8-4-2014

Garcia v. State Respondent's Brief Dckt. 41248

IN THE SUPREME COURT OF THE STATE OF IDAHO

ARMANDO GARCIA, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 41248 Ada Co. Case No. CV-2010-24962

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

Armando Garcia appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

In 2009, Garcia entered a plea of guilty to trafficking in heroin pursuant to a Rule 11 plea agreement in which he agreed to waive his right to appeal the case, including the district court's denial of his motion to suppress. (R., p.149; Resp. Ex. C, p.2.) The district court sentenced Garcia to thirty years with fifteen years fixed. (R., p.149.) Garcia filed a motion to withdraw his guilty plea, which was denied after a hearing. (Resp. Ex. G.)

Garcia filed a Petition and Affidavit for Post Conviction Relief and was appointed counsel to represent him. (R., pp.6-12, 24-28.) In his petition, Garcia claimed that his plea agreement was breached and that his trial counsel provided ineffective assistance in several ways. (R., pp.6-12.) The state filed an answer (R., pp.29-34), and Garcia filed a Second Affidavit in Support of Petition for Post Conviction Relief, alleging nine more ways his trial counsel was ineffective (R., pp.59-63). The State filed a Motion for Summary Dismissal and Memorandum in Support of Motion for Summary Dismissal (R., pp.73-83), and Garcia filed a brief and a supplemental brief opposing the state's motion (R., pp.89-97,122-127). After oral argument (see generally 4/17/13 Tr.), the district court issued a Memorandum Decision and Order granting the state's motion for summary dismissal. (R., pp.149-159.) Garcia filed a timely notice of appeal. (R., pp.160-164.) This Court issued an order remanding the case to the district court for

entry of a final judgment, and the district court subsequently filed its judgment. (R., pp.169-170.)

ISSUE

Garcia states the issue on appeal as:

> Whether the district court abused its discretion when it dismissed the petition for post-conviction relief, concerning breach of plea agreement[?]

(Appellant's Brief, p.iii (capitalization and underscore modified).)

The state rephrases the issue on appeal as:

Has Garcia failed to establish error in the district court's summary dismissal of his post-conviction claims?

ARGUMENT

Garcia Has Failed To Establish Error In The District Court's Summary Dismissal Of His Post-Conviction Claims

A. Introduction

On appeal, Garcia contends the district court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to adequately explain the terms of the Rule 11 plea agreement -- namely, that the state was free to recommend any fixed prison term it deemed appropriate.[1] (Appellant's Brief, pp.1-15.) Garcia also argues that the trial court erred by (1) not finding out, at the time of Garcia's plea, "just what it was that [he] did not agree with, and that [he] understood the ramifications of his guilty plea, and not just rolling with it, for some unknown reason" (Appellant's Brief, pp.15-16), and (2) threatening him into pleading guilty by telling him that, if he did not accept the plea agreement, the original indictment would be refiled (id., pp.16-18). Lastly, Garcia appears to argue that his guilty plea should be invalidated because it was entered pursuant to I.C.R. 11(f)(1)(C),[2] which requires the parties to agree on a "specific

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[1] Garcia alleges his trial counsel tricked him into signing the Rule 11 plea agreement by not informing him about the true nature of such agreement. (Appellant's Brief, pp.2-13.)

[2] Idaho Criminal Rule 11(f)(1)(C) reads in relevant part:

> (1) **In general.** The prosecuting attorney and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement, which may include a waiver of the defendant's right to appeal the judgment and sentence of the court, that upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:
>
> (C) agree that a specific sentence is the appropriate disposition of the case;

sentence," and his agreement permitted an open recommendation by the prosecutor in regard to the fixed portion of Garcia's sentence. (Id., pp.12-13.)

A review of the record shows Garcia has failed to demonstrate any error in the district court's conclusion that he failed to meet his burden of establishing a genuine issue of material fact relative to any of his post-conviction claims that his trial counsel was ineffective. Additionally, Garcia failed to preserve his "trial court error" and "specific sentence" claims because he did not present them to the district court.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The Court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. 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).

C. Applicable Legal Standards

Idaho Code § 19-4906(c) authorizes a district court to summarily dismiss a post-conviction petition upon motion by a party if it appears there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In order to survive summary dismissal, a post-conviction petitioner must present evidence in support of his petition sufficient to make "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). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999). While a court must accept a petitioner's unrebutted allegations as true, 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). In other words, bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985).

