5-9-2018

Thumm v. State Respondent's Brief Dckt. 45290

IN THE SUPREME COURT OF THE STATE OF IDAHO

VANCE E. THUMM,	)	
	)	**No. 45290**
Petitioner-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CV-PC-2013-14688**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Vance E. Thumm appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

After a night of drinking, Thumm, Deven Ohls, and several other people went to an early morning party at a Boise Budget Inn room that Thumm had rented. (Trial Tr.[1], Vol. I, p.315, Ls.6-25, p.439, L.18 – p.470, L.7, p.493, L.8 – p.499, L.7, p.539, L.22 – p.551, L.6; Trial Tr., Vol. II, p.696, L.3 – p.718, L.24, p.850, L.7 – p.864, L.10.) At some point, Thumm physically attacked Ohls, striking him with a closed fist several times in the head. (Trial Tr., Vol. I, p.499, L.8 – p.523, L.12; Trial Tr., Vol. II, p.718, L.25 – p.726, L.15, p.865, L.9 – p.893, L.16.) Another person kicked Ohls and stabbed him in the buttock. (Trial Tr., Vol. I, p.507, L.14 – p.508, L.21; Trial Tr., Vol. II, p.724, Ls.12-23, p.869, L.16 – p.870, L.5.) The attack continued for a time, all over the hotel room and in the bathroom. (Trial Tr., Vol. I, p.499, L.8 – p.523, L.12; Trial Tr., Vol. II, p.718, L.25 – p.726, L.15, p.865, L.9 – p.893, L.16.)

The stated charged Thumm with aggravated battery, felony intimidation of a witness, and the persistent violator sentencing enhancement. (See R., p.350; Prelim. Tr.,

[1] The Idaho Supreme Court granted Thumm's motion to take judicial notice of the trial transcripts associated with the underlying case and direct appeal, State v. Thumm, Idaho Supreme Court Docket No. 37512. (2/9/18 Order.) In this brief, the state refers to the two volumes from this trial transcript simply as "Trial Tr., Vol. I" and "Trial Tr., Vol. II."

p.1, L.23 – p.2, L.4.[2]) The state dismissed the felony intimidation of a witness charge during the preliminary hearing. (Prelim. Tr., p.37, Ls.17-20.) The state asserted that Thumm was guilty of aggravated battery for "kicking and/or stomping and/or punching and/or stabbing Deven Ohls about the face and/or body" and/or that Thumm aided and abetted others who used such force on Ohls. (Trial Tr., Vol. I, p.50, L.16 – p.51, L.4.) The state also charged Frankie Hughes, Chris Smith, and Paris Davis in connection with the attack. (Trial Tr., Vol. II, p.974, L.24 – p.975, L.6.) Specifically, the state charged Davis with solicitation of felony destruction of evidence and being an accessory to Thumm's aggravated battery for encouraging Thumm and Hughes to destroy the clothes they wore at the time of the incident. (R., p.351; Trial Tr., Vol. I, p.51, L.20 – p.52, L.6.) The district court granted the state's motion to join Thumm's and Davis' cases together for trial. (R., p.282.) Prior to trial, Thumm was represented by Nick Wollen from the Ada County Public Defender's Office. (See R., p.351.) On September 10, 2009, approximately six weeks before the start of the jury trial, Thumm retained Virginia Bond as private counsel. (See R., pp.246, 351.)

Police testimony and photographs admitted at the jury trial revealed the aftermath of the mêlée in the hotel room – a beaten and bloody Ohls, and a blood-spattered hotel room in disarray. (Trial Tr., Vol. I, p.369, L.16 – p.430, L.19.) Ohls suffered significant bleeding, a concussion, two black eyes, a complex lip laceration, a nasal fracture, and the stab wound. (Trial Tr., Vol. I, p.257, Ls.2-19, Trial Tr., Vol. II, p.619, L.9 – p.644, L.23.)

[2] The district court took judicial notice of the preliminary hearing transcript. (R., p.76.) The Idaho Supreme Court granted Thumm's motion to take judicial notice of the "trial transcripts." In his Appellant's brief, Thumm cites to the preliminary hearing transcript. (See, e.g., Appellant's brief, pp.28-29.) The state presumes that the Idaho Supreme Court's order taking judicial notice includes the preliminary hearing transcript, and in the alternative, moves for the Court to take judicial notice of this transcript.

State trial witnesses Hughes and Jeremy Steinmetz testified that they witnessed Thumm battering Ohls in the hotel room. (Trial Tr., Vol. II, p.723, L.12 – p.726, L.9; p.866, L.24 – p.884, L.4.) In its closing argument, the state argued that other evidence presented by the state corroborated the eyewitness testimony of Hughes and Steinmetz. (Trial Tr. Vol. II, p.1096, L.7 – p.1109, L.8; p.1171, L.1 – p.1184, L.16.)

The jury found Thumm and Davis guilty as charged. (See R., p.351.) The district court imposed a unified 40-year sentence with 15 years fixed upon Thumm. (Trial Tr., Vol. I, p.1360, L.25 – p.1361, L.5.) In a published opinion, the Idaho Court of Appeals affirmed the judgment of conviction. State v. Thumm, 153 Idaho 533, 285 P.3d 348 (Ct. App. 2012).

Through counsel, Thumm filed a post-conviction petition, and then an amended post-conviction petition containing additional claims and evidence. (R., pp.7-65, 138-211.) Collectively, the petitions asserted approximately 15 claims and sub-claims asserting ineffective assistance of trial and appellate counsel; a Brady[3] violation, prosecutorial misconduct, and cumulative error. (Id.) The state filed an Answer, Motion for Summary Dismissal and brief in support, and supplemental briefing. (R., pp.102-130, 214-218.) The state alleged that each of Thumm's claims was conclusory, inadequately supported, waived, and/or otherwise failed as a matter of law. (Id.)

After a hearing (Tr.), the district court granted the state's motion for summary dismissal. (R., pp.348-393.) The court concluded that Thumm failed to allege facts which, if true, demonstrated he was entitled to relief on any of his claims. (Id.) Thumm timely appealed. (R., pp.409-411.)

[3] Brady v. Maryland, 373 U.S. 83 (1963).

ISSUES

Thumm states the issue on appeal as:

> Whether the court erred in summarily dismissing the petition for post-conviction relief.

(Appellant's brief, p.10 (capitalization modified).)

The state rephrases the issues on appeal as:

1. Has Thumm failed to demonstrate that the district court erred by summarily dismissing his ineffective assistance of trial counsel claims?

2. Has Thumm failed to demonstrate that the district court erred by summarily dismissing his ineffective assistance of appellate counsel claims?

3. Has Thumm failed to demonstrate that the district court erred by summarily dismissing his Brady claim?

4. Has Thumm failed to demonstrate that the district court erred by summarily dismissing his prosecutorial misconduct claims?

5. Has Thumm failed to demonstrate cumulative error?

ARGUMENT

I.
Thumm Has Failed To Demonstrate That The District Court Erred By Summarily Dismissing His Ineffective Assistance Of Trial Counsel Claims

A. Introduction

Thumm contends that the district court erred by summarily dismissing his ineffective assistance of trial counsel claims.[4] (Appellant's brief, pp.11-39.) However, as the district court correctly concluded (R., pp.350-393), these claims fails because Thumm has failed to allege facts which, if true, demonstrate he is entitled to relief.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. The District Court Correctly Dismissed Each Of Thumm's Ineffective Assistance Of Trial Counsel Claims

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

[4] In addition to the ineffective assistance of trial counsel claims the state responds to in Issue I, Thumm also raised ineffective assistance of trial counsel as an alternative argument to his direct Brady and prosecutorial misconduct claims. The state address these claims below, in the context of its response to those direct claims.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if 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." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable…."

Strickland, 466 U.S. at 690. A defense counsel's choice of witnesses, manner of cross-examination, and lack of objections to testimony are generally considered to be tactical or strategic decisions. Grove v. State, 161 Idaho 840, 851, 392 P.3d 18, 29 (Ct. App. 2017) (citing Giles v. State, 125 Idaho 921, 877 P.2d 365 (1994)). Therefore, such decisions can be considered deficient performance pursuant to Strickland only if made on the basis of an ignorance of the law, inadequate preparation, or another shortcoming capable of objective review. State v. Dunlap, 155 Idaho 345, 384, 313 P.3d 1, 40 (2013); Giles, 125 Idaho at 924, 877 P.2d at 368.

To establish prejudice, a petitioner must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999). Where the alleged deficiency is trial counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court is generally determinative of both prongs of the Strickland test. State v. Hairston, 133 Idaho 496, 512, 988 P.2d 1170, 1186 (1999).

In this case, Thumm challenges the district court's summary dismissal of approximately 15 ineffective assistance of trial and appellate counsel claims and sub-claims, including ineffective assistance of counsel claims that function as alternative arguments to direct claims of trial error. (Appellant's brief, pp.11-39.) Thumm's ineffective assistance of trial counsel claims generally constitute a second-guessing of the manner in which Thumm's trial counsel chose to cross-examine witnesses, made or declined to make objections, or argued legal issues to the court. The state submits that

each of these claims is conclusory, inadequately supported by law and fact, and/or otherwise fails to demonstrate Strickland deficiency, particularly when considered in the context of trial counsel's authority to make strategic decisions throughout the course of a four-day jury trial with 11 witnesses. Likewise, the state asserts that Thumm has failed to demonstrate Strickland prejudice with respect to any of his ineffective assistance of counsel claims, and that the individual portions of the trial upon which Thumm bases his numerous criticisms of counsel's performance did not have an impact upon the critical issues of the case and the determinations made by the jury, particularly in light of the strength of the state's case. (See Trial Tr., Vol. I, p.1087, L.16 – p.1123, L.10, p.1163, L.1 – p.1185, L.21 (the prosecutor summarizing the evidence against Thumm and Davis in his closing and rebuttal arguments).)

