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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT BENJAMIN BRACKETT,)	
)	No. 45402
Petitioner-Appellant,)	
)	Twin Falls County Case No.
v.)	CV42-2017-572
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
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BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

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District Judge**

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**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Robert Benjamin Brackett appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

In its published opinion affirming Brackett's judgment of conviction on direct appeal, the Idaho Court of Appeals described the underlying facts and procedure as follows:

In January 2011, a minor reported to authorities that she had a sexual relationship with forty-six-year-old Brackett. At the time of the relationship, the minor was sixteen years old. Officers recovered a camera containing many sexually explicit photos of the minor, which the minor claimed were taken by Brackett and some of which depicted her having sexual contact with Brackett. Brackett was charged with eight counts of possession of sexually exploitive materials, I.C. § 18-1507A, and eight counts of sexual battery on a minor child of sixteen or seventeen, I.C. § 18-1508A. Brackett's first trial ended in a mistrial after Brackett, during his opening statement, violated the district court's pretrial order. After his second trial, Brackett was found guilty by a jury of eight counts of possession of sexually exploitive materials and five counts of sexual battery on a minor child of sixteen or seventeen.

State v. Brackett, 160 Idaho 619, 624, 377 P.3d 1082, 1087 (Ct. App. 2016).

On direct appeal, Brackett asserted that the district court violated his speedy trial rights, abused its discretion by declaring a mistrial in the first trial over his objection, erred in denying his requests to access certain evidence, and erred by limiting his access to investigative assistance. See id. at 624-635, 377 P.3d 1087-1098. The Idaho Court of Appeals affirmed Brackett's judgment of conviction. Id. The Idaho Court of Appeals subsequently affirmed the

district court's denial of Brackett's second and third motions for a new trial.¹ See State v. Brackett, 2018 WL 2145658 * 1-4 (Idaho App. 2018) (unpublished).

In February 2017, Brackett filed a *pro se* post-conviction petition. (R., pp.8-42.) He also filed an amended post-conviction petition in which he raised additional claims. (R., pp.223-260.) The district court appointed counsel to represent Brackett in the proceeding. (R., pp.112-113.) However, Brackett later discharged counsel and chose to represent himself. (See R., pp.197-203, 211-212; Tr., p.3, L.6 – p.8, L.2.)

The district court entered a notice of intent to summarily dismiss Brackett's petition. (R., pp.323-335.) The court construed the petition as containing the following 25 claims: (1) previously-appointed trial counsel was ineffective for failing to request that the charges filed in Brackett's original case (Twin Falls County Case CR-2011-00692) be dismissed *with* prejudice; (2) previously-appointed trial counsel had a conflict of interest prior to withdrawing from the case; (3) the attorney Brackett retained for the sentencing hearing was ineffective for failing to adequately argue mitigation; (4) appellate counsel was ineffective for failing to raise various claims on direct appeal; (5) Brackett's Fourth Amendment rights were violated in the course of his arrest; (6) Brackett's Fifth Amendment rights were violated as a result of the district court's process of randomly pre-seating the jury; (7) Brackett's Sixth Amendment rights were violated by the trial court permitting numerous counsel to withdraw from the case; (8) Brackett's

¹ Brackett did not appeal from the district court's denial of his first motion for a new trial. See Brackett, 2018 WL 2145658 at *1 (unpublished). Brackett's appeal from the district court's denial of what appears to be his fourth motion for a new trial is currently pending. See State v. Brackett, Idaho Supreme Court Docket No. 45566.