In the context of claims of ineffective assistance of counsel, the Idaho Supreme Court has articulated the applicable standards as follows:

> For an application for post-conviction relief based on a claim of ineffective assistance of counsel to survive a summary dismissal, the petitioner must establish that: (1) a material issue of fact exists as to whether counsel's performance was deficient, and (2) a material issue of fact exists as to whether the deficiency prejudiced the applicant's case. . . .
>
> To establish deficient assistance, the burden is on the petitioner to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent. Thus, the claimant has the burden of showing that his attorney's performance fell below the wide range of reasonable professional assistance.

> To establish prejudice, the claimant must show a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different. Trial counsel's strategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.

Baldwin v. State, 145 Idaho 148, 153-154, 177 P.3d 362, 367-368 (2008) (internal citations omitted).

D. Garcia Has Failed To Show Error In The District Court's Summary Dismissal Of His Post-Conviction Claims

Garcia's argument that the district court erred in granting the state's motion for summary dismissal is completely rebutted by the district court's "Memorandum Decision and Order" (R., pp.149-159), attached as Appendix A, which is incorporated into this Respondent's Brief and relied upon as if fully set forth herein.

Garcia makes several arguments for the first time on appeal. First, he claims the district court erred by not finding out, at the time of Garcia's plea, "just what it was that [he] did not agree with, and that [he] understood the ramifications of his guilty plea, and not just rolling with it, for some unknown reason." (Appellant's Brief, p.p.15-16.) Next, Garcia contends the trial court threatened him into pleading guilty by telling him that if he did not accept the plea agreement, the original indictment would be refiled. (Id., pp.16-18.) Finally, Garcia alleges that because Rule 11(f)(1)(C) requires the parties to agree "that a specific sentence is the appropriate disposition of the case" (see Appellant's Brief, p.12), and his plea agreement did not involve a specific recommendation by the state, his guilty plea should be invalidated. (Appellant's Brief, pp.12-15.)

Garcia did not present any of his "trial court error" or "specific sentence" arguments to the district court. (See R. pp.6-12, 59-63; see generally 4/17/13 Tr.) Therefore, this Court should not consider Garcia's arguments because he failed to preserve them. Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) (declining to consider for first time on appeal claims not raised in post-conviction petition); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal."). This Court should affirm the district court's decision.

In addition to the above, the state makes the following comments in regard to Garcia's Appellant's Brief. On pages 5 and 6 of his opening brief, Garcia quotes a segment of his trial counsel's testimony that was presented during the hearing on his motion to withdraw his Rule 11 guilty plea.[3] Immediately after the quote, Garcia asserts his trial counsel's explanation of what words he used to explain the plea agreement to Garcia "does not explain anything," and that "[e]verything else in [trial counsel's] statement in [sic] far to [sic] vague to make any sence [sic] out of." (Appellant's Brief, p.6.) However, Garcia omitted the subsequent and more pertinent testimony by his trial counsel, as follows:

> Q. [by prosecutor] And in that explanation, I've already heard you say that you told him or explained to him that the State, specifically myself, would be free to argue for fixed life; correct?
>
> A. Um-hmm.
>
> Q. Is that yes?
>
> A. Yes.

[3] Garcia incorrectly cites to page 40, lines 6 through 25, as where the quoted testimony is found. (Compare Appellant's Brief, p.5 with Resp. Ex. G, p.42, L.21 - p.43, L.22.)

Q. Okay. And did you also explain to Mr. Garcia that the ultimate sentence would be up to Judge Hansen?

A. Yes, I did.

Q. Did you ever tell Mr. Garcia that he was guaranteed to be sentenced to ten years fixed, only?

A. I never said that.

Q. Did you ever give any words that would lead him to believe that, in your opinion?

A. I did not. I made it perfectly clear to Armando that that's what I would be arguing for. And that's what I declared success, in terms of my personal benchmark that I set for myself in representing him.

But I also knew that I don't get to make those important decisions with regards to the defendant and what a reasonable sentence is. That's the Court's responsibility. And that while I would be making a recommendation and you would be making a recommendation, the final arbiter of what the sentence would be, would be, in fact, the Court.

Q. And you explained that to Mr. Garcia?

A. I believe I did that in great detail.

Q. Sir, I'm also looking at the Rule 11 plea agreement.

And I'm wondering if you went over this plea agreement with Mr. Garcia, as well?