In fact, Thumm appears to have acknowledged that the majority of his ineffective assistance of trial counsel claims do not, by themselves, demonstrate he is entitled to relief. He instead asserts that the claims combine to demonstrate cumulative prejudice. In the hearing on the state's motion for summary dismissal, Thumm described his post-conviction petition as presenting a "bag of problems," and stated that while "[m]ost of [the problems] I can't point out and say: Yeah, he would have been acquitted based on this specific one," that the court should look cumulatively at "what happened from beginning to end." (Tr., p.31, L.25 – p.32, L.8.) Likewise, in his Appellant's brief, Thumm noted that he "raises many errors with the first two being the most significant and the rest having a more cumulative effect." (Appellant's brief, p.1.) While, as discussed below, prejudice may be cumulated in a Strickland analysis, the state submits that Thumm's "kitchen sink" approach reveals a difficulty in establishing Strickland

deficient performance or prejudice with respect to any individual claim. Further, even in a cumulative error analysis, there is no prejudice to cumulate when a petitioner has failed to demonstrate more than one incident of deficient performance. See Commonwealth v. Spotz, 18 A.3d 244, 321 (Pa. 2011).

The district court correctly concluded that Thumm failed to demonstrate Strickland deficient performance and/or prejudice with respect to any of his ineffective assistance of trial counsel claims. To the extent this Court construes or organizes Thumm's claims differently than the state has in this brief, the state adopts the reasoning set forth by the district court in its order granting the state's motion for summary dismissal. (See R., pp.348-393).

D. The District Court Correctly Dismissed Thumm's Ineffective Assistance Of Trial Counsel Claims Related To The Joinder Of Thumm's and Davis' Cases For Trial

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to object to the state's motion to join Thumm's and Davis' cases for trial and/or for failing to file a motion to sever the cases prior to, or during, the trial. (Appellant's brief, pp.13-21.) However, as the district court correctly concluded (R., pp.356-367), Thumm failed to demonstrate Strickland deficient performance or prejudice.

Several months prior to trial, the state moved to join Thumm's, Davis', and Hughes' cases for trial.[5] (See R., p.278.) At a subsequent hearing, the state argued that joinder pursuant to I.C.R. 8 and 13 was appropriate because there were a number of common trial witnesses between the cases and because the charges all arose from the

[5] For reasons that are not clear from the appellate record in this case, Hughes was ultimately not tried with Thumm and Davis. (See generally Trial Tr.)

same act or transaction. (Id.) An attorney from the Ada County Public Defender's Office, which represented Thumm at the time, sought a continuance because she was not the handling attorney on the case and was not familiar with the relevant facts and issues. (Id.) Davis' counsel objected to the state's motion on the ground that joinder would be prejudicial to Davis. (R., pp.278-279.[6]) At a continued hearing, Nick Wollen, Thumm's handling attorney from the Public Defender's Office, informed the court that Thumm intended to retain private counsel. (R., p.282.) Wollen did not address the state's pending motion for joinder, but asked the court to continue the scheduled jury trial. (See id.) Davis' counsel renewed her objection to the state's motion. (Id.) The district court granted the state's motion for joinder and continued the jury trial. (Id.) The court stated that it "[d]id not see any issue that required that these matters be subject to separate trials," but that "as the case develops, something could occur that could require that." (Id.)

During the trial, the state elicited evidence which, Thumm now asserts (Appellant's brief, pp.13-21), prejudiced him because it would not have been admissible had he been tried individually. Specifically, both Jeremy Steinmetz and Frankie Hughes testified that, after the attack in the hotel room, Paris Davis told Thumm that he was "going to prison." (Trial Tr., Vol. II, p.755, Ls.15-21; p.899, Ls.21-23.) Hughes additionally testified that Davis told Thumm and Hughes, after the attack, that they needed to burn their clothes, which had blood on them. (Trial Tr., Vol. II, p.899, L.24 – p.901, L.22.) These statements from Davis, Thumm asserts, would have constituted

[6] Portions of the transcripts of the two pretrial hearings related to the joinder issue were included in the clerk's record on appeal.

inadmissible hearsay, as opposed to admissible statements of a party opponent, if Thumm had been tried individually. (Appellant's brief, pp.13-21.)

Additionally, Thumm points to evidence that was admitted to prove that Davis had knowledge that Thumm committed a felony, a necessary element of her charges of solicitation of felony destruction of evidence, I.C. § 18-2503, and accessory to the commission of a felony, I.C. § 18-205. (Appellant's brief, pp.18-20.) This evidence included: the nature of the high-risk felony traffic stop of Thumm's and Davis' vehicle, a stop which involved multiple police vehicles and officers with their weapons drawn; a testifying officer's unsolicited blurt that Thumm invoked his right to silence during his arrest;[7] and Davis' counsel's concession during closing argument that Davis was guilty of *misdemeanor* solicitation of destruction of evidence. (Id.) Additionally, Thumm asserted he was prejudiced by: a jury instruction involving Davis' charges which, Thumm argued, assumed the truth of the charges against Thumm; and the fact that Thumm was required to split his preemptory challenges with Davis, who would have been looking for a different type of jury. (Id.)

The state construes this claim as encompassing two parts: (1) that trial counsel was ineffective for declining to object to the state's pretrial motion for joinder; and (2) that trial counsel was ineffective for declining to utilize a Bruton[8] challenge to sever the cases, either prior to or during trial. Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to either of these sub-claims.

[7] In affirming Thumm's judgment of conviction, the Idaho Court of Appeals held that this unobjected-to blurt did not constitute fundamental error. Thumm, 153 Idaho at 541-542, 285 P.3d at 356-357.

[8] Bruton v. United States, 391 U.S. 123 (1968).

1. Thumm's Trial Counsel Was Not Ineffective For Declining To Object To The State's Pretrial Motion For Joinder

Idaho Criminal Rule 8(b) provides that joinder of defendants is proper "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions, constituting an offense or offenses." "The propriety of joinder is determined by what is alleged, not what the proof eventually shows." State v. Cochran, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975).

The purpose of joinder is to promote judicial efficiency and "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Bruton v. United States, 391 U.S. 123, 134 (1968)). For these reasons, federal courts and some state courts broadly construe the language of Rule 8 in favor of joinder. See, e.g., United States v. Rock, 282 F.3d 548, 552 (8th Cir. 2002) (noting federal rule 8(a) is broadly construed in favor of joinder); State v. Reeder, 182 S.W.3d 569, 576 (Mo. Ct. App. 2006) (noting that "liberal joinder" is favored in the interest of judicial economy).

Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to this sub-claim. As the district court concluded (R., p.366), the initial joinder of the cases was proper, and therefore, any objection from Thumm's counsel would have been unsuccessful – just as Davis' counsel's objection was unsuccessful. The state's charging information alleged that Thumm and Davis participated in the same series of acts or transactions constituting the offenses charged. (See Trial Tr., Vol. I, p.50, L.8 – p.52, L.6.) Further, the only prejudice alleged by Thumm as a result of the joinder concerned statements and evidence presented at the subsequent trial. Thumm has not attempted to argue how, or if, his trial counsel should have anticipated the presentation of

this particular evidence at the time of the state's pretrial joinder motion. Further, considering the strength of the state's case, Thumm has failed to demonstrate that an individual trial, and the absence of the highlighted evidence discussed above, would have resulted in an acquittal.

2. Thumm's Trial Counsel Was Not Ineffective For Declining To Move To Sever The Cases Prior To, Or During, The Trial

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court held that the Sixth Amendment protects a defendant from incriminating out-of-court statements of co-defendants being used against him in a joint trial where the co-defendant does not testify and thereby does not become subject to cross-examination. In that case, Bruton was tried with a co-defendant, Evans. Id. at 124. Evans did not testify at the trial, but evidence of Evans' pretrial confessions were admitted into evidence. Id. at 124-128, 136. These confessions implicated Bruton in the charges against him. Id. The United States Supreme Court held that introduction of Evans' confessions added substantial weight to the prosecution's case in a form that was not subject to cross-examination, thereby violating Bruton's Sixth Amendment right to confrontation. Id. at 126-137.

However, in order to implicate the confrontation clause as interpreted by Bruton, a co-defendant's incriminating statement must be "testimonial" in nature. See United States v. Dargan, 738 F.3d 643, 651 (4th Cir. 2013) ("*Bruton* is simply irrelevant in the context of nontestimonial statements."); United States v. Clark, 717 F.3d 790, 816 (10th Cir. 2013) ("[T]he *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.") (citation omitted); United States v. Castro-Davis, 612 F.3d 53, 65-66 (1st Cir. 2010) ("the *Bruton* rule does not apply to non-testimonial hearsay statements."); United States v. Pugh, 273 Fed. Appx. 449, 454 (6th

Cir. 2008) ("The statement at issue…is nontestimonial in nature, and therefore, does not implicate the Confrontation Clause as analyzed under *Bruton* or otherwise.")