Fourteenth Amendment rights were violated based upon a trial issue related to an SD card; (9) I.C. § 18-1508A is unconstitutional; (10) I.C.R. 48 is unconstitutional; (11) the state committed various Brady² violations; (12) the jury selection process violated Brackett's due process rights; (13) the prosecutor committed misconduct by failing to disclose an SD memory card; (14) vindictive prosecution; (15) the district court committed error in instructing the jury; (16) the district court erred in making various evidentiary rulings; (17) I.C.R. 16(m) is unconstitutional; (18) Brackett's rights to a speedy and fair trial were violated; (19) double jeopardy; (20) prejudicial joinder; (21) the PSI was falsified; (22) the district court erred by failing to provide a jury instruction on a lesser-included charge; (23) the district court failed to properly warn Brackett of the dangers of self-representation; (24) the district court failed to inform Brackett of "new laws" (I.C.R. 16(m) and I.C.R. 12.2); (25) the district court erred by failing to order an evaluation to determine Brackett's competence to stand trial. (R., pp.325-333.)

In the notice, the district court concluded that most of Brackett's post-conviction claims were forfeited pursuant to I.C. 19-4901(b) because they could have been raised on direct appeal, or were already adjudicated on direct appeal. (R., pp.330-333.) The court also concluded that Claim One was untimely because it related to a case that had been dismissed by stipulation of the parties several years before charges were re-filed. (R., pp.325-326.) Finally, the court concluded that Brackett failed to assert facts which, if true, demonstrated he was entitled to relief on Claims Two, Three, and Four. (R., pp.326-328.) The court informed Brackett that he was entitled to reply within 20 days. (R., p.334.)

² Brady v. Maryland, 373 U.S. 83 (1963).

Brackett filed an “objection” to the district court’s notice of intent to dismiss. (R., pp.351-366.) Brackett also filed a premature notice of appeal. (R., pp.344-345.) The Idaho Supreme Court suspended Brackett’s appeal until a final judgment was entered. (10/5/17 Order.) The district court entered an order and judgment dismissing the petition on the grounds previously set forth in its notice. (R., pp.460-464.) The Idaho Supreme Court reinstated Brackett’s appeal. (10/17/17 Order).

The district court appointed counsel to represent Brackett in his post-conviction appeal. (R., pp.469-471.) However, the Idaho Supreme Court granted Brackett’s motion to discharge counsel and proceed *pro se*. (1/11/18 Order.)

ISSUE

Brackett's issue statement is set forth at pages 12-14 of his Appellant's brief, and, due to its length, is not reproduced here.

The state rephrases the issue on appeal as:

Has Brackett failed to demonstrate that the district court erred by summarily dismissing his post-conviction petition?

ARGUMENT

Brackett Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

A. Introduction

Brackett contends that the district court erred by summarily dismissing his post-conviction petition. (See generally Appellant’s brief.) Brackett has failed to demonstrate that the district court erred. A review of the record and Brackett’s appellate brief reveals that Brackett has failed to assign any specific error to the district court, has failed to adequately support his assertions with argument or authority, and has attempted to raise unpreserved issues on appeal. In any event, the district court correctly dismissed Brackett’s petition.

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 Concluded That Brackett Failed To Make A *Prima Facie* Showing For Post-Conviction Relief With Respect To Any Of His 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).

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). Where the district court summarily dismisses a post-conviction petition on its own initiative, a petitioner is entitled to notice of the basis for the dismissal, and 20 days to respond. I.C. § 19-4906(b).

It is a well-settled tenet of appellate review that the "party alleging error has the burden of showing it in the record." Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014) (citation omitted). It is equally well-settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for unspecified errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983). Moreover, "[a] party waives an issue on appeal if either authority or argument are lacking." State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v.

Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). Finally, Idaho’s appellate courts “will not consider issues not raised in the court below.” State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2011) (citing State v. Wheaton, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992)).

Brackett’s Appellant’s brief, like his post-conviction petitions (see R., pp.8-42, 223-260), are lengthy and somewhat difficult to decipher. Brackett spends the first portion of his brief arguing the facts of the underlying case and raising complaints against the post-conviction counsel who was originally appointed to his case. (Appellant’s brief, pp.1-11.) Brackett then largely recites several of the claims raised in his post-conviction petition without assigning specific error to the district court. (Appellant’s brief, pp.12-26.)