A. I did.

Q. And you did that before he signed the Rule 11?

A. Yes.

Q. And before he entered his guilty plea?

A. Yes.

(Resp. Ex. G, p.43, L.23 - p.46, L.1.) Contrary to Garcia's assertion that his trial counsel's testimony did not explain anything and was vague, the record reflects that

counsel clearly testified (a) he told Garcia the state was free to argue for a fixed term of up to life, (b) he explained to Garcia in great detail that the trial judge was the final arbiter of his sentence, (c) he never told Garcia he was guaranteed a sentence of ten years fixed, and (d) he explained the Rule 11 plea agreement to Garcia before Garcia signed it and entered his plea.

Next, Garcia states his defense counsel "testified that he 'BATED' Garcia into taking the plea agreement, (M.W.P., P.48, Li. 10-12,) . . . but how did he bate Garcia, thats [sic] the question." (Appellant's Brief, p.10.) Page 48 of the transcript of the hearing on Garcia's motion to withdraw his guilty plea does not contain the words bait or baited, nor does it indicate any conduct that suggests such conduct. The only time the word "bait" was used in trial counsel's testimony was when he explained his wariness that the prosecutor might have offered to amend the charge in order to bait Garcia into pleading guilty -- knowing that she was going to recommend a fixed term of more than ten years. (See Resp. Ex. G, p.52, Ls.13-23.) In short, Garcia's trial counsel never testified that *he* baited Garcia into accepting the plea agreement.

Based on the district court's "Memorandum Decision and Order" (Appendix A), and the above supplemental arguments, Garcia has failed to show any error in the district court's summary dismissal of his post-conviction claims.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Garcia's petition for post-conviction relief.

DATED this 4th day of August, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of August, 2014, 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:

ARMANDO GARCIA
#29287
P.O. Box 70010--L-106-B
Boise, ID 83707

John C. McKinney
Deputy Attorney General

JCM/pm

APPENDIX A

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

ARMANDO GARCIA,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CVPC 1024962

MEMORANDUM DECISION AND ORDER

BACKGROUND AND PROCEDURAL HISTORY

On September 14, 2009, Petitioner Armando Garcia entered a plea of guilty to the felony offense of Trafficking in Heroin, I.C. § 37-2732B(a)(6), in Ada County Case No. CR-FE-2008-0000062. Petitioner was sentenced to an aggregate term of thirty years with fifteen years fixed.

On December 20, 2010, Petitioner filed a Petition and Affidavit for Post Conviction Relief. The State filed an Answer on February 23, 2011, along with a Motion for Production of Transcripts and for an Order Taking Judicial Notice of the Record in Case No. CR-FE-2008-0000062. An Order for Production of Transcripts and Order Taking Judicial Notice of the Record in Case No. CR-FE-2008-0000062 entered on May 16, 2011. Pursuant to a Motion to Extend Time filed by Petitioner on May 6, 2011, the Court entered an Order to Extend Time on May 16, 2011. On August 29, 2011, Petitioner filed a Motion to Unseal Pre-Sentence Report, which was granted pursuant to an Order to Unseal Pre-Sentence Report Pursuant to ICR 32 entered on January 23, 2012.

On October 17, 2011, Petitioner filed a Second Affidavit in Support of Petition for Post Conviction Relief. Pursuant to a stipulation filed on February 10, 2012, the Court entered an Order Extending Time for State to File Motion for Summary Dismissal on February 23, 2012. On March 5, 2012, the State filed a Motion for Summary Dismissal and Memorandum in Support of Motion for Summary Dismissal, along with a Supplemental Motion for Production of Transcripts and for an Order Taking Judicial Notice of the Record in Case No. CR-FE-2008-0000062. Petitioner's Brief in

Opposition to the State's Motion for Summary Dismissal was filed on May 17, 2012. An Order for Grand Jury Transcript entered on August 14, 2012.

Hearing on the State's motion for summary dismissal was scheduled for November 9, 2012. However, the matter was rescheduled due to the need to further supplement the record. Petitioner filed a Motion for Hearing Transcripts at County Expense on November 16, 2012, and an Order for Hearing Transcripts at County Expense was entered on November 26, 2012. Respondent's Supplemental Notice of & Request for Judicial Notice Pursuant to IRE 201(c) was filed by the State on December 31, 2012. An Order Taking Judicial Notice Pursuant to I.R.E. 201(c) entered on January 7, 2013.