Whether a statement is testimonial is determined by looking at the statement's primary purpose and its similarities to traditional testimony. State v. Stanfield, 158 Idaho 327, 332, 347 P.3d 175, 180 (2015) (citing Davis v. Washington, 547 U.S. 813, 822 (2006)). Testimony is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). Therefore, a statement is testimonial when "the circumstances objectively indicate that…the primary purpose…is to establish or prove past events potentially relevant to later criminal prosecution." Id. (quoting Davis, 547 U.S. at 822). When no such primary purpose exists, the statement is nontestimonial and its admissibility is governed by state and federal rules of evidence, not the Confrontation Clause. Id. (citing Michigan v. Bryant, 562 U.S. 344, 358-359 (2011)). Further, the co-defendant's statement, even if testimonial, must be "directly incriminating" against the defendant in order for Bruton to apply. State v. Gamble, 146 Idaho 331, 337-339, 193 P.3d 878, 884-886 (Ct. App. 2008).

Parties properly joined under I.C.R. 8(b) may later be severed under I.C.R. 14 if it appears that one of the defendants or the state would be prejudiced by a joinder of defendants for trial. State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Cochran, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975). The defendant has the burden of showing such prejudice. Caudill, 109 Idaho at 226, 706 P.2d at 460; Cochran, 97 Idaho at 74, 539 P.2d at 1002. An I.C.R. 14 motion to sever must be filed within 28 days after the entry of a plea of not guilty or seven days before trial, whichever is earlier. I.C.R.

12(b)(5), (d). However, I.C.R. 14 also permits a trial court to shorten or enlarge the time to file, and, for good cause shown or for excusable neglect, to relieve a party of the failure to comply with the timeliness requirement of the rule.

In the federal system, pursuant to the analogous F.R.C.P. 14, severance is not mandated "whenever codefendants have conflicting defenses." Zafiro v. United States, 506 U.S. 534, 538 (1993). Thus, "mutually antagonistic defenses are not prejudicial *per se*" and F.R.C.P. 14 does not require severance even if some prejudice is shown. Id. at 538–539. Further, criminal defendants "are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Id. at 540. Instead, severance is proper "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. at 539; see also United States v. Blankenship, 382 F.3d 1110, 1121-1126 (11th Cir. 2004) (discussing Zafiro and analyzing F.R.C.P. 14).

As the district court correctly concluded (R., p.365), there was no Bruton problem in this case, either evident before trial, or considering the evidence admitted at trial, because no testimonial statements of Davis directly incriminating Thumm were admitted. Davis' statement to Thumm that he was going to prison, and her statement to Thumm and Hughes that they needed to burn their bloody clothes, were clearly not made for the primary purpose of creating evidence for a subsequent trial. Therefore, Thumm has failed to demonstrate that his trial counsel was ineffective for not attempting to raise a Bruton-based motion to sever before trial, or a motion for a mistrial during trial, because such a motion would not have been successful. Thumm has also failed to demonstrate that he would have been acquitted had he been tried individually.

Additionally, the state submits that while Thumm has pointed to various evidence submitted at trial which, he asserts, demonstrates prejudice from the joinder, he has, on appeal, relied exclusively on a constitutional framework pursuant to Bruton. Thumm has not argued that his trial counsel was ineffective for failing to make a pretrial motion, or a motion for a mistrial, pursuant to I.C.R. 14 and I.C.R. 29.1. (See Appellant's brief, pp.13-21.) Therefore, any such argument is waived on appeal. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). In any event, the state submits that any pretrial motion or motion for a mistrial made pursuant to I.C.R. 14 would have been unsuccessful. The statements and evidence implicating Davis did not implicate or prejudice Thumm, particularly in light of the strength of the state's case against Thumm.

Finally, in the alternative,[9] and as the district court concluded (R., pp.359-361), Davis' statements would have been admissible under the excited utterance exception to the hearsay exception even had Davis and Thumm been tried separately. For this assertion, the state adopts the reasoning as set forth by the district court. (Id.)

[9] On appeal, Thumm asserts that the district court should not have even reached the Bruton issue because its Bruton analysis begins with the "faulty premise" that Davis' statements would have been admissible even if Thumm was tried individually. (Appellant's brief, p.18.) The state submits that this is backwards. There is no Bruton problem in this case because no testimonial statements of Davis directly incriminating Thumm were admitted at trial. This is the end of Bruton inquiry. Whether or not Davis' statements would have been admissible against Thumm had he been tried individually is *only* relevant if this Court concludes that Thumm's trial counsel was deficient for failing to move to sever the cases pursuant to a Bruton challenge or I.C.R. 14 motion. In such an instance, the theoretical admissibility of the statements in an individual trial would be relevant (if not determinative) to a determination of whether Thumm was prejudiced by the joint trial and his trial counsel's failure to obtain a severance. In other words, even if Thumm's trial counsel should have raised a motion to sever, and even if the district court would have granted such a motion – Thumm *still* cannot demonstrate he is entitled to relief because, as the court concluded, Davis' statements would have been admissible against him regardless pursuant to the excited utterance exception.

E. The District Court Correctly Dismissed Thumm's Ineffective Assistance Of Trial Counsel Claims Related To Counsels' Pre-Trial Representation

1. Trial Counsel Was Not Ineffective With Respect To Her Attempt To Suppress A Photo Lineup Utilized By Officers

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to timely and adequately move to suppress a photo lineup utilized by officers that was admitted into evidence. (Appellant's brief, pp.38-39.) However, as the district court correctly concluded (R., pp.372-373), Thumm has failed to demonstrate he was entitled to relief on this claim.

Shortly before trial, Thumm's counsel filed a motion to suppress State's Exhibit 66, a photo lineup containing Thumm that investigators had presented to a state witness, on the ground that the lineup identification procedure was suggestive. (R., pp.268-269; Trial Tr., Vol. I, p.30, L.19 – p.31, L.2.) The district court did not rule on the motion, but informed counsel that she could make an appropriate objection when the evidence was presented at trial. (Trial Tr., Vol. I, p.31, Ls.3-5.) During the trial, the state sought to admit the lineup through witness Detective Leavitt. (Trial Tr., Vol. I, p.290, L.12 – p.292, L.15.) Thumm's trial counsel objected and questioned Detective Leavitt in aid of the objection. (Trial Tr., Vol. I, p.292, L.16 – p.295, L.24.) Counsel then argued that the lineup procedure utilized was faulty. (Trial. Tr., Vol. I, p.296, Ls.5-8.) The district court overruled the objection, concluding that a written admonition that was presented to the witness by Detective Leavitt indicated compliance with the policy established by the law enforcement agency, and that questions regarding the adequacy of the notice went to the weight of the evidence and not to its admissibility. (Trial. Tr., Vol. I, p.296, L.24 – p.297, L.17.)

In summarily dismissing this claim, the district court first noted that trial counsel *did* object to the admission of the photo lineup, and that counsel was thus clearly aware of the relevant potential legal implications of an unduly suggestive photo lineup. (R., p.372.) This indicates the manner in which trial counsel chose to make the objection was strategic, rather than being based upon some objective shortcoming such as ignorance of the relevant law. Additionally, Thumm has failed to demonstrate that any alternative argument raised in support of trial counsel's objection would have been successful. Thumm has therefore failed to demonstrate deficient performance.

The district court also concluded that Thumm failed to demonstrate prejudice because he failed to show how the outcome of the trial would have been different had the lineup not been admitted. (R., p.373.) As the district court noted, Thumm was identified as a perpetrator in the aggravated battery by Hughes and Steinmetz, who both knew Thumm. (R., pp.372-373.) Additionally, the identification of Thumm generated by the photo lineup was of limited evidentiary value in this case because the lineup was presented to Aaron Childress – who was simply the employee at the hotel who checked Thumm in on the night of the attack. (Trial Tr., Vol. I, p.290, L.12 – p.299, L.23.) It is not clear from the existing appellate record in this case whether this lineup was utilized to elicit any other witness identifications that were presented at trial.

2. Trial Counsel Was Not Ineffective For Failing To Provide Physical Discovery To Thumm Prior To The Trial

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to provide him physical copies of the discovery prior to the trial. (Appellant's brief, p.38.) The state construes this claim as containing two parts: (1) whether trial counsel was ineffective for entering into a pretrial

stipulation limiting Thumm's personal access to discovery; and (2) whether trial counsel was ineffective for failing to provide Thumm with physical copies of discovery documents that were *not* subject to the stipulation. In both respects, the district court correctly dismissed this claim (R., pp.374-375) because it fails as a matter of law.

Prior to trial, Thumm's counsel entered into a stipulated protective order with the state preventing anyone from disclosing the addresses of potential trial witnesses, or physically transferring police reports or compact discs related to the case to Thumm. (See R., p.374.) The state asserted that this action was necessary because Thumm's association with the Severely Violent Criminals gang created a concern that Thumm may hurt others associated with the case. (See id.)

In summarily dismissing this claim, the district court concluded that Thumm failed to identify any specific discovery he was denied access to, or explain how such access would have changed the outcome of his trial. (Id.) Thumm also failed to argue that the stipulation entered into by trial counsel was somehow unwarranted, or that defense counsel would have successfully gotten access to the materials had she refused to enter into the stipulation. Further, in her response to Thumm's bar complaint regarding the stipulation, trial counsel explained that she was concerned about delays in obtaining complete redacted discovery in light of the fact that she was retained by Thumm relatively late in the criminal proceeding. (R., pp.247-252.) Additionally, trial counsel stated that she felt the stipulation was warranted given Thumm's violent history, that she was genuinely concerned that Thumm was a member of a gang that could use violence to protect its members, and that the protection order could protect Thumm from any criminal accusations should anything happen to any of the witnesses prior to trial. (Id.)

Thumm has failed to demonstrate that it was some objective shortcoming, rather than a tactical decision, that prompted trial counsel to enter into the stipulation, or that he was prejudiced by this decision.

