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## Chacon v. State Respondent's Brief Dckt. 38612

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

MAXIMO CHACON,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38612

**BRIEF OF RESPONDENT**

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

HONORABLE MICHAEL R. CRABTREE  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

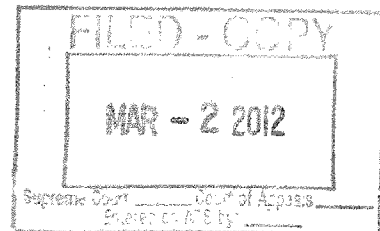
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## STATEMENT OF THE CASE

### Nature Of The Case

Maximo Chacon appeals from the denial of his petition for post-conviction relief.

### Statement Of The Facts And Course Of The Proceedings

Chacon filed a petition for post-conviction relief challenging his conviction for conspiracy to commit drug trafficking and failing to purchase a drug tax stamp. (R., pp. 1-2.) Chacon alleged that his trial counsel rendered ineffective assistance of counsel by “not requesting and reviewing all discovery materials prior to trial,” “failing to provide [Chacon] with copies of all discovery material,” “failing to communicate with [Chacon] during trial preparation,” “fail[ing] to adequately investigate the snitch,” withholding favorable evidence, and “failing to follow [Chacon’s] instructions in attempting to reach a plea negotiation.” (R., pp. 2-3.) He also alleged that his appellate counsel was ineffective for “failing to inform [Chacon] of the ramifications of proceeding pro se,” and “fail[ing] to properly apprise [Chacon] that by raising ineffective assistance of counsel on a direct appeal [sic] may thereby ... act as a bar to raising all other potential claims of ineffective assistance of counsel ....” (R., p. 3.)

The state answered and filed for summary dismissal (R., pp. 11-17), which the district court denied (R., pp. 46-49). The matter then proceeded to evidentiary hearing. (R., pp. 55-57.) At the conclusion of the hearing the district court ordered, and took judicial notice of, a transcript of the criminal trial and

pretrial hearings. (Tr., p. 110, Ls. 7-18; R., pp. 57, 60.<sup>1</sup>) The district court ultimately denied all claims for failure to prove them at the evidentiary hearing. (R., pp. 58-67.) Chacon filed a timely notice of appeal. (R., pp. 76-78.)

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<sup>1</sup> Chacon has not included in the appellate record a copy of the trial transcript from the criminal case considered by the district court in its denial of post-conviction relief. He has therefore failed to provide an adequate record for appellate review of his claims of error. State v. Repici, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992) (missing portions of the record are presumed to support the actions of the court below).

## ISSUES

Chacon states the issues on appeal as:

1. Did the district court err when it dismissed [sic] Mr. Watt's [sic] Petition for Post-Conviction Relief concerning his trial counsel?
2. Did the district court err when it dismissed [sic] Mr. Chacon's petition for Post-Conviction Relief concerning his appellate counsel?

(Appellant's brief, p. 2 (issues renumbered and bolding omitted).)

The state rephrases the issues as:

1. Has Chacon failed to show error in the district court's conclusion that Chacon failed to prove that his trial counsel was ineffective in relation to sharing discovery with his client or investigating the confidential informant?
2. Has Chacon failed to show error in the district court's conclusion that Chacon failed to prove ineffective assistance of appellate counsel?

## ARGUMENT

### I.

#### Chacon Has Failed To Show Error In The District Court's Conclusion That Chacon Failed To Prove That His Trial Counsel Was Ineffective In Relation To Sharing Discovery Or Investigating The Confidential Informant

##### A. Introduction

The district court rejected Chacon's claims of ineffective assistance of trial counsel. (R., pp. 62-65.) On appeal Chacon claims that some of these claims were proven. (Appellant's brief, pp. 4-6.) Specifically, Chacon asserts he proved that counsel did not provide him copies of tapes and a letter later used as evidence at trial and did not adequately cross examine the confidential informant. (Appellant's brief, pp. 5-6.) As to the claim that he proved he had not been provided copies of the discovery, the district court found that trial counsel made the discovery available to Chacon, a factual finding Chacon does not dispute on appeal. As to the claim that cross examination of the confidential informant was ineffective, this claim was not asserted in Chacon's petition or decided by the district court, but is alleged for the first time on appeal. Chacon's general assertions that he proved these claims do not show error by the district court.