On February 1, 2013, Petitioner filed a Supplemental Memorandum in Opposition to the State's Motion for Summary Dismissal. The matter was set for hearing on March 4, 2013, but was again rescheduled due to the need for further supplementation of the record. Petitioner filed a Motion for Judicial Notice Pursuant to IRE 201(c) on March 8, 2013. At a hearing on March 20, 2013, the Court overruled the State's objection to Petitioner's motion for judicial notice and indicated that it would consider the relevant portions of the documents at issue in connection with Petitioner's post-conviction application.

Hearing on the State's motion for summary dismissal was held on April 17, 2013, at which time the Court took the matter under advisement.

LEGAL STANDARDS

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. Accordingly, the applicant must "prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based." *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007), *citing Grube v. State*, 134 Idaho 24, 995 P.2d 794 (2000). Summary disposition of a petition for post-conviction relief "is appropriate if the applicant's evidence raises no genuine issue of material fact." *Charboneau*, 144 Idaho at 903, 174 P.3d at 873, citing I.C. § 19-4906(b), (c). In reviewing the application,

> [a] court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. *Ferrier v. State*, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001). When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990), *citing Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Allegations

> contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law. *Id.*

Charboneau, 144 Idaho at 903, 174 P.3d at 873.

The right to counsel in criminal actions is guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 13 of the Idaho Constitution. The Uniform Post-Conviction Procedure Act "provides an appropriate mechanism for considering claims of ineffective assistance of counsel." *Parrott v. State*, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990). To prevail on a claim of ineffective assistance of counsel, a petitioner "must demonstrate not only that his counsel's performance was deficient, but that the deficient performance so prejudiced his defense as to deprive him of a fair trial." *Id.* at 275, 787 P.2d at 261 (citations omitted). To establish deficient performance, a petitioner must show that his "counsel's representation fell below an objective standard of reasonableness." *Id.*, *quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984). To demonstrate prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Parrott*, 117 Idaho at 275, 787 P.2d at 261, *quoting Strickland*, 466 U.S. at 694. A reasonable probability "does not mean 'more likely than not'; it means a probability sufficient to undermine confidence in the outcome." *Esquivel v. State*, 149 Idaho 255, 258, 233 P.3d 186, 189 (Ct. App. 2010), *citing Strickland*, 466 U.S. at 693-94. "Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel." *Cooke v. State*, 149 Idaho 233, 246, 233 P.3d 164, 177 (Ct. App. 2010), *citing Roman*, 125 Idaho at 649, 873 P.2d at 903.

DISCUSSION

In his Petition and Affidavit for Post Conviction Relief, and Second Affidavit in Support of Petition for Post Conviction Relief, Petitioner sets forth two grounds for relief: Breach of plea agreement and ineffective assistance of counsel. The Court will address each of the claims separately.

Breach of plea agreement

In his Petition and Affidavit for Post Conviction Relief, Petitioner alleges "Breach of Plea Agreement" as a ground on which he bases his application. See Petition for Post Conviction Relief

at 2. Neither the petition and affidavit, nor the Second Affidavit in Support of Petition for Post Conviction Relief, sets forth any details regarding how the State allegedly breached its plea agreement with Petitioner. Rather, those documents deal only with bases for Petitioner's ineffective assistance of counsel claims. However, attached as an exhibit to Petitioner's Motion for Judicial Notice Pursuant to IRE 201(c) that was filed on March 8, 2013, is a copy of the Supplement to I.C.R. 35 Motion for Reduction of Sentence and Memorandum in Support (hereinafter Supplement to I.C.R. 35 Motion) that had been filed by Petitioner on April 23, 2010, in Case Nos. CR-FE-2008-0000062 and CR-FE-2008-0017452.[1] In that supplement, Petitioner stated that his "total understanding of his plea bargain was that he was guaranteed (10) years fixed, with (20) years indeterminate." See Supplement to I.C.R. 35 Motion at 9.