For purposes of this appeal, the state adopts the manner in which the district construed Brackett’s post-conviction claims. (See R., pp.325-333.) Brackett does not appear to argue that the district court failed to address any of his claims in dismissing his petition, or that it misconstrued any of his claims. (See Appellant’s brief, pp.12-26.) Thus, the state asserts all of the claims potentially at issue before this Court are among those identified by the district court in its notice of intent to dismiss and its dismissal order. Any claims that Brackett attempts to raise on appeal that were not among those identified by the district court in either its notice of intent to dismiss the petition, or in its dismissal order, are unpreserved, and may not be considered on appeal. Sanchez v. Arave, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991) (explaining that, generally, issues not raised below may not be considered for the first time on appeal). Further, to the extent this Court construes Brackett’s petition as raising any claims or arguments differently

than the state has, and chooses to address any of these claims, the state adopts the conclusions as set forth in the district court's notice of intent to summarily dismiss Brackett's petition. (R., pp.323-335.) Finally, the state also notes that, while the district court took judicial notice of the "file" associated with Brackett's underlying criminal case (R., p.324), the Idaho Supreme Court has not taken judicial notice of any records or transcripts compiled in the course of Brackett's direct appeal. On appeal, missing portions of the record are presumed to support the action of the trial court. Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980).

1. The District Court Properly Dismissed Brackett's Claims That Were Forfeited Pursuant To I.C. § 19-4901(b)

The remedy available under the Uniform Post-Conviction Procedure Act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction." I.C. § 19-4901(b); accord Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997) ("An application for post-conviction relief is not a substitute for an appeal."). Thus, any "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings" except upon a "substantial factual showing" by admissible evidence "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." I.C. § 19-4901(b) (emphasis added).

In this case, the district court properly recognized that most of Brackett's post-conviction claims were waived because they could have been raised on direct appeal and were not, or had already been determined on direct appeal. (R., pp.330-333.) On appeal, Brackett appears to

challenge the district court's summary dismissal of some of these claims. Specifically, Brackett references his claims that I.C. § 18-1508A is unconstitutional, that the state committed Brady violations, that the district court committed various evidentiary errors during the trial, that the state engaged in vindictive prosecution, that the jury selection process violated his due process rights, and that the district court failed to adequately warn him of the dangers of self-representation. (Appellant's brief, pp.15-26.) However, Brackett has merely recited these claims in the manner in which he raised them in his post-conviction petitions, and has wholly failed to allege why these claims could not have been raised previously. Further, a review of these claims reveals no reason why any of them could not have been raised previously. Brackett has therefore failed to assign, let alone demonstrate, specific error to the district court, and has failed to demonstrate that the district court erred in concluding that all of these claims were forfeited.

2. The District Court Properly Dismissed Brackett's Claim That His Previously-Appointed Trial Counsel Had A Conflict Of Interest

In his post-conviction petition, Brackett argued that Dan Brown, one of the attorneys appointed to represent him prior to Brackett electing to represent himself in the underlying criminal proceeding, had a conflict of interest based upon his previous representation of another defendant who had been charged with a crime involving the same victim with whom Brackett was accused of having a sexual relationship. (R., pp.11, 17-18.) Brackett further argued that, due to this conflict, Brown sabotaged his defense in various ways, which "possibly impl[ied] some back room dealing with the Gooding County prosecutor." (R., pp.17-18.) The district court rejected this claim. (R., pp.326-327.) In his Appellant's brief, Brackett briefly recites the claim, but fails

to assign any specific error to the district court. (Appellant’s brief, p.25.) Brackett has therefore failed to demonstrate that the district court erred in summarily dismissing the claim. In any event, a review of the record reveals that the district court properly concluded that Brackett failed to demonstrate he was entitled to relief.