Likewise, Thumm has failed to demonstrate that his trial counsel's decision not to provide him with physical copies of discovery that was *not* subject to the stipulated protection order constituted deficient performance, or how he was prejudiced from lack of access to physical discovery. Thumm's counsel's decision not to provide Thumm physical copies of discovery does not constitute deficient performance. In her bar complaint response, counsel noted that she met with Thumm frequently to discuss the evidence in the case – though there was not enough time to get through everything "page by page." (R., pp.248-250.) With respect to the Strickland prejudice prong, Thumm contends that if he had been given personal access to the discovery, he would have been able to better assist trial counsel on issues (discussed in greater detail below) related to a fingerprint report disclosed by the state (Appellant's brief, p.38). However, while Thumm raised a similar argument in a brief filed in response to the state's motion for summary dismissal (R., p.235), Thumm did not present admissible evidence supporting this assertion. Further, Thumm's claim that he himself would have not only identified some relevant issue related to the fingerprint report (which, as discussed below, was not disclosed by the state until shortly before trial), but that he could have utilized this knowledge to assist his counsel and obtain a different trial outcome is optimistically speculative.

3. Thumm's Other Ineffective Assistance Of Trial Counsel Claims Related To Counsels' Pre-Trial Representation Are Waived On Appeal

On appeal, Thumm identifies other ineffective assistance of trial counsel claims related to trial counsels' pretrial representation that were raised in his amended post-conviction petition.[10] (Appellant's brief, pp.37-38.) Further, Thumm noted that while he was "expressly appealing the dismissal of the entire petition and all claims" he would discuss only two of the claims related to his trial counsels' pretrial representation in his Appellant's brief. (Appellant's brief, p.13.) The remainder of Thumm's claims related to his trial counsels' pretrial representation are waived because Thumm failed to support them with argument or authority on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("[a] party waives an issue on appeal if either authority or argument are lacking"). In the alternative, should this Court choose to reach the merits of these claims, the state adopts the reasoning set forth by the district court as to why these claims fail. (R., pp.368-372, 375-376.)

F. The District Court Correctly Dismissed Thumm's Ineffective Assistance Of Trial Counsel Claims Related To Thumm's Counsel's Trial Representation

1. Trial Counsel Was Not Ineffective For Declining To Object To The District Court's Rulings Regarding The Admissibility, As Impeachment Evidence, Of The Gang Memberships Of Potential Defense Witnesses

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for declining to challenge and/or by inadequately challenging the district court's rulings regarding the admissibility, as impeachment

[10] In his amended post-conviction petition, Thumm additionally asserted that trial counsel was ineffective for: (1) failing to timely disclose an expert witness who would have purportedly provided exculpatory evidence; (2) missing a deadline to submit redacted tapes; and (3) failing to adequately prepare for state witness Helen Fischer's testimony. (R., pp.160, 171-172, 190.)

evidence, of gang memberships and associations of potential defense witnesses. (Appellant's brief, pp.32-35.) However, as the district court properly concluded (R., pp.376-379), this claim fails as a matter of law.

Prior to the jury trial, the district court ruled that evidence of membership or close association with the Severely Violent Criminal gang was admissible at trial, but only to impeach witnesses' credibility. (See R., p.376.) Thumm's trial counsel did not object to this ruling and conceded that gang membership evidence could be used for impeachment purposes with respect to Davis, Thumm, and another individual. (See id.) Later, during the trial, counsel raised the gang membership issue with respect to two other potential witnesses – Ariel Carpenter and Chris Smith. (Trial Tr., Vol. II, p.941, L.4 – p.942, L.8.) Counsel stated that she was concerned that if she called Carpenter or Smith to testify, the state would argue that they were associates of the Severely Violent Criminal gang, and would ultimately be able to impeach them on this association. (Id.) Counsel further noted that Chris Smith was a documented gang member, albeit not a member of the Severely Violent Criminal gang. (Trial Tr., Vol. II, p.942, Ls.1-8.) Counsel did not discuss Carpenter's gang membership or non-membership. (See Trial Tr., Vol. II, p.941, L.4 – p.942, L.8.) The district court cited United States v. Abel, 469 U.S. 45 (1984), and informed Thumm's counsel that defense witnesses may be impeached on their gang memberships, or on their gang associations if they were not members of the same gang. (Trial Tr., Vol. II, p.942, L.9 – p.945, L.1.) The state informed the court that, should it become necessary, it possessed evidence that Smith was associated with Hughes and Thumm. (Trial Tr., Vol. II, p.943, Ls.5-20.) Thumm's counsel did not call either Smith or Carpenter as witnesses at the trial.

On direct appeal, Thumm asserted that the district court erred by ruling that, should the defense call Smith to testify, the state would be permitted to impeach his testimony with information that both Thumm and Smith were alleged gang members. Thumm, 153 Idaho at 538-540, 285 P.3d at 353-355. The Idaho Court of Appeals first rejected the state's arguments that Thumm failed to preserve this claim for appeal, and that the district court did not enter an appealable ruling on the issue. Id. at 538-539, 285 P.3d at 353-354. The Court then rejected Thumm's argument that, pursuant to Abel, individuals had to be members of the *same gang* in order to be subject to gang membership-related impeachment. Id. at 539-540, 285 P.3d 354-355. The Court instead held that Abel reaffirmed the proposition that a district court has the discretion to determine admissibility of evidence showing bias, including evidence of gang membership, and is not foreclosed from admitting such evidence where the individuals in question are members of different gangs. Id. Then, applying its traditional standards related to a court's use of discretion, it held that the district court did not err in concluding that any evidence of Smith's gang association with Thumm would be relevant as impeachment evidence. Id. at 540, 285 P.3d at 354.

In his amended post-conviction petition, Thumm asserted that his trial counsel was ineffective for: (1) failing to raise a *constitutional* challenge to the district court's impeachment rulings, as opposed to merely a rules of evidence-based Abel challenge; (2) failing to challenge the district court's "expansion" of its pretrial impeachment ruling to include Smith and Carpenter; and (3) failing to challenge the district court's conclusion that Abel permitted gang membership-related impeachment even when the individuals are not members of the same gang. (R., pp.166-170.)

Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to any of these sub-claims. First, with respect to all three sub-claims, Thumm has failed to demonstrate that any of the defense witnesses would have testified absent the court's rulings, or identified what any of these witnesses would have testified about. This alone is fatal to the claim and each associated sub-claim. While, in his response to the state's motion for summary dismissal (R., p.239), and Appellant's brief (Appellant's brief, pp.34-35), Thumm utilized police reports to speculate as to what Smith and Carpenter may have testified about, he has not presented any affidavits or other admissible evidence supporting this speculation. Further, the jury was made aware of perhaps the most significant element of this speculated testimony – that Chris Smith punched and stabbed Ohls during the mêlée – through Thumm's defense counsel's cross-examination of Detective Holland. (Trial Tr., Vol. II, p.988, L.24 – p.990, L.23.)

Thumm has also failed to demonstrate that any constitutional challenge would have been successful. In his Appellant's brief, as in his amended post-conviction petition (R., p.166 n.2), Thumm cited cases standing for broad concepts associated with the constitutional rights of criminal defendants to present a defense. (Appellant's brief, pp.32, n.13 (citing Rock v. Arkansas, 483 U.S. 44 (1987) (right of a defendant to testify in his own behalf); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Delaware v. Fensterer, 474 U.S. 15 (1985) (right to cross-examine); Chambers v. Mississippi, 410 U.S. 284 (1973) (right to present a meaningful defense)). However, Thumm has failed to demonstrate or explain how any of these concepts, if argued, would have resulted in a different district court ruling regarding the admissibility of gang associations as impeachment evidence in this case. This is

particularly true in light of the well-established principle that a state court's application of its own state's evidentiary rules generally does not offend the constitution. See, e.g., Rock, 483 U.S. at 55 (reaffirming that an accused's right to present relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process" (quoting Chambers, 410 U.S. at 295)); Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability - even if the defendant would prefer to see that evidence admitted"); Chambers, 410 U.S. at 301 ("the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); Nevada v. Jackson, 569 U.S. 505, 509 (2013) ("[o]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence"). Thumm has not demonstrated that the district court's application of Abel in this case is the "rare" situation where the correct application of state evidentiary rules violates the constitution. Therefore, Thumm has failed to show that his trial counsel was ineffective for not making such an argument, or that the district court erred by summarily dismissing this claim.

Also, Thumm has failed to argue, below or on appeal, that Carpenter was, in fact, not a member or associate of the Severely Violent Criminals gang. Instead, Thumm appears to rely on the fact that *the state* did not present evidence of Carpenter's gang association. (Appellant's brief, pp.32-33.) At the trial, the district court simply ruled that evidence of gang membership or close association, *if the state could present it*, would be admissible as impeachment evidence. Thumm's trial counsel was in the best position to

evaluate the risks of facing such impeachment evidence should Carpenter be called as a witness. Thumm has failed to demonstrate that this evaluation, and counsel's decision not to call Carpenter as a witness, constituted anything other than an execution of trial strategy.

Finally, the Idaho Court of Appeals has already held, in the context of this case, that the reasoning set forth by Abel does not preclude the admission, for impeachment purposes, of gang-related associations even if the individuals are not a member of the same gang. Thumm, 153 Idaho at 536-540, 285 P.3d at 351-355. Thumm has not successfully demonstrated that the Court of Appeals' opinion would have been different if only trial counsel had raised this argument in some different manner. As the Court of Appeals held, Thumm's defense counsel properly preserved this issue for appeal. Id. at 539, 285 P.3d at 354. Therefore, the Court of Appeals had the jurisdiction to freely review, *de novo*, the relevancy of the evidence, regardless of what arguments were presented by Thumm. Id. at 540, 285 P.3d at 355.