A defendant is "constitutionally entitled to relief when the State breaches a promise made to him in return for a plea of guilty, because when the prosecution breaches its promise, the defendant pleads guilty on a false premise." *Nevarez v. State*, 145 Idaho 878, 882, 187 P.3d 1253, 1257 (Ct. App. 2008) (citations omitted). *See also Mata v. State*, 124 Idaho 588, 595, 861 P.2d 1253, 1260 (Ct. App. 1993) (citation omitted), *and Garzee v. State*, 126 Idaho 396, 400, 883 P.2d 1088, 1092 (Ct. App. 1994), *citing State v. Rutherford*, 107 Idaho 910, 915, 693 P.2d 1112, 1117 (Ct. App. 1985) (a breach of the plea agreement by the state affects the voluntariness of a guilty plea). For the following reasons, however, the Court concludes that Petitioner's assertion that the State breached its plea agreement in his case is disproven by the record.

The State has submitted a copy of the written Rule 11 Plea Agreement Pursuant to I.C.R. 11(f)(1)(C) that was entered into between the State and Petitioner in Case No. CR-FE-2008-0000062. That agreement states, in pertinent part:

> The terms are as follows:
> 1. The mandatory minimum fixed sentence will decrease from fifteen (15) years fixed, to ten (10) years fixed;
> 2. The parties are open to argue the terms of the Defendant's sentence, meaning the defense may argue the court simply impose the mandatory minimum sentence of ten (10) years, and the state may argue the court impose up to a maximum of life in prison as a fixed sentence;

Respondent's Exhibit C at 1 (emphasis added). That written plea agreement was signed by Petitioner on September 14, 2009. See Respondent's Exhibit C at 2. At Petitioner's change of plea

[1] The Court notes that Petitioner was sentenced on both cases together. However, his application for post-conviction relief in this matter was filed in connection with Case No. CRFE 2008-0000062.

hearing on September 14, 2009, the Court placed the terms of that plea agreement on the record as follows:

> In this case, my understanding then is that Mr. Garcia would plead guilty to that amended information [in Case No. CR-FE-2008-0000062] and would also plead guilty to the indictment in case number CR-FE-08-17452.
>
> In exchange for those guilty pleas in those two cases, the State is free to argue any sentence up to the maximum which, again, is up to life in prison for either charge.
>
> The defense is free to argue that the Court simply impose the mandatory minimum in each case, which in the 062 case is 10 years in the State penitentiary and in the 17452 case, it is three years in the State penitentiary. The State has agreed in its written Rule 11 agreement to recommend that those sentences run concurrently, one with the other.

Respondent's Exhibit F at 4 (emphasis added). After placing the other terms of the plea agreement on the record, the Court then inquired, "And in this case, Mr. Garcia, was that your understanding of the agreement?" Respondent's Exhibit F at 5-6. Petitioner responded, "It is, Your Honor." Respondent's Exhibit F at 6. After questioning Petitioner as to whether he understood the minimum and maximum penalties for the charges against him, the Court stated, "Now, sir, in this case do you understand that I am not bound by the agreement in terms of sentencing. In other words, there has been no sentencing agreement in this case and, therefore, I could impose any sentence up to the maximum. Do you understand that, sir?" Respondent's Exhibit F at 17 (emphasis added). Petitioner replied, "Yes, sir, I do." Respondent's Exhibit F at 17.

The record demonstrates that the State did not agree to make any particular sentencing recommendation with regard to fixed and indeterminate terms in Petitioner's case, and the record also contradicts Petitioner's assertion that his understanding of the plea agreement was that he was guaranteed ten years fixed, with twenty years indeterminate. In an application for post-conviction relief based upon a claim that the State breached its plea agreement, where the record "shows that the State did not breach the plea agreement, and where essential elements of a post-conviction petitioner's claim are conclusively disproven by the record in the underlying criminal proceedings, summary dismissal is appropriate. *Nevarez*, 145 Idaho at 882-83, 187 P.3d at 1257-58 (citations omitted). Accordingly, the Court concludes that summary dismissal of this claim is appropriate.

Ineffective assistance of counsel claims

In his first ineffective assistance of counsel claim, Petitioner alleges that his attorney "Lied to me about the plea agreement, got me to plead under false pretenses and manipulation." Petition for Post Conviction Relief at 3. Petitioner has provided no information, contained in an affidavit or otherwise, to explain or support this allegation. Neither the Affidavit of Facts in Support of Post-Conviction Petition nor Petitioner's Second Affidavit in Support of Petition for Post Conviction Relief contain any statements referencing or supporting this claim. The State has provided an affidavit of John DeFranco, who represented Petitioner at his change of plea hearing. Mr. DeFranco states that he "explained in great detail the ramifications of the plea agreement in the above-entitled case; specifically, the fact that the State was free to argue for a fixed sentence of more than ten years." See Motion for Summary Dismissal and Memorandum in Support of Motion for Summary Dismissal, Exhibit A at 1. As noted above, the Court set forth the terms of the plea agreement on the record and inquired as to Petitioner's understanding of those terms, and such terms were also contained in a writing signed by Petitioner. During his change of plea hearing, Petitioner indicated that he could read, write and understand the English language. See Respondent's Exhibit F at 6. After the Court set forth the details of the plea agreement, including the fact that there was no agreement as to sentencing, and ensured that Petitioner understood the minimum and maximum penalties for the charges against him, the Court then inquired as follows:

> THE COURT: Mr. Garcia, I do have some questions for you. As I indicated, it is my understanding you wish to plead guilty pursuant to [a] written Rule 11 plea agreement in these two cases to the two charges of trafficking in heroin. Is that correct, sir?
>
> THE DEFENDANT: That is correct, Your Honor.
>
> THE COURT: In this case, sir, have you discussed this matter fully with Mr. DeFranco?
>
> THE DEFENDANT: I have.
>
> THE COURT: Do you feel you are fully aware of the consequences of entering the guilty plea to these two charges today?
>
> THE DEFENDANT: Yes, I am aware.

Respondent's Exhibit F at 11-12. As noted, Petitioner has not explained or demonstrated how Mr. DeFranco allegedly lied to Petitioner with regard to the plea agreement. However, to the extent

that Petitioner's claim is based upon an assertion that he understood the terms of the plea agreement to be different than what they were, that claim is unsupported by any evidence provided by Petitioner, and is contradicted by Petitioner's own statements at the change of plea hearing, as well as by the written plea agreement which was signed by Petitioner. Allegations contained in an application for post-conviction relief are insufficient for the granting of relief when they are disproved by the record. *See Charboneau*, 144 Idaho at 903, 174 P.3d at 873. Further, bare assertions, "unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel." *See Cooke*, 149 Idaho at 246, 233 P.3d at 177, *citing Roman*, 125 Idaho at 649, 873 P.2d at 903. For these reasons, the Court concludes that summary dismissal is appropriate as to this claim.

In his next ineffective assistance of counsel claim, Petitioner asserts that his attorney "failed to file a Notice of Appeal after I requested he do so after the Rule 11 Breach." Affidavit of Facts in Support of Post-Conviction Petition at 1. The Court notes that Petitioner's attorney could not have filed an appeal in Petitioner's case, as the written plea agreement specifically provided that Petitioner waived his right to appeal, as follows:

> The Defendant agrees to waive his right to appeal the case, this waiver includes, but is not limited to, the adverse ruling on Defendant's motion to suppress evidence, as well as abuse of discretion regarding sentencing.

Respondent's Exhibit C at 2. Again, this written plea agreement was signed by Petitioner. The Court also placed that portion of the plea agreement on the record and examined Petitioner as follows:

> **Q.** Okay. In this case, then, sir, you also understand I am going to go over this in some detail because you are giving up a significant number of rights pursuant to this agreement.
>
> You also understand, sir, in this case you have given up your right to appeal any decision I have made in this case other than the denial of your motion to dismiss for vindictive prosecution. Do you understand that?
>
> **A. I do understand that, Your Honor.**
>
> **Q.** In other words, you cannot appeal, you will not be able to appeal my denial of your suppression motion, my granting of the State's joinder motion in this case. None of those things can be appealed by you. Do you understand that?
>
> **A. I understand.**

Q. In this case, if I do follow the agreement, in other words, if I do run these sentence concurrently but if I impose a sentence up to and including life, in this case, you would not be able to appeal that decision to the Idaho Supreme Court for abuse of discretion. Do you understand that, as well?

A. I do.

Respondent's Exhibit F at 19.

Absent a breach of a plea agreement by the State, a defendant's "waiver of the right to appeal as a term of a plea bargain is generally valid and enforceable." *State v. Allen*, 143 Idaho 267, 270, 141 P.3d 1136, 1139 (Ct. App. 2006) (citations omitted). As Petitioner waived his right to appeal pursuant to the plea agreement, Petitioner has failed to demonstrate prejudice as required by *Strickland v. Washington*, 466 U.S. 668, 688 (1984), caused by his attorney's failure to file such an appeal. For these reasons, the Court concludes that summary dismissal is appropriate as to Petitioner's claim for ineffective assistance of counsel based upon his attorney's failure to file a notice of appeal.

