following:

> Isn't it true that in your interview with on 5/1 of 2009 you told Frankie Hughes that you had fingerprints and DNA on a bottle that would connect him with hitting Brooke Everhart?

Tr. p. 334, lns. 12-15.

Detective Leavitt testified that he did not recall making that statement, and the court sustained a hearsay objection as to whether he heard Detective Holland make it.

(Tr. p. 335.) Retained counsel did establish that said interview was audio recorded, but that was one of the late redacted tapes that could not be used.[16] (Tr. p. 335.)

Even though Detective Holland testified after Detective Leavitt, retained counsel failed to ask him the same question even though she had the police report from the interview in which Detective Holland described confronting Hughes with the evidence including his possible prints on a bottle used to strike Brooke Eberhardt. (R. p. 210.)

Further, retained counsel failed to impeach Detective Holland about lying to Frankie Hughes when he confronted him about possible fingerprints on bottles since he obviously did not have the fingerprint results at that time since they only had just gotten the results shortly before trial.

As to the lineups, the inability of the victim and his girlfriend to identify Vance is more impeachment of Frankie Hughes' story which retained counsel did not pursue. Likewise, retained counsel is forgoing even more chances to show the jury that the state's witnesses lie, even the police.

H. Ineffective Assistance of Counsel Based on Lack of Preparation

Appellant will provide the Order's summary of all these claims, but discuss the ruling and Appellant's response to only two of them. The Order summarized the lack of preparation claims as follows:

> Petitioner's second claim for post-conviction relief is that Wollen and Bond provided ineffective assistance of counsel by (a) failing to timely disclose an expert witness who could have provided exculpatory evidence, (b) missing the deadline to submit redacted tapes, (c) failing to timely file a motion to suppress the lineups, (d) failing to adequately meet, communicate, prepare, or provide discovery to Petitioner, and (e) failing

[16] As a claim of pre-trial ineffective assistance of counsel, retained counsel missed the deadline for submitting redacted tapes and so could not use them for impeachment.

> to adequately prepare for Helen Fischer's testimony. Each claim will be addressed in turn.

Order, p. 18. (R. p. 367.)

i) Failure to provide discovery to Vance

The prosecutor and retained counsel entered into a protective order which did not allow discovery produced after a particular date to be physically transferred to Vance. However, his attorneys did not even give him the previous discovery either.

As to the failure to provide or to go over discovery with Vance, the post-conviction court ruled that Petitioner failed to identify any specific discovery he was denied access to and how the outcome would be different. (R. p. 374-375.)

Vance did identify specific discovery. The fingerprint report is a perfect example of Vance being prejudiced by not being given, or being able to be given, the discovery. The fingerprint results report was in the discovery subject to the protective order and was not seen by Vance. Retained counsel did not look at the fingerprint report because it was tardy, she was moving her office, and trial was upon her. However, had Vance had it, he would have seen it was exculpatory because he is the one who later realized it was exculpatory after he saw it. Had he been timely given that discovery he could have alerted retained counsel to its exculpatory nature and it could have been used at trial instead of it mistakenly being excluded by retained counsel.

ii) Failure to timely move to suppress lineups

As to the claim regarding retained counsel's failure to timely file a motion to suppress the lineups, the district court ruled that even if the motion was timely and was successful, Petitioner has not shown the outcome of the case would have been different

because the evidence of Frankie Hughes, who knew Vance, still implicated him in the crime. (R. p. 373.)

The other IDs of Vance from the unduly suggestive lineups did matter. They unfairly corroborated Frankie Hughes who blamed it all on Vance. Without them, the case was essentially just Frankie Hughes' word.

I. Ineffective assistance of counsel at sentencing and on appeal

The Order characterized these claims as follows:

> Petitioner's fourth claim for post-conviction relief is that Anthony Geddes provided ineffective assistance of counsel at sentencing and appellate counsel provided ineffective assistance of counsel by failing to raise the *Bruton* issue, *Abel* issue, *Brady* issue, and all the instances of prosecutorial misconduct.

Order, p. 385. (R. p. 385.)

The post-conviction court ruled that these issues (or alternative basis of issues) would not have been successful on appeal. (R. p. 387.) Appellant has addressed the first three of these in the relevant sections and will discuss the prosecutorial misconduct immediately below.