2. Trial Counsel Was Not Ineffective For Declining To Impeach Jeremy Steinmetz On Alleged Inconsistencies Between His Preliminary Hearing Testimony And Trial Testimony, Or For Declining To Object To His Testimony About Thumm's Statements To Him After The Attack

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for: (1) failing to impeach Jeremy Steinmetz on apparent inconsistencies between his preliminary hearing testimony and trial testimony with respect to whether he was afraid of Thumm; and (2) failing to object to Steinmetz's testimony that Thumm told him "don't say nothing" after the attack. (Appellant's brief, pp.27-30.) The district court correctly dismissed this claim (R., pp.381-382), because it fails as a matter of law.

During the pretrial investigation, Steinmetz failed to identify Thumm in a photo lineup that was presented to him by police. (See Trial Tr., Vol. II, p.763, L.12 – p.764, L.13.) At the jury trial, Steinmetz explained that while he could have identified Thumm in the lineup, he declined to do so because he was "kind of scared" of implicating Thumm to law enforcement. (Trial Tr., Vol. II, p.764, L.10 – p.765, L.10.) However, as noted by Thumm in the post-conviction proceeding and on appeal, Steinmetz, at Thumm's preliminary hearing, testified that he chose not to identify Thumm in the photo lineup because he was "just trying to protect [Thumm]." (Prelim. Tr., p.21, Ls.9-13.) The district court overruled an objection to counsel's follow-up question of whether Steinmetz was "worried about what might happen if [Steinmetz] cooperated with police." (Prelim. Tr., p.21, Ls.14-18.) Later in the hearing, Steinmetz testified that Thumm had not threatened him, and that instead, Steinmetz had "changed his story" with police "[o]nly after the police had told [Steinmetz] [Thumm's] name," which indicated to Steinmetz that the police "knew [Thumm]." (Prelim. Tr., p.23, Ls.7-12.) Near the conclusion of the preliminary hearing, immediately before the felony intimidation of the witness charge was dismissed, Steinmetz, in responding to questioning from the magistrate court, testified that he did not feel intimidated, threatened, or harassed by Thumm. (Prelim. Tr., p.36, L.5 – p.37, L.20.)

Prior to trial, the state filed a notice of intent to utilize I.R.E. 404(b) evidence that, several days after the attack, Thumm told Steinmetz, in the presence of Davis, "[d]on't say anything." (See Trial Tr., Vol. I, p.36, L.8 – p.37, L.19.) On the first day of the trial, the prosecutor discussed the I.R.E. 404(b) notice and explained that Thumm's statement was admitted at the preliminary hearing to attempt to prove the felony intimidation of a

witness charge against Thumm – a charge that was ultimately dismissed. (Id.) The prosecutor argued that the statement did not constitute I.R.E. 404(b) evidence, but, even if the district court concluded otherwise, the statement should still be admitted because it demonstrated Thumm's consciousness of guilt and Davis' knowledge of the attack. (Id.) Thumm's trial counsel objected to the admission of the statement. (Trial Tr., Vol. I, p.38, Ls.14-24.) The district court noted that while, "at first blush," the statement appeared to be "overly prejudicial," it would defer its ruling until the appropriate part of the trial so it could analyze the statement in context. (Trial Tr., Vol. I, p.38, L.25 – p.39, L.5.) At the trial, the prosecutor raised the issue again shortly prior to the anticipated introduction of the statement. (Trial Tr., Vol. II, p.748, L.21 – p.749, L.5.) The district court ruled that the statement was admissible. (Trial Tr., Vol. II, p.749, Ls.6-12.) Thumm's trial counsel did not attempt to renew her previous objection to the admission of the statement. (Id.) Consistent with the ruling, Steinmetz later testified that Thumm told him "don't say nothing" several days after the attack. (Trial Tr., Vol. I, p.762, L.6 – p.763, L.4.)

Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to either sub-claim. It is unsurprising that Thumm's trial counsel would choose not to delve into, on cross-examination, any specifics regarding whether Steinmetz was afraid of Thumm. This was a reasonable tactical decision, particularly considering it is unlikely that trial counsel could know, for certain, what Steinmetz's response to such impeachment questions might be. As the district court noted (R., p.382), trial counsel may have been concerned that it was, in fact, Steinmetz's fear of Thumm that motivated him to deny, at the preliminary hearing, that Thumm had threatened or harassed him. Also, it is notable that Thumm's trial counsel *did* utilize the preliminary

hearing transcript to cross-examine Steinmetz during the jury trial on a different topic. (Trial Tr., Vol. II, p.796, L.17 – p.797, L.25.) The fact that Thumm's trial counsel was aware of the preliminary hearing transcript and Steinmetz's testimony in it indicates that her decision not to impeach Steinmetz on whether he was afraid of Thumm was tactical, and not based upon some objective shortcoming, such as failing to review the preliminary hearing transcript. Thumm has also failed to demonstrate prejudice with respect to this sub-claim, particularly in light of the strength of the state's case.

Likewise, Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to his sub-claim that his trial counsel was ineffective for failing to object to Steinmetz's testimony that Thumm told him, "don't say nothing" after the attack. First, this statement was properly admitted at trial, and therefore, it did not constitute deficient performance for Thumm's counsel to decline to renew her objection. State v. Pokorney, 149 Idaho 459, 463, 235 P.3d 409, 413 (2010) ("Rule 404(b) allows evidence of other acts if admitted for the purpose of showing knowledge or consciousness of guilt….Evidence of a defendant's efforts to influence or affect evidence, such as intimidating a witness…may be relevant to demonstrate consciousness of guilt." (internal citation and footnote omitted)). Thumm also cannot demonstrate that the district court's decision to admit the evidence would have changed if only Thumm's counsel had renewed the objection. In fact, the district court's decision to admit the evidence can be read as an overruling of the objection that Thumm's counsel already made. Finally, Thumm has also failed to demonstrate prejudice with respect to this sub-claim, particularly in light of the strength of the state's case.

3. Trial Counsel Was Not Ineffective For Declining To Object To Paris Davis' Use Of The Term "Prison" At Trial

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for declining to object to Paris Davis' use of the term "prison" at trial, a term which, Thumm asserts, was utilized as a legal conclusion. (Appellant's brief, p.31.) However, as the district court correctly concluded (R., pp.382-383), this claim fails as a matter of law.

Before the start of the jury trial, the prosecutor informed the court of the anticipated trial evidence that Paris Davis told Thumm, after the attack, that he was "going to prison." (Trial Tr., Vol. I, p.31, L.16 – p.32, L.16.) Thumm's counsel objected to the testimony on the ground that, because Davis is not a legal expert, her opinion or understanding regarding whether Thumm was going to prison was not relevant. (Trial Tr., Vol. I, p.32, L.18 – p.33, L.4.) Davis' counsel also objected to the admission of the statements. (Trial. Tr., Vol. I, p.33, L.7 – p.34, L.5.) The district court deferred its ruling until it could analyze the issue with the appropriate factual context during the trial. (Trial Tr., Vol. I, p.35, L.14 – p.36, L.7.) Prior to the admission of the statements, the prosecutor brought the matter to the attention of the district court. (Trial Tr., Vol. II, p.742, L.20 – p.743, L.20.) Thumm's counsel expressed concern that the prosecutor might inappropriately lead the witnesses to make the statement at issue. (Trial. Tr., Vol. II, p.743, L.23 – p.744, L.3.) The district court ruled that the statement was admissible, and that the state would be permitted to elicit the statement with leading questions to mitigate the risk that the witnesses might testify that Davis told Thumm that he was "going *back* to prison." (Trial Tr., Vol. II, p.745, L.8 – p.748, L.3) (emphasis added). Then, as noted above, both Jeremy Steinmetz and Frankie Hughes testified that, after the

attack in the hotel room, Paris Davis told Thumm that he was "going to prison." (Trial Tr., Vol. II, p.755, Ls.15-21; p.899, Ls.21-23.)

In his amended post-conviction petition, Thumm asserted that his trial counsel was ineffective for failing to renew her pretrial objection to Davis' statement on the ground that the term "prison" constituted a legal conclusion. (R., pp.176-177.) Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to this claim. First, he has failed to demonstrate that the manner in which his trial counsel approached this issue was anything but a tactical decision. Instead, Thumm appears to dock this claim to an assumption that Thumm's mere failure to renew the objection, after raising it prior to trial, constitutes deficient performance. However, counsel's mere failure to renew the objection does not constitute *per se* deficiency. As noted, the district court deferred its ruling on the statement, and then during trial ruled that the statement was admissible. This can be read as an overruling of Thumm's counsel's prior objection that was already made. Further, Thumm has also failed to demonstrate, or argue, that the statement was actually inadmissible. Davis' use of the term "prison" did not constitute some inadmissible "legal conclusion." The evidence was relevant to prove Davis' *knowledge* that Thumm had committed an aggravated battery. Thumm has also failed to demonstrate Strickland prejudice. Davis' statement, while likely damaging to her case, did not tend to prove *Thumm's* guilt.

4. Trial Counsel Was Not Ineffective For Declining To Impeach Frankie Hughes On The Specific Potential Exposure To Prison He Faced In Connection With This Case

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to impeach Hughes on the fact that he

potentially faced up to 60 years of prison for his role in the attack. (Appellant's brief, pp.30-31.) However, as he district court correctly concluded (R., pp.383-384), this claim fails as a matter of law.