##### B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct.



App. 1990). When reviewing a district court's denial of post-conviction relief following an evidentiary hearing, this Court must defer to the district court's findings of fact unless they are clearly erroneous. McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999). This Court freely reviews the district court's application of relevant law. Id.

C. Chacon Has Failed To Show Error In The District Court's Determination That He Failed To Prove His Claims Of Ineffective Assistance Of Counsel

A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)). To establish deficient performance the petitioner must overcome a strong presumption that counsel performed within the wide range of professional assistance by proving trial counsel's actions fell below an objective standard of reasonableness. State v. Shackelford, 150 Idaho 355, \_\_\_, 247 P.3d 582, 609 (2010); 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). To meet this burden "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, a defendant must prove 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, 244 (Ct. App. 1999). This two-prong 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)).

1. Chacon Has Failed To Show Error In The Denial Of His Claim That Counsel Was Ineffective In The Handling Of Discovery

The district court concluded, “There was no evidence presented at trial identifying a single piece of discovery information that [trial counsel] failed to request, receive or *make available* to Mr. Chacon.” (R., p. 62 (emphasis added).) On appeal Chacon points out that counsel did not provide copies of tapes and a letter used as evidence at his criminal trial (Appellant’s brief, p. 5), but does not dispute the district court’s factual finding that those items were in his counsel’s possession and made available to him (R., p. 62). Chacon has failed to show that trial counsel had a duty to make sure Chacon had copies of the items in question or that lack of copies of those items in any way affected the outcome of the trial. He has failed to show the district court erred when it concluded Chacon failed to prove deficient performance or prejudice in conducting discovery or sharing it with Chacon.

2. Chacon Has Failed To Show Ineffective Assistance Of Counsel In Relation To The Confidential Informant

In his petition Chacon alleged that his counsel “failed to adequately investigate the snitch and obtain critical information regarding the snitch’s

background.” (R., p. 3.) The district court rejected this claim, stating “Mr. Chacon did not present any evidence demonstrating that [trial counsel’s] investigation of the confidential informant was deficient, nor did he present any previously available evidence regarding the confidential informant that was not discovered by [trial counsel].” (R., p. 63.) On appeal Chacon does not dispute that he failed to prove the claim he alleged in his petition (that counsel failed to adequately investigate the snitch), but instead argues that he presented evidence that counsel did not request a jury instruction regarding the confidential informant, did not effectively cross examine her, and did not “pursue” trying to have her testimony excluded from the trial. (Respondent’s brief, pp. 5-6.) Chacon’s argument on appeal is irrelevant because it has nothing to do with the claim asserted in his petition and adjudicated by the district court.

## II.

### Chacon Has Failed To Show Error In The District Court’s Conclusion That Chacon Failed To Prove Ineffective Assistance Of Appellate Counsel

The district court found that Chacon retained an attorney to represent him on appeal. (R., p. 65.) That attorney filed a notice of appeal and obtained transcripts at county expense, but before he had even completed a review of those transcripts Chacon terminated his services by letter. (Id.) “Upon receiving the termination letter, [appellate counsel] provided Mr. Chacon with all of the deadlines, records, and transcripts in the case, as well as [filed] a notice of withdrawal.” (Id.) Appellate counsel did not provide advice about how to proceed on appeal after receipt of the letter because “the attorney-client relationship had been terminated by Mr. Chacon.” (Id.) Because appellate

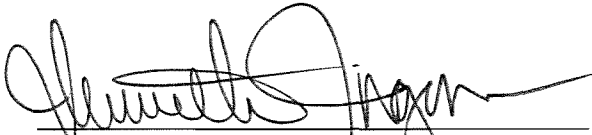
counsel had “no duty to further provide professional advice” there was no deficient performance or prejudice proven by Chacon. (Id.)

Chacon claims error on appeal but does not actually address the district court’s grounds for finding no ineffective assistance of counsel. (Appellant’s brief, p. 7.) Because Chacon has presented neither argument nor authority for the proposition that counsel had an ongoing duty to advise Chacon after the termination of the lawyer-client relationship, he has failed to present any issue capable of appellate review. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (“A party waives an issue cited on appeal if either authority or argument is lacking”).

#### CONCLUSION

The state respectfully requests this Court to affirm the district court’s denial of post-conviction relief.


DATED this 2nd day of March, 2012.

  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of March, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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PO Box 1707  
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KKJ/pm