J. Prosecutorial misconduct

> Petitioner's sixth claim for post-conviction relief is that the prosecutor violated his due process right to a fair trial in multiple ways, but most significantly, by making improper closing arguments. Petitioner also alleges ineffective assistance of counsel for failing to object or raise this issue.

Order, p. 40. (R. p. 389.)

The post-conviction court dismissed this claim:

> Petitioner has made no showing that the above issues were unknown and could not have reasonably been known during the direct appeal. Thus, the claims of prosecutorial misconduct are waived. Moreover, there is no showing that Petitioner would have been successful on appeal or that the

> outcome of his trial would have been different had these issues been raised. Indeed, appellate counsel did raise three instances of prosecutorial misconduct. As set forth previously, appellate counsel may fail to raise an issue because he or she "foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Dunlap v. State*, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015) (citations omitted). Here, there is not a reasonable probability that Petitioner would have prevailed. Petitioner has also failed to show how the alleged misconduct amounted to prejudice or reversible error. Accordingly, this claim must be dismissed.

Order, p. 41-42. (R. p. 390-391.)

Appellant asserts that had trial counsel objected and harmless error rather than fundamental error review applied and/or had appellate counsel added all of the following complaints about the state's closing argument to the three actually argued, one of which was found to be improper albeit not fundamental error, then the results on appeal would have been different.

First, while having the words "no defense" up on his power point presentation, the prosecutor disparaged defense counsel and the defense:

> You know, it's interesting when you don't have a defense, there's certain things that happen. Okay? There's certain techniques that are used. Let me go through some of these techniques. You create a smoke cloud. Ask an octopus if that works. Okay. You put the police on trial to deflect attention from your actions.
>
> Remember in opening statements, Ms. Virginia Bond told you she was going to talk to you about the police actions in the case. Remember that? Well, that's moved a little bit. That's changed a little bit. But what happens is just as Ms. Virginia Bond says, hey, if Frankie is pointing the finger, there is a reason why he is pointing the finger; right? If the Defense is putting the police on trial there's a reason why they are putting the police on trial. You pull a red herring, you cross the trail to divert to other issues that aren't even there. Other details that are not elements. And lastly, you present a moving target and you change. If you don't have a defense, that's pretty common.

Tr. p. 1169, ln. 11--p. 1170, ln. 7.

Next, the prosecutor made unsupported comments about the victim, Deven Ohls, being afraid of Vance Thumm and because of that he committed perjury:

> "Why do you think in court he won't identify the attacker?" (Tr. p. 1176.)
>
> "Why do you think he doesn't identify Vance." (Tr. p. 1176.)
>
> "Yeah, he won't ID. He won't ID him. It's not disfigurement. Yeah, he is going to say that because that because takes care of Vance and Vance isn't going to be riding him anymore. See how that works?" (Tr. p. 1179.)
>
> "And they [statements] tell you that Deven is minimizing because he is scared and it tells you that Vance is guilty of aggravated battery." (Tr. p. 1181.)

The prosecutor also improperly argued to the jury that Jeremy Steinmetz was afraid of Vance:

> "He is a 22-year-old timid young man because if you notice his testimony, he wouldn't even look at Vance. He coward [sic] from Vance because he knows what Vance can do." (Tr. p. 1178.)
>
> "Protecting Paris. Yeah, they're still friends. Scared of Vance." (Tr. p. 1179.)

Of course, Jeremy's only comment at trial about fear was in reference to him not identifying Vance to the police, and even that was at odds with his preliminary hearing testimony (with which retained counsel did not impeach him) indicating he was not scared of Vance.

Also, the prosecutor mischaracterized significant evidence, arguing that Frankie Hughes admitted to the attack rather than denying it and blaming it on Vance. (Tr. p. 1179.)

And finally, the prosecutor used inflammatory words while arguing that Vance was part of the fight because once it began he would not have turned tail and ran:

> "No alpha male does that. And he won't let a kill go without tasting the blood." (Tr. p. 1184.)

CONCLUSION

Wherefore, for the reasons above stated, Appellant respectfully requests the district court's order summarily dismissing his petition for post-conviction relief be reversed and remanded to the district court.

DATED this 30th day of January, 2018.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

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

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

Dated and certified this 30th day of January, 2018.

/s/ Greg S. Silvey
Greg S. Silvey