For his role in the attack on Ohls (and Ohls' girlfriend, Brooke Everhart), Hughes was charged with two counts of aggravated battery and two counts of use of a deadly weapon during the commission of a crime. (See R., p.190.) In his amended post-conviction petition, Thumm asserted that Hughes faced up to 60 years in prison for these crimes, and that his trial counsel was ineffective for failing to impeach Hughes about this potential exposure and Hughes' "great motivation to provide biased testimony against [Thumm]." (R., pp.190-191.)

As the district court concluded (R., pp.383-384), this claim is belied by the record. Thumm's trial counsel *did* cross-examine Hughes on his potential bias related to his criminal exposure. Specifically, Thumm's trial counsel cross-examined Hughes on: (1) his interview with police in which officers told him that they would "talk to the prosecutor about getting probation"; and (2) the fact that, despite Hughes' testimony denying that he was involved in the attack on Ohls, Hughes was charged with two counts of aggravated battery, and that these two charges had been bound over by a magistrate judge. (Trial Tr., Vol. II, p.914, L.7 – p.916, L.9.) Later in the trial, Thumm's counsel elicited testimony indicating that Detective Holland told Hughes that he had a "good chance" at probation in his case. (Trial Tr., Vol. II, p.988, Ls.13-17.) The state also elicited testimony from Hughes about his aggravated battery charges. (Trial Tr., Vol. II, p.908, Ls.2-19.) During his closing argument, Davis' counsel referenced the aggravated battery charges against Hughes (Trial Tr. Vol. II, p.1138, L.25 – p.1139, L.13), and during

her closing argument, Thumm's counsel specifically argued that "Frankie [Hughes] has a lot to gain by testifying and pointing the finger." (Trial Tr., Vol. II, p.1157, L.24 – p.1158, L.2.)

The fact that Thumm's counsel did not elicit specific testimony about the *maximum length* of the sentences potentially faced by Hughes does not demonstrate Strickland deficient performance or prejudice. Therefore, Thumm has failed to show that the district court erred in summarily dismissing this claim.

5. Trial Counsel Was Not Ineffective With Respect To The Manner In Which She Cross-Examined Detectives Leavitt And Holland

Thumm contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for inadequately cross-examining Detectives Leavitt and Holland. (Appellant's brief, pp.35-37.) However, as the district court correctly concluded (R., pp.384-385), this claim fails as matter of law.

Thumm's trial counsel asked Detective Leavitt, upon cross-examination, about an interview he conducted with Ohls. (Trial Tr., Vol. I, p.308, L.2 – p.309, L.2.) Counsel asked Detective Leavitt if Detective Holland, who was also at the interview, presented Ohls with a photo lineup. (Trial Tr., Vol. I, p.308, Ls.15-24.) Detective Leavitt responded that he could not recall without looking at his police report. (Trial Tr., Vol. I, p.308, L.24 – p.309, L.2.) Counsel did not attempt to refresh Detective Leavitt's recollection. Thumm's counsel also asked Detective Leavitt whether Leavitt told Frankie Hughes, during a police interview, that the police had fingerprints and DNA on a bottle that would implicate Hughes in his battery of Ohls' girlfriend, Brooke Everhart. (Trial Tr., Vol. I, p.334, Ls.12-15.) The district court sustained the state's hearsay objection to

this question, because it was not Detective Leavitt that made this statement to Hughes. (Trial Tr., Vol. I, p.334, L.16 – p.335, L.21.)

Detective Holland subsequently testified at the trial. (Trial. Tr., Vol. II, p.952, p.16 – p.1027, L.6.) Upon cross-examination, Thumm's trial counsel did not question Detective Holland either about the lineup presented to Ohls, or the statement to Hughes. (See Trial Tr., Vol. II, p.911, L.1 – p.914, L.1; p.985, L.9 – p.998, L.21; p.1026, Ls.1-21.)

In his amended post-conviction petition, Thumm argued that his trial counsel's cross-examination of Detectives Leavitt and Holland constituted ineffective assistance of trial counsel because counsel ultimately failed to elicit testimony that: (1) the detectives met with Ohls and Everhart, presented them both lineups, including one that included Thumm, and that neither were able to identify a suspect; and (2) Detective Holland, in fact, deceptively told Hughes that police had fingerprints and DNA on a bottle that would implicate Hughes in his battery of Everhart.[11] (R., pp.191-193.)

As the district court concluded (R., pp.384-385), Thumm failed to establish Strickland deficient performance or prejudice with respect to either sub-claim. Thumm has failed to demonstrate that the decisions made by counsel in the course of her cross-examination of the detectives was anything but strategic. Further, the fact that Ohls failed to identify Thumm in a lineup was of very minimal significance in this case. Ohls testified at the jury trial and did not identify his attackers. (Trial Tr., Vol. I, p.501, L.7 – p.516, L.21.) Ohls did not identify Thumm even in the suggestive context of a jury trial at which Thumm was being charged in connection with the attack, and in fact, testified that he did not remember Thumm even being in the hotel room that night. (Trial. Tr., Vol.

[11] As discussed below, the fingerprint report was not actually generated until several months later. (R., pp.202-203.)

I, p.515, L.10 – p.516, L.21.) The fact that Ohls could also not identify Thumm in a pretrial investigative lineup would not have benefitted Thumm.

Further, Thumm failed to demonstrate that his counsel's decision not to cross-examine Detective Holland on his pretrial interview with Hughes constituted deficient performance. Thumm has not demonstrated or alleged that Detective Holland's deceptive interview tactics were somehow improper. Further, as Thumm noted in his amended post-conviction petition, his counsel possessed the police report in which Detective Holland described his interview with Hughes. (R., p.192.) Thumm's counsel's possession of this report, as well as her previous questioning of Detective Leavitt regarding the same interview with Hughes, indicates that counsel's decision not to follow up with Holland was strategic, as opposed to being based on some objective shortcoming, such as ignorance of the police report. Further, contrary to Thumm's apparent assertion, counsel's decision not to follow-up on the issue after initially raising it with Detective Leavitt does not constitute *per se* deficient performance. A defense attorney is entitled to evolve her strategic approach to a case as the case develops. Finally, Thumm has also failed to demonstrate Strickland prejudice. Thumm has not adequately explained how the deceptive nature of Detective Holland's interview with Hughes prejudiced Thumm's case.

6. Thumm's Claim That His Trial Counsel Was Ineffective For Failing To Call Various Named Defense Witnesses Is Waived On Appeal

In his amended post-conviction petition, Thumm asserted that his trial counsel was ineffective for failing to call various named individuals as witnesses during the trial. (R., pp.171-172.) However, Thumm has not raised this claim in his Appellant's brief. (See generally Appellant's brief.) Therefore, despite the fact that Thumm noted, in his Appellant's brief, that he was "expressly appealing the dismissal of the entire petition and

all claims" (Appellant's brief, p.13), this claim is waived pursuant to Zichko, 129 Idaho at 263, 923 P.2d at 970 ("[a] party waives an issue on appeal if either authority or argument are lacking"). In the alternative, should this Court choose to reach the merits of this claim, the state adopts the reasoning set forth by the district court as to why this claim fails as a matter of law. (R., pp.379-381.)

II.
Thumm Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Ineffective Assistance Of Appellate Counsel Claims

A. Introduction

Thumm contends that the district court erred by summarily dismissing his ineffective assistance of appellate counsel claims. (Appellant's brief, pp.20-21, 34 n.15, 39-41.) As the district court correctly concluded (R., pp.367, 385-387, 390-391), these claims fail as a matter of law.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman, 144 Idaho at 523, 164 P.3d at 803.

C. The District Court Properly Dismissed Thumm's Ineffective Assistance Of Appellate Counsel Claims

The two-prong Strickland test for ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel,

a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). As explained by the United States Supreme Court, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 752. The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)). It is "difficult" to demonstrate that appellate counsel provided deficient performance simply for failing to raise a particular claim. Robbins, 528 U.S. at 287-288.

Thumm's appellate counsel raised numerous claims on direct appeal. Specifically, appellate counsel asserted: (1) the district court erred by denying Thumm's motion for a mistrial after Hughes purportedly referenced Thumm's alleged gang affiliation during the trial; (2) the district court erred by ruling that if the defense called Chris Smith to testify, then the state would be permitted to impeach his testimony that both Thumm and Smith were alleged gang members; (3) an officer's trial testimony that Thumm invoked his rights constituted a violation of his Fifth Amendment right to remain

silent; (4) the prosecutor committed misconduct in numerous respects during closing argument; and (5) cumulative error. Thumm, 153 Idaho 533, 285 P.3d 348.

Thumm has failed to demonstrate Strickland deficient performance or prejudice with respect to any of his ineffective assistance of appellate counsel claims.[12] With respect to each claim, Thumm has failed to adequately allege or demonstrate that his appellate counsel's decision not to raise the claims, or to not raise the claims in the manner Thumm now assets they should have been raised, was based upon some objective shortcoming. Further, Thumm has failed to demonstrate that any of these claims would have been successful had they been raised on appeal, or that they were potentially more meritorious than any of the claims appellate counsel actually chose to raise.

1. Appellate Counsel Was Not Ineffective For Declining To Attempt To Raise The *Bruton* Issue As Fundamental Error On Direct Appeal

Thumm contends that his appellate counsel was ineffective for declining to attempt to raise, as fundamental error, a claim that the joinder of his case with Paris Davis' case violated his Sixth Amendment rights pursuant to Bruton. (Appellant's brief, pp.20-21.) As the district court correctly concluded (R., p.367), this claim fails as a matter of law.