As the district court first correctly noted (R., p.327), it was not required to accept Brackett’s unsubstantiated and conclusory allegations regarding “back room dealing[s]” in his case. See Ferrier, 135 Idaho at 799, 25 P.3d at 112; Roman, 125 Idaho at 647, 873 P.2d at 901. Further, as the district court observed (id.), Brackett ultimately represented himself at both jury trials, and overall, between at least February 2012 and his second jury trial almost a year later in January 2013.³ Thus, Brackett had ample time to secure any of the unspecified evidence and/or witnesses that he alleges Brown failed to obtain for him. (Id.) Brackett has cited no support for his proposition, set forth in his Appellant’s brief, that a defense attorney’s conflict of interest results in presumed prejudice against the defendant, even after the attorney with the conflict withdraws from the case. This argument is therefore waived. Zichko, 129 Idaho at 263, 923 P.2d at 970. Brackett has thus failed to demonstrate that the district court erred in summarily dismissing this claim.

³ Brackett’s first five court-appointed attorneys all withdrew from Brackett’s representation between January 2011 and October 2011. See Brackett, 160 Idaho at 626, 377 P.3d at 1089. The first three of these attorneys withdrew due to conflicts of interest, and the next two attorneys withdrew as a result of Brackett’s uncooperative behavior. See id. Brackett chose to discharge his sixth court-appointed counsel and to represent himself on the day scheduled for Brackett’s original trial. Id. at 626-627, 377 P.3d at 1089-1090.

3. The District Court Properly Dismissed Brackett's Claim That The Counsel He Retained For Sentencing Was Ineffective

In his post-conviction petition, Brackett argued that the counsel he retained for the sentencing hearing inadequately argued mitigation. (R., pp.11, 18-19.) The district court rejected this claim. (R., pp.327-328.) In his Appellant's brief, Brackett simply recites the claim and fails to assign any specific error to the district court. (Appellant's brief, p.25.) Brackett has therefore failed to demonstrate that the district court erred in summarily dismissing the claim. In any event, a review of the record and relevant caselaw reveals that the district court properly concluded that Brackett failed to demonstrate he was entitled to relief.

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. To establish prejudice, a defendant 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).

On appeal and in his post-conviction petition, Brackett contends that the counsel he retained for the sentencing hearing should have: (1) presented evidence that the victim utilized a fake identification to enter bars and drink alcohol; (2) presented evidence that the state offered a plea offer prior to trial, pursuant to which Brackett would have only served eight years in prison; (3) presented a photograph of the victim and another individual engaged in a sexually suggestive posture in a motel room bed; and (4) presented a telephone recording between the victim and her sister. (Appellant's brief, p.25; R., pp.11, 18-19.)

The district court correctly rejected this claim. (R., pp.327-328.) As the court concluded after reviewing the relevant sentencing transcript, it was clearly a strategic decision for counsel not to attempt to shed a negative light on the victim in arguing for a more lenient sentence in this case. (R., p.327 ("The Court fails to see how the circumstances argued by the Petitioner are mitigating for purposes of sentencing given the nature of the underlying offenses.")) Brackett has not argued that his counsel's sentencing argument was based upon some objective shortcoming or was based upon anything other than strategy. As the court also concluded (R., pp.327-328), Brackett failed to attempt to demonstrate that his sentence would have been different had his counsel framed his argument the way Brackett now contends he should have. Brackett has therefore failed to demonstrate that the district court erred in summarily dismissing this claim.

4. The District Court Properly Dismissed Brackett's Claim That His Appellate Counsel Was Ineffective

In his post-conviction petition, Brackett argued that his appellate counsel was ineffective for failing to raise certain issues on direct appeal. (R., pp.12, 19-21.) The district court rejected this claim. (R., pp.328-329.) In his Appellant's brief, Brackett simply recites the claim and fails to assign any specific error to the district court. (Appellant's brief, pp.24-25.) Brackett has therefore failed to demonstrate that the district court erred in summarily dismissing this claim. In any event, a review of the record and relevant caselaw reveals that the district court properly concluded that Brackett failed to demonstrate he was entitled to relief.