In his next claim, Petitioner alleges that his attorney "Failed to argue 5th Amend. violation, coercion to make statement, No notification of Marenda (sic), and waiver." Petition for Post Conviction Relief at 3. However, this claim is contradicted by the record, as it is clear that such issues were the subject of the motion to suppress Mr. DeFranco argued on Petitioner's behalf in the underlying case. See generally Respondent's Exhibit E. Again, allegations contained in an application for post-conviction relief are insufficient for the granting of relief when they are disproved by the record. *See Charboneau*, 144 Idaho at 903, 174 P.3d at 873. For these reasons, the Court concludes that summary dismissal is appropriate as to this claim.

Petitioner also alleges, "Detective C. Christansen coerced my statement with indirect threats of arrest of my sister in law, and threatened me with years of imprisonment if I did not cooperate, and my attorney cooperated and participated." Affidavit of Facts in Support of Post-Conviction Petition at 1. Petitioner has not directed the Court to any evidence in the record that supports the bare allegation that his attorney cooperated and participated in an alleged coerced statement. "Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel." *Cooke*, 149 Idaho at 246, 233 P.3d at 177, *citing Roman*, 125 Idaho at 649, 873 P.2d at 903. Accordingly, summary dismissal is appropriate as to this claim.

The remainder of Petitioner's claims relate to allegations that Petitioner's attorney failed to investigate or adequately investigate certain matters. Those claims are as follows:

1. My Attorney did not thoroughly investigate the Confidential Informant's agreement w/DEA.

2. My Attorney failed to adequately investigate the warrantless search & seizure & did not adequately investigate possible suppression issues in the warrantless search & seizure.

3. My attorney did not investigate the fact that the Confidential Informant may have tampered with the evidence & the chain of custody may have been affected.

4. My attorney did not investigate whether there was adequate probable cause for the traffic stop.

5. My attorney did not investigate whether or not surveillance footage of the parking lot where the stop occurred may have revealed suppression issues.

6. My attorney did not adequately investigate whether or not Det. Christensen exerted undue influence & pressure on me during my interrogation.

7. My attorney did not adequately investigate whether or not I was coerced into taking the trip to Salt Lake City & the controlled buy.

8. My attorney did not investigate the fact that I had numerous discussions w/law enforcement w/out my attorney present after I had requested counsel.

9. My attorney didn't adequately investigate whether or not law enforcement followed proper procedures for collection of evidence.

Second Affidavit in Support of Petition for Post Conviction Relief, Exhibit A at ¶¶ 1-9. However, Petitioner has not provided any evidence or information regarding what, if anything, a more thorough investigation of the above matters would have revealed. The Idaho Court of Appeals has noted that without such information, an applicant for post-conviction relief cannot demonstrate the prejudice prong of an ineffective assistance of counsel claim:

> Bare assertions that discovery was not properly conducted or that all avenues of investigation were not exhausted will not, by themselves, give rise to a right to relief. An applicant must provide at least some indication of what information is missing or how it would have been used in the defense. Without such a showing, there can be no evidence of prejudice and a claim is subject to summary dismissal.

Jones v. State, 125 Idaho 294, 297, 870 P.2d 1, 4 (Ct. App. 1994). As Petitioner's bare assertions and speculation regarding his attorney's alleged failure to conduct an adequate investigation does not

make out a prima facie case for Petitioner's ineffective assistance of counsel claims, summary dismissal is appropriate as to such claims. *See Cooke*, 149 Idaho at 246, 233 P.3d at 177, *citing Roman*, 125 Idaho at 649, 873 P.2d at 903.

CONCLUSION

For the foregoing reasons, it is the Court's conclusion, pursuant to I.C § 19-4906(c), that the State's Motion for Summary Dismissal should be granted. The State is hereby directed to prepare a form of judgment consistent with this decision.

IT IS SO ORDERED.

Dated this 12th day of June, 2013.

TIMOTHY HANSEN
District Judge

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 13th day of June, 2013, one copy of the ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

LAYNE DAVIS
DAVIS & WALKER
200 NORTH 4TH STREET, SUITE 302
BOISE, IDAHO 83702

HEATHER REILLY
ADA COUNTY PROSECUTOR'S OFFICE
VIA INTERDEPARTMENTAL MAIL

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

By: Kim Maxwell
Deputy Clerk