In Mintun, 144 Idaho at 662, 168 P.3d at 46, the Idaho Court of Appeals held that a claim alleging ineffective assistance of appellate counsel for failing to raise an issue as fundamental error "is not meritorious" for a number of reasons, including: a rule allowing such a claim "would be impractical, inefficient, and often disadvantageous to defendants whose interest would be better served by presenting such a claim in a post-conviction

[12] Thumm also raises ineffective assistance of appellate counsel claims related to his substantive Brady and prosecutorial misconduct post-conviction claims. The state address these claims below, in the context of its response to those substantive claims.

action asserting ineffective assistance of trial counsel" for failing to object to the alleged error in the trial court; and a trial counsel's failure to object to errors may be done for legitimate strategic or tactical purposes, and the record on appeal would rarely show this strategy. Id. Thumm's claim that his appellate counsel was ineffective for failing to attempt to raise a Bruton challenge as fundamental error therefore fails as a matter of law and Thumm has failed to demonstrate he is entitled to relief.[13]

On appeal, Thumm appears to argue that his appellate counsel *could* have raised a Bruton challenge as preserved error on direct appeal. (Appellant's brief, pp.20-21.) Specifically, Thumm notes that Paris Davis' counsel actually *did* raise an unsuccesful Bruton challenge during the trial. (Id.; see also Trial Tr., Vol. II, p.744, Ls.12-22.) Thumm contends that this showed that "the district court would have overruled a *Bruton* objection had [Thumm's] attorney made it, so it could be considered to have been preserved error." (Appellant's brief, p.21.) Thumm did not cite authority for this proposition that a co-defendant's constitutional challenge is preserved for appeal if the other co-defendant preserves an analogous challenge that *her* constitutional rights were violated. As Thumm acknowledges (id.), an objection related to the violation of *Thumm's* constitutional rights "was not Paris Davis' to make." This is because, as Thumm further acknowledged in his amended post-conviction petition (R., p.153), Davis' Bruton challenge could not be the same as Thumm's Bruton challenge because the challenges concern completely different statements, and thus require completely different analyses.

[13] While the district court did not, in its summary dismissal order, cite Mintun or the general principle upon which Mintun is based, it did note that "the [s]tate contends that the ineffective assistance of counsel claims related to appellate counsel fail, because the *Bruton* issue was not preserved for appeal…." (R., p.385.) Indeed, the state cited Mintun and thus provided Thumm notice for this specific ground for dismissal, as required by I.C. § 19-4906. (R., pp.123-124.)

Therefore, if Thumm's appellate counsel attempted to raise a Bruton challenge on direct appeal, it would have been analyzed under the Idaho fundamental error framework because Thumm's trial counsel did not preserve this challenge with respect to Thumm's constitutional rights. Therefore, Thumm's ineffective assistance of appellate counsel claim fails as a matter of law.

In the alternative, this claim also fails because, for all of the reasons discussed above in Sec. I, Part D, a Bruton fundamental error challenge would have clearly been unsuccessful on appeal, because no testimonial statements of Davis were entered into evidence at trial.

2. Thumm Has Failed To Show His Appellate Counsel Was Ineffective For Failing To Raise Various Prosecutorial Misconduct Claims

Thumm contends that the district court erred by summarily dismissing his claim that his appellate counsel was ineffective for failing to raise various prosecutorial misconduct claims on direct appeal. (Appellant's brief, pp.40-41.) As the district court correctly concluded (R., pp.385, 390-391), this claim fails as a matter of law and Thumm has failed to demonstrate he is entitled to relief.

On direct appeal, Thumm's appellate counsel raised several prosecutorial misconduct claims. Specifically, Thumm's appellate counsel asserted that the prosecutor committed misconduct by: (1) eliciting testimony from Hughes which indicated that Thumm was a gang member; (2) appealing to the passions and prejudices of the jury during closing argument by asking the jury to picture themselves in the position of the victim; (3) eliciting testimony from an officer that utilized Thumm's pre-*Miranda* silence to imply his guilt; and (4) misstating the reasonable doubt standard. Thumm, 153 Idaho at 538, 542-544, 285 P.3d at 348, 357-359. The final three of these claims were raised as

fundamental error on appeal. Id. In his amended post-conviction petition, Thumm asserted that his appellate counsel was ineffective because "he did not raise all of the issues of prosecutorial misconduct." (R., p.178.) Specifically, Thumm contends that his appellate counsel should have asserted, as fundamental error, that the prosecutor additionally committed misconduct by: (1) eliciting testimony that Davis told Thumm that he was "going to prison" after the attack; (2) making disparaging comments about the defense during closing argument; (3) making statements about the victim during closing argument that were unsupported by the evidence; (4) mischaracterizing Hughes' trial testimony during closing argument; and (5) utilizing unnecessarily inflammatory language when describing Thumm during closing argument. (R., p.177 n.15, 178, 184-188.)

This claim is conclusory. It does not constitute deficient performance for appellate counsel to decline to raise "all of the issues of prosecutorial misconduct." Dunlap v. State, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015) ("Courts have recognized that appellate counsel may fail to raise an issue on appeal because counsel 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." (citations and internal quotations omitted)). Thumm has additionally failed to argue or demonstrate that appellate counsel's decisions regarding which claims to raise were based upon some objective shortcoming, or that the claims he raises now were more meritorious than the claims actually raised by appellate counsel. Finally, as the district court concluded (R., pp.390-391), there was also no reasonable probability that the claims raised by Thumm would have resulted in the vacating of his conviction if raised.

3. Thumm's Claims That Appellate Counsel Was Ineffective For Failing To Raise And/Or Inadequately Raising *Abel* and *Brady* Issues Are Waived

Thumm contends that the district court erred by summarily dismissing his claims that his appellate counsel was ineffective for failing to attempt to raise Abel and Brady claims on direct appeal. However, these claims are waived for appeal pursuant to Zichko, 129 Idaho at 263, 923 P.2d at 970 ("[a] party waives an issue on appeal if either authority or argument are lacking"), because Thumm has failed to support them with argument.

In his Appellant's brief, Thumm only "noted" his claim that his appellate counsel was ineffective for failing to raise an Abel claim in the context of a footnote. (Appellant's brief, p.34 n.15.) Likewise, while Thumm references, in passing, his claim that his appellate counsel was ineffective for failing to attempt to raise a Brady claim on direct appeal (Appellant's brief, pp.21, 39), Thumm failed to support this claim with argument.

Even to the extent that either of these claims is not precluded by Zichko, they still fail as a matter of law because Thumm has not attempted to demonstrate Strickland deficient performance or prejudice with respect to either claim. Therefore, Thumm has failed to show that the district court erred in summarily dismissing either claim.

III.
Thumm Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His *Brady* Claim

A. Introduction

Thumm contends that the district court erred by summarily dismissing his Brady claim that the state untimely disclosed certain fingerprint evidence. (Appellant's brief, pp.21-27.) This claim is forfeited pursuant to I.C. § 19-4901(b) because Thumm could have raised it on direct appeal but did not.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman, 144 Idaho at 523, 164 P.3d at 803.

C. Thumm's Post-Conviction *Brady* Claim Was Forfeited Pursuant To I.C. § 19-4901(b) Because It Was Not Raised On Direct Appeal

A post-conviction petition is not a substitute for a direct appeal, and any issue which could have been raised to the trial court or on direct appeal, but was not, is forfeited. I.C. § 19-4901(b); see also Bias v. State, 159 Idaho 696, 702-703, 365 P.3d 1050, 1056-1057 (Ct. App. 2015). A post-conviction petition may overcome this forfeiture only if "it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." Id.

The week prior to the trial, the state disclosed a fingerprint report to the defense. (See Trial Tr., Vol. II, p.750, Ls.2-9.) During the trial, Thumm's trial counsel objected to the admission of the fingerprint report because it was untimely pursuant to the district court's pretrial orders. (Trial Tr., Vol. II, p.750, Ls.2-13.) The state explained that it just itself obtained the report from the state crime laboratory the previous week, but that due to late disclosure, it would not attempt to introduce the report as evidence at trial. (Trial Tr., Vol. II, p.750, Ls.15-25.) The district court agreed with the parties and excluded the evidence. (Trial Tr., Vol. II, p.751, Ls.1-13.)

For the first time in his amended post-conviction petition, Thumm asserted that the state's untimely disclosure of the fingerprint evidence constituted a Brady violation. (R., pp.179-184.) Thumm asserted that the fingerprint report, though not discussed at trial as such, was actually exculpatory. The fingerprint report indicated that Vance Thumm was the source of the latent print found on a broken Jose Cuervo Tequila bottle (Item 4A), but that Thumm was excluded as being the source of the latent prints recovered on a certain Budweiser bottle, broken pieces of a Jose Cuervo Tequila bottle, and an unopened bottle of Olde English 800 Malt Liquor (Items 3A-1, 3A-5, 3A-7, 4A/5-B, 4B-3, 6A-1 and 6A/L3-B). (R., pp.181-183, 202-203). No latent prints were discovered on several other tested pieces of evidence. (R., p.202.) Thumm asserts that this report was exculpatory because there was no evidence presented at trial that anyone was struck with the Tequila bottle – the only beverage container upon which Thumm's prints were found; and because Hughes testified at trial that Thumm struck Ohls with an Olde English 800 Malt Liquor bottle and a Budweiser bottle – bottles seemingly similar to those upon which Thumm was excluded as being a source of recovered prints. (R., pp.182-183; see also Trial Tr., Vol. II, p.879, L.8 – p.881, L.12.)