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, 751-53 (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)).

In his Appellant’s brief, Brackett identifies two direct appellate claims that he asserts his appellate counsel should have raised: (1) that I.C. § 18-1508A is unconstitutional; and (2) “erroneous jury instruction.” (Appellant’s brief, pp.24-25.) However, as was the case in his post-conviction petition (see R., pp.12, 19-21), Brackett has wholly failed to argue that these claims were meritorious as viewed individually, or that they were more meritorious than any of the claims that direct appellate counsel actually chose to raise (see Appellant’s brief, pp.24-25). This is fatal to his claim. In fact, it is not even clear from Brackett’s Appellant’s brief, or his post-conviction petition, to which “jury instruction” he refers. Brackett has also failed to attempt to identify any objective shortcoming in his appellate counsel’s decision not to raise these claims. A review of the Idaho Court of Appeals’ published opinion affirming Brackett’s convictions on direct appeal reveals that appellate counsel raised numerous non-frivolous claims, including one for which the Court of Appeals found trial court error, albeit harmless error. Brackett, 160 Idaho at 624-635, 377 P.3d at 1087-1098. Therefore, Brackett has failed to demonstrate that the district court erred in summarily dismissing his ineffective assistance of appellate counsel claim.

5. The District Court Did Not Err In Declining To Conduct A Previously-Scheduled Evidentiary Hearing

Brackett raises two other issues related to the district court's decision to summarily dismiss his post-conviction petition. First, Brackett contends that the district court erred in summarily dismissing his petition when the court had already scheduled an evidentiary hearing. (Appellant's brief, pp.17-18.) Next, Brackett contends that the district court erred by taking judicial notice of records from the underlying criminal case and then summarily dismissing his petition, because, Brackett asserts, the very act of taking judicial notice creates an issue of material fact in a post-conviction proceeding. (Appellant's brief, p.18.) Brackett has failed to show that the district court erred in either respect.

In October 2017, Brackett filed a written objection in which he alleged that the district court summarily dismissed his petition and canceled a scheduled evidentiary hearing in "retaliation" for Brackett choosing to represent himself in the proceeding. (R., pp.351-366.) However, in its order summarily dismissing Brackett's petition on the grounds previously set forth in its notice of intent to dismiss, the court explained that it dismissed the petition simply because Brackett's claims lacked merit. (R., pp.460-461.) Earlier in the proceeding, prior to the summary dismissal of Brackett's petition, the district court entered a scheduling order which included dates for a potential "pretrial" hearing and evidentiary hearing. (R, pp.158-161.) However, the court expressly recognized that the case could still be "resolved by a motion for summary disposition or pursuant to a notice of intent to dismiss issued by the court," and that the scheduling of the hearings would merely "permit expeditious resolution of this matter *in the*

event this matter is not resolved by agreement or motion.” (R., p.160 (emphasis added).) Brackett has cited no authority for his apparent proposition that once a district court reserves a date for a potential evidentiary hearing in a post-conviction proceeding, the court *must* conduct the hearing regardless of the merits of the petitioner’s claims. This argument is therefore waived, in addition to lacking merit. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Brackett has also failed to support, with authority, his apparent assertion that a district court’s decision to take judicial notice of records from the underlying case precludes that court from summarily dismissing the petition. This argument is also therefore waived. Id. It also lacks merit. As noted above, I.C. § 19-4906 authorizes the 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, 131 Idaho at 518, 960 P.2d at 739. A post-conviction petitioner cannot defeat a meritorious motion for summary dismissal or notice of intent to dismiss entered on the court’s own initiative simply by moving successfully for the court to take judicial notice of underlying criminal records. Brackett has thus failed to demonstrate that the district court erred.

CONCLUSION

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

DATED this 18th day of June, 2018.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 18th day of June, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

ROBERT BENJAMIN BRACKETT
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MWO/dd