As the state argued in its brief in support of its motion for summary dismissal (R., pp.126-127),[14] Thumm's *Brady* claim was forfeited pursuant to I.C. § 19-4901(b). While the state's disclosure of the fingerprint evidence was untimely pursuant to the district

[14] The district court did not dismiss this claim on the ground that it was forfeited pursuant to I.C. § 19-4901(b). However, the state's utilization of this ground in its brief in support of its motion for summary dismissal (R., pp.126-127), provided Thumm notice for this specific ground for dismissal, as required by I.C. § 19-4906. Thumm's specific response to this ground for dismissal in his response to the state's motion for summary dismissal further indicates that he was actually aware of this ground for dismissal. (R., p.226.)

court's pretrial orders, disclosure still occurred prior to the jury trial. Therefore, this claim could have been raised on direct appeal.

In his response to the state's motion for summary dismissal, Thumm argued that the Brady claim could not have been raised on direct appeal because the fingerprint results were not in the appellate record. (R., pp.225-226.) However, "[i]t is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal." Greenfield v. Smith, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017) (citation omitted). Thumm has failed to demonstrate or argue that he could not, in the exercise of due diligence, have included the fingerprint results in the appellate record. This claim is therefore forfeited pursuant to I.C. § 19-4901(b).

Thumm also argued that the state's response to his Brady claim constituted an attempt to "whipsaw the Petitioner, asserting that the claim needed to be raised on direct appeal while also asserting that appellate counsel was not ineffective for failing to raise it on direct appeal." (R., p.226 n.2.) However, contrary to Thumm's apparent assumption, it can be possible *both* that an individual waived a post-conviction claim by failing to include it in his direct appeal, *and* that the individual's appellate counsel was not constitutionally deficient for exercising a strategic choice not to raise the claim. Thumm does not possess a universal right for this claim to be considered on its merits in the manner of his choosing. This claim may only be considered by Idaho's courts if raised in compliance with applicable procedural rules regarding preservation and forfeiture.

In the alternative, Thumm's Brady claim also fails on its merits. In order to establish a Brady violation, there must be evidence that: (1) is favorable to the accused because it is either exculpatory or impeaching; (2) was willfully or inadvertently

suppressed by the state; and (3) was prejudicial or material in that there is a reasonable probability that its disclosure to the accused would have led to a different result. State v. Lankford, 162 Idaho 477, 503, 399 P.32d 804, 830 (2017). As the district court concluded (R., p.368), there is no evidence that the state suppressed the fingerprint report, either willfully or inadvertently. The jury trial commenced on October 26, 2009. (Trial Tr., Vol. I, p.5.) The lab report, consistent with the prosecutor's representation to the court, was not generated until October 19, 2009, at which point, the state disclosed it. (R., p.203.) While the report was properly excluded by the district court due to its untimely generation and disclosure, there is no evidence that the report could have been disclosed any earlier. Further, for all of the reasons discussed in greater detail below, Thumm failed to demonstrate any probability that the report, if disclosed earlier, could have been utilized by Thumm to secure a different trial result.

D. Thumm's Trial Counsel Was Not Ineffective For Declining To Attempt To Utilize The Fingerprint Evidence At Trial

Thumm also asserts, in the alternative to his Brady claim, that the district court erred by summarily dismissing his claim that trial counsel was ineffective for failing to recognize the exculpatory nature of the fingerprint evidence, and for failing to attempt to utilize the report at trial. (Appellant's brief, pp.26-27.) However, as the district court concluded (R., pp.387-389), Thumm has failed to demonstrate he is entitled to relief on this claim.

First, as the district court noted (R., p.388), the fingerprint report was of limited usefulness in this case because Thumm was not actually charged with striking Ohls with any beverage containers. (See Trial Tr., Vol. I, p.50, L.16 – p.51, L.4.) Further, the report

did not disprove the state's theory of the case or necessarily demonstrate that anyone testified falsely about the attack. Hughes testified that Thumm struck Ohls with: (1) an Olde English bottle that was not full and which was broken in the course of the attack; and (2) a Budweiser bottle that was also broken in the course of the attack. (Trial Tr., Vol. II, p.879, L.8 – p.881, L.12.) The Olde English bottle described by Hughes does not appear to be the same bottle as the *unopened* Olde English Bottle (Item 6A), that was found to contain prints from which Thumm was excluded as the contributor. (R., pp.202-203.) Likewise, the Budweiser bottle described by Hughes does not clearly or necessarily correspond to the specific Budweiser bottles, or pieces thereof, identified in the report which contained prints from which Thumm was excluded as the contributor. (Id.) Therefore, and in light of the strength of the state's case, Thumm has failed to demonstrate that even had trial counsel attempted to utilize the fingerprint evidence, that trial court would have admitted the evidence at that stage in the proceeding, let alone that such evidence would have resulted in a different trial outcome.

IV.
Thumm Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Prosecutorial Misconduct Claims

A. Introduction

Thumm contends that the district court erred by summarily dismissing his claim that the prosecutor committed misconduct in numerous respects during closing argument. (Appellant's brief, pp.39-41.) As the district court correctly concluded (R., pp.389-391), these claims were forfeited because they could have been raised on direct appeal and were not.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman, 144 Idaho at 523, 164 P.3d at 803.

C. Thumm's Prosecutorial Misconduct Claims Are Forfeited

As discussed above, a post-conviction petition is not a substitute for a direct appeal, and any issue which could have been raised to the trial court or on direct appeal, but was not, is forfeited. I.C. § 19-4901(b); see also Bias, 159 Idaho at 702-703, 365 P.3d at 1056-1057. A post-conviction petition may overcome this forfeiture only if "it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." Id.

In this case, as the district court recognized (R., pp.390-391), each of Thumm's prosecutorial misconduct claims could have been raised on direct appeal. Thumm has not argued to the contrary. (See Appellant's brief, pp.39-41.) Therefore, these claims are forfeited, and Thumm has failed to show that the district court erred.

D. Thumm's Trial Counsel Was Not Ineffective For Declining To Object To The Alleged Instances Of Prosecutorial Misconduct At Trial

Thumm argues, in the alternative, that if his prosecutorial misconduct claims could not be raised in his post-conviction petition, then his trial counsel was ineffective for failing to preserve these claims with a contemporaneous trial objection. (Appellant's

brief, p.40.) However, as the district court concluded (R., pp.389-391), this alternative claim fails as a matter of law.

This claim is conclusory. Thumm has failed to demonstrate that his trial counsel's decision not to object to the alleged instances of prosecutorial misconduct was anything but strategic. Nor has Thumm demonstrated that any of the objections would have been successful, let alone that they would have changed the outcome of the proceeding.

Further, "[f]rom a strategic perspective…many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991). A defense attorney may also decide to not object because he believes the prosecutor's argument is helpful to his case or believes he can capitalize on the prosecutor's statements during his own closing argument. Id.; see also Lambert v. McBride, 365 F.3d 557, 564 (7th Cir. 2004) ("Under *Strickland*, we must note that there may very well be strategic reasons for counsel not to object during closing arguments. Counsel may have been trying to avoid calling attention to the statements and thus giving them more force."); United States v. Daas, 198 F.3d 1167, 1179 (9th Cir. 1999) (counsel's decision not to object to the prosecutor's closing argument "falls within the range of permissible conduct of trial counsel"). "Whatever the actual explanation, *Strickland* requires [the Court] to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Molina, 934 F.2d at 1448 (quoting Strickland, 466 U.S. at 689). "This presumption especially applies to silence in

the face of allegedly improper arguments." Vicory v. State, 81 S.W.3d 725, 731 (Mo. App. 2002) (citation omitted).

In light of the strong presumption that a trial attorney's decisions regarding whether to object during closing argument are strategic, and the absence of evidence to the contrary in this case, Thumm has failed to demonstrate that he is entitled to relief on this claim or that the district court erred by summarily dismissing it.

V.
Thumm Has Failed To Demonstrate Cumulative Error

Under the doctrine of cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Therefore, since a finding of Strickland ineffective assistance of counsel requires a showing of both deficient performance and prejudice, there is no prejudice to cumulate when a petitioner has failed to demonstrate more than one incident of deficient performance. See Spotz, 18 A.3d at 321. The ultimate question of Strickland prejudice, and thus, how Strickland prejudice may "cumulate," is whether the defendant was denied "a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

In his amended post-conviction petition and supporting briefing, Thumm asserted that the numerous instances of deficient performance of his trial counsel resulted in cumulative prejudice. (R., pp.148-149, 226.) As discussed above, Thumm framed his underlying post-conviction petition, and this appeal, as presenting a series of instances of deficient performance which, while relatively insignificant individually, cumulated to

constitute a violation of his Sixth Amendment right to the effective assistance of counsel. (See Tr., p.31, L.25 – p.32, L.8; Appellant's brief, p.1.)

On appeal, while Thumm cited the cumulative error standard (Appellant's brief, p.12), and asserted, in a conclusory manner, that the instances of deficient performance had a "cumulative effect" (Appellant's brief, p.1), he has not provided specific argument regarding the manner in which prejudice cumulated and why he is entitled to relief. Therefore, the state asserts that this claim is waived pursuant to Zichko, 129 Idaho at 263, 923 P.2d at 970 ("A party waives an issue cited on appeal if *either* authority or argument is lacking, not just if both are lacking." (emphasis added)).

In any event, should this Court choose to the address the merits of Thumm's claim of cumulative Strickland prejudice, the state submits that this claim fails as a matter of law, and the district court therefore properly dismissed it. For the reasons discussed above, Thumm failed to demonstrate any instances of Strickland deficient performance, let alone multiple errors that could be cumulated.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Thumm's post-conviction petition.

DATED this 9th day of May, 2018.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of May, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

GREG S. SILVEY
SILVEY LAW OFFICE, LTD.

at the following email address: greg@idahoappeals.com.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd