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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARCOS AYALA-JIMENEZ,)
) No. 45232
 Petitioner-Appellant,)
) Gooding County Case No.
 v.) CV-2016-614
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

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

HONORABLE JOHN K. BUTLER
District Judge

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PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Marcos Ayala-Jimenez appeals from the district court's order, following an evidentiary hearing, denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In 2016, Ayala-Jimenez ("Jimenez") pled guilty in Gooding County district court to felony driving under the influence and was sentenced to five years with zero years fixed, all suspended. (Augmented R., pp.38-41.) The court ordered Jimenez's sentence to "run consecutive to the sentence in Jerome County Case No. CR-2014-5169." (Id., p.38 (emphasis original).) Jimenez did not appeal from his Gooding County judgment of conviction.

Jimenez filed a *pro se* Petition for Post-Conviction Relief (Augmented R., pp.5-24), and after appointing him counsel (id., p.54), the district court filed a Notice of Intent to Dismiss (id., pp.51-61). Jimenez filed a motion to extend the time for filing an amended petition (id., pp.62-64), which was granted (id., pp.68-69). Jimenez filed a Verified Amended Petition for Post-Conviction Relief ("Amended Petition") (id., pp.74-78), claiming only that his trial counsel provided ineffective assistance "because it was not indicated in [the] plea agreement whether the sentence imposed would be run concurrent or consecutive with Jerome County case CR-2014-5169." Jimenez alleged his attorney

(a) should have properly explained the plea agreement to Petitioner; and (b) should have ensured that such term was clearly indicated in the plea agreement or properly recited at the sentencing hearing.

(Id., p.76.)

The district court held an evidentiary hearing in which both Jimenez and his trial counsel testified. (See generally 5/30/17 Tr. (Exhibit 1 of Certificate of Exhibits).) After the parties

submitted post-evidentiary briefs (Augmented R., pp.121-129), the court entered Findings of Fact and Conclusions of Law (id., pp.143-153), denying Jimenez's amended petition for post-conviction relief. Jimenez filed a timely notice of appeal. (Id., pp.154-156.)

ISSUE

Jimenez states the issue on appeal as:

Whether the district court erred when it denied post-conviction relief after an evidentiary hearing, rejecting Mr. Jimenez's assertions that he had received ineffective assistance of counsel.

(Appellant's Brief, p.3.)

The state rephrases the issue on appeal as:

Has Jimenez failed to show that the district court erred in denying him post-conviction relief following an evidentiary hearing?

ARGUMENT

Jimenez Has Failed To Show That The District Court Erred In Denying Him Post-Conviction Relief Following An Evidentiary Hearing

A. Introduction

Jimenez argues the district court erred in denying him post-conviction relief following an evidentiary hearing. He contends his guilty plea was not entered knowingly, intelligently, and voluntarily because his trial counsel did not adequately explain that his sentence could run consecutively to his sentence in his Jerome County case. (Appellant's Brief, pp.4-12.) Jimenez's argument fails.

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). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Jimenez Failed To Meet His Burden Of Proving Ineffective Assistance Of Counsel

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). 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 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, 153-54, 177 P.3d 362, 367-68 (2008).

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). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

The state relies upon and incorporates into this response, as if fully set forth herein, the district court's analysis and findings in its Findings of Fact and Conclusions of Law (Augmented R., pp.143-156, attached as Appendix A), in which the court concluded that Jimenez's trial counsel "advised the petitioner as to the possibility his sentences would be ordered to be served consecutively, and that [trial counsel] informed the petitioner that this meant he would have to serve his sentence in the Jerome case before serving his sentence in the Gooding case" (id., p.152).

The district court's ruling is supported by Jimenez's trial counsel's testimony at the evidentiary hearing that he specifically recalled the case, and when the state made a plea offer, he met with Jimenez in the courtroom, and, *using an interpreter*, told him "his thoughts on their offer, especially when [he] found out that [Jimenez] had a probation violation out of Jerome County." (Tr., p.25, Ls.16-24.) Jimenez's trial counsel also explained during a colloquy with the prosecutor:

Q. Did you ever discuss concurrent or consecutive with Mr. Jimenez?

A. When I was telling him what I thought would happen to him, as painting a bleak picture, I told him that the Court could very well make it a consecutive, meaning he'd have to serve his first sentence first. That was my exact words to him.

Q. Okay. And then did you explain to him what would happen regarding his second sentence if that happened?

A. Yeah. And then he would have to serve his first sentence before he would start serving his fixed sentence.

(5/30/17 Tr., p.27, L.16 - p.28, L.3.)

Based on the testimony of his trial counsel at the evidentiary hearing, and the district court's Findings of Fact and Conclusions of Law, Jimenez has failed to show that the district court erred in denying his claim.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order dismissing Jimenez's post-conviction petition.

DATED this 9th day of August, 2018.

/s/ John C. McKinney
JOHN C. McKinney
Deputy Attorney General

CERTIFICATE OF SERVICE

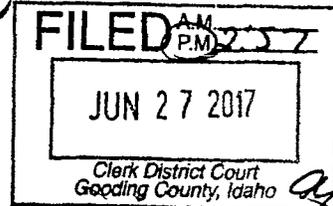
I HEREBY CERTIFY that I have this 9th day of August, 2018, served two true and correct paper copies of the foregoing RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

MARCOS AYALA-JIMENEZ
IDOC #114079
ISCC D-1, 18 B
P. O. BOX 70010
BOISE, ID 83707

/s/ John C. McKinney
JOHN C. MCKINNEY
Deputy Attorney General

JCM/dd

APPENDIX A



**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

MARCOS AYALA-JIMENEZ,)	
)	
Petitioner,)	
)	
vs.)	Case No. CV-2016-0614
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on for an Evidentiary Hearing on the Petition for Post-Conviction Relief on May 30, 2017. The Petitioner, Marcos Ayala-Jimenez was present and represented by appointed counsel, Steven McRae. The State was represented by Matt Pember, the Gooding County Prosecuting Attorney.

Testimony of the witnesses was received and exhibits were admitted into evidence. At the conclusion of the hearing, the petitioner was given fourteen (14) days to submit written closing arguments and proposed findings of fact and conclusions of law; the Respondent thereafter had fourteen (14) days to submit closing arguments and proposed findings of fact and conclusions of law and, thereafter, the Petitioner had seven (7) days to submit any rebuttal

argument or supplemental findings of fact and conclusions of law after which the matter would be deemed submitted for decision.

The briefing by the parties was completed June 21, 2017. This matter was deemed submitted to the Court for decision on June 22, 2017. The Court, having considered the evidence and the arguments of counsel as contained in their post-trial memorandums and counsel's proposed findings of fact and conclusions of law, makes the following findings of fact and conclusions of law.

I.

STATEMENT OF THE CASE

This is an action for post-conviction relief which was filed by the petitioner after he was sentenced for Driving Under the Influence, a felony following entry of a guilty plea in *State v. Marcos Ayala-Jimenez*, Gooding County Case No. CR-2016-224. The petitioner filed an Amended Petition for Post-Conviction Relief after appointment of counsel and the Court's entry of a Notice of Intent to Dismiss his petition for post-conviction relief. The only issue for purposes of the Evidentiary Hearing is whether his appointed counsel was ineffective in failing to inform the defendant that he could be subject to consecutive sentencing and whether counsel explained the difference between consecutive and concurrent sentencing.

II.

POST-CONVICTION RELIEF STANDARD

The petitioner in post-conviction relief proceedings has the burden of proving his grounds for relief by a preponderance of the evidence. I.C.R. Rule 57(c); *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986). In order to be granted post-conviction relief the petitioner "must show that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt."

I.C. § 19-4901 (b); *Fodge v. State*, 125 Idaho 882, 884, 876 P.2d 164, 166 (Ct. App. 1994). The Rules of Evidence apply to these proceedings, with the exception that the court “may receive proof by affidavits, depositions, oral testimony, or other evidence.” I.C. § 19-4907; I.R.E. Rule 101(d)(4). *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990); *Curless v. State*, 146 Idaho 95, 190 P.3d 914 (Ct. App. 2008).

In order to prove a claim of ineffective assistance of counsel, an applicant must show that the attorney's conduct fell below an objective standard of reasonableness, the first prong of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). There is a strong presumption that trial counsel's performance falls within the wide range of “professional assistance.” *Id.* An applicant must not only show deficiency, but must also show that the deficient conduct so undermined the proper functioning of the adversarial process that the underlying proceeding cannot be relied upon as having produced a just result, the second prong of the *Strickland* test. *State v. Ivey*, 123 Idaho 77, 844 P.2d 706, 709 (1992). In order for the applicant to satisfy the second prong of the *Strickland* test, he or she must establish that there is a reasonable probability that the outcome of the trial would have been different. *Aragon v. State*, 114 Idaho at 761, 760 P.2d at 1177.

III.

TESTIMONY AND EVIDENCE

At the request of the petitioner and without objection by the respondent, the court took judicial notice of the Judgment of Conviction in the petitioner's underlying criminal case, Gooding County Case No. CR-2016-0224, and the transcript of the arraignment and change of plea hearing, held on February 23, 2016.

The petitioner offered his own testimony in support of the petition and the respondent offered the testimony of Philip Brown. The relevant witness testimony is summarized as follows:

Marcos Ayala-Jimenez:

The petitioner testified that he was charged with driving under the influence in Gooding County and Philip Brown was his attorney. The petitioner testified that he had a case pending in Jerome County at the time the charges were filed in Gooding, and Philip Brown was not his attorney in the Jerome County case. The petitioner testified that he and Mr. Brown did not talk very much, and that Mr. Brown was unaware of what was going on in the petitioner's Jerome case. The petitioner testified that he and Mr. Brown did not discuss his Jerome case or what underlying sentence existed in that case. The petitioner testified that he did not know what the words consecutive and concurrent meant, and that he never talked to Mr. Brown about those terms. The petitioner testified that he still does not know what those terms mean. The petitioner noted that he did remember Mr. Brown telling him that the case in Jerome was separate from the case in Gooding.

The petitioner testified that he showed up to his arraignment and pleaded guilty "blind." The petitioner noted that he did not think his sentence was going to be as bad as it was, and that he didn't feel he deserved the punishment he received, which he described as "pretty hard." The petitioner testified that if he would have known he was going to have two different prison sentences running one after the other, he would not have pled guilty, because he would have to "fight until the end," and he would have kept on fighting to see if he could resolve it.

During cross examination by Mr. Pember, the petitioner testified that he did not think he would get as much of a sentence as he did, but he does remember the court telling him the maximum penalty he was eligible for. The petitioner testified that he had adequate time with Mr.

Brown during the change of plea process, but Mr. Brown never told the petitioner the difference between a consecutive and concurrent sentence. When questioned about the plea agreement process the petitioner noted that he was “never offered anything” and that he only pled guilty because he didn’t believe he was a criminal. The petitioner testified that he remembered the court telling him he was not bound by the recommendation in the underlying agreement, but that he never thought the court would give him such a high sentence. The petitioner also noted that Mr. Brown did not tell the petitioner that he needed more time to look into the Jerome case, and that Mr. Brown didn’t tell the petitioner anything.

On redirect by Mr. McRae the petitioner testified that he did not remember anyone advising him at the change of plea hearing that the sentence could run consecutive to the sentence in the Jerome case. Upon questioning by the court, the petitioner noted that Mr. Brown never spoke to him about filing an appeal or about his appellate rights, and that the petitioner never asked Mr. Brown about appealing. Mr. McRae questioned the petitioner about the relation between the Gooding County case and the Jerome County case, and the petitioner testified that he did not understand how his pleading guilty in Gooding would affect the Jerome County case.

Philip Brown:

Mr. Brown testified that he remembered the petitioner and that he advised him regarding his pleading guilty and about his case in Jerome County. Mr. Brown testified that he advised the petitioner to waive his right to a speedy preliminary hearing so that they would have time to go through everything, but the petitioner wanted to waive the preliminary hearing and enter a guilty plea. Mr. Brown testified that once he found out about the petitioner’s case in Jerome County he told the petitioner not to accept a plea agreement offer, because Mr. Brown did not think the court would sentence the petitioner to probation. Mr. Brown testified that he explained the

ramifications of a guilty plea to the petitioner, and that he “painted a bleak picture” to illustrate to the petitioner that if he pled guilty he would go straight to prison. Mr. Brown testified that the petitioner told Mr. Brown to be quiet and that Mr. Brown did not know what he was doing. Mr. Brown also testified that he told the petitioner the court could very well order the sentence be served consecutive to his other sentence, and that would mean he would have to serve his other sentence first. Mr. Brown testified that he told the petitioner the court would not follow a probation recommendation.

On cross exam by Mr. McRae, Mr. Brown testified that prior to court on February 23, 2016, the petitioner said he was going to get probation in Jerome, so he wanted to enter his guilty plea in Gooding right away. Mr. Brown testified that he told the petitioner he didn’t think he would get probation in Jerome, but the petitioner was not listening to his advice. Mr. Brown testified that he did not move to withdraw as the petitioner’s counsel because it is his practice to give his clients the final decision on whether to plead guilty, take something to jury trial, etc. Mr. Brown testified that he told the petitioner he had nothing to lose going to trial, but the petitioner wanted to plead guilty. Mr. Brown testified that he did not think the client’s insisting he wanted to plead guilty was a conflict warranting his withdrawal. Mr. Brown noted that he remembered putting something on the record during the change of plea hearing about how the defendant was incorrect in thinking he was going to get probation.

Pursuant to I.R.E. 201 the Court hereby takes judicial notice of the following documents/proceedings:

State of Idaho v. Marcos Ayala-Jimenez, Gooding County Case No. CR-2016-224:

1. On February 18, 2016 the defendant waived his preliminary hearing;

2. The defendant on February, 23, 2016 the defendant was arraigned in District Court and pled guilty to felony DUI, I.C. § 18-8005(6);
3. The defendant on April 12, 2016 was sentenced on his felony DUI to 5 years, with 0 years fixed and 5 years indeterminate, to run consecutive to his Jerome County sentence. The defendant was granted credit of 66 days served as of April 12, 2016.

IV.

FINDINGS OF FACT

1. Philip Brown was appointed to represent Marcos Ayala-Jiminez in Gooding County Case No. CR-2016-0224 in which the petitioner pled guilty to Driving Under the Influence (two or more prior violations within ten years), a felony, violation of Idaho Code §§ 18-8004, 18-8005(6).
2. At the time charges were filed against the petitioner in Gooding County Case No. CR-2016-0224, the petitioner was on felony probation in Jerome County Case No. CR-2014-5169.
3. The petitioner entered a guilty plea in Gooding County Case No. CR-2016-0224 on February 23, 2016, and this court did not advise the petitioner that he could be subject to consecutive, as opposed to concurrent, sentencing.
4. The court did advise the petitioner of the maximum penalty he faced, "10 years in the state penitentiary and a fine of \$5,000 or both" *inter alia*, and the petitioner responded that he understood. (Tr. Pg. 11, L. 2-12).
5. There is a discrepancy between the petitioner's testimony and Mr. Brown's testimony as to whether Mr. Brown discussed with the petitioner the meaning of the terms consecutive

and concurrent, and that the petitioner could be subject to serve any sentence in the Gooding case consecutive to the sentence in his Jerome Case.

- a. The petitioner testified that he and Mr. Brown did not discuss the sentence in the Jerome case, and that he and Mr. Brown never discussed what the terms concurrent and consecutive mean.
 - b. Mr. Brown testified that he advised the petitioner that the court may order the sentence in the Gooding case to be served consecutive to the sentence in his Jerome case, and that told the petitioner that this meant he would have to serve the sentence in his Jerome case first.
6. Mr. Brown's testimony is credible based on the colloquy during the change of plea hearing.
- a. When asked if the petitioner understood that pleading guilty would trigger a probation violation he said that he understood, (Tr. Pg. 12, L. 6-11), and when asked if he had discussed the plea agreement offer with his attorney he said that he did. (Tr. Pg. 16, L. 1-4). When asked if he agreed with the plea agreement and whether it was satisfactory to him, he said yes. (Tr. Pg. 16, L. 8-10). When asked if he had adequate access to his attorney to discuss the law and facts of the case, the petitioner answered yes. (Tr. Pg. 18, L. 14-17). When asked if he was satisfied with the services of his attorney and whether he believed his attorney had been adequately prepared, he answered yes. (Tr. Pg. 18, L. 18-23).
 - b. During the petitioner's change of plea, Mr. Brown said, "And for the record, Your Honor, I told the defendant this was not binding on the Court. He had informed me that there, I think, is a pending probation violation before this Court in

Jerome. I've told him I wanted to look into that further, but he told me he wanted to enter a plea today, so I'm doing that with that knowledge." (Tr. Pg. 6, L. 17-23). When the court asked if the plea was given on the advice and consent of counsel, Mr. Brown responded, "Yes, Your Honor. I pointed out my issues with what is going to happen in Jerome County." (Tr. Pg. 21, L. 21-15).

- c. Comparing the petitioner's testimony to the transcript of the change of plea hearing, specifically the portions cited above, it is clear that the petitioner discussed the plea agreement with Mr. Brown, that he agreed with the plea agreement, and that he had adequate access to Mr. Brown and was satisfied with his services. Based on the discrepancies between the petitioner's claims during testimony on this petition, and the statements he made under oath during his change of plea, Mr. Brown's testimony regarding discussions on concurrent vs. consecutive sentencing, and not the petitioner's, is credible.
7. At the sentencing hearing on April 12, 2016 in the petitioner's Gooding case, the petitioner was sentenced to 0 years fixed and 5 years indeterminate, to be served consecutively to the petitioner's sentence in the Jerome case. The petitioner has offered no evidence that the ultimate sentence imposed by the court in his Gooding County case exceeded 10 years even if the sentence was to run consecutive to his Jerome County case.

V.

CONCLUSIONS OF LAW

1. The petitioner has the burden of proving, by a preponderance of the evidence, the "allegations upon which the request for post-conviction relief is based." *Ramsey v. State*,

159 Idaho 887, 367 P.3d 711, 714 (Ct. App. 2015); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002).

2. In a claim for post-conviction relief for ineffective assistance of counsel, “the petitioner must show that the attorney’s performance was deficient and that the petitioner was prejudiced by the deficiency.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316 900 P.2d 221, 224 (Ct. App. 1995); *Ramsey v. State*, 159 Idaho 887, 367 P.3d 711, 715 (Ct. App. 2015).
3. In order to establish a deficiency, “the petitioner has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness.” *Ramsey v. State*, 159 Idaho 887, 367 P.3d 711, 715 (Ct. App. 2014) (citing *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)).
4. Petitioner argues that Mr. Brown’s representation was deficient because Mr. Brown failed to counsel petitioner regarding whether the petitioner’s sentence would run concurrent with or consecutive to the sentence in Jerome County Case No. CR-2014-5169.
5. Based on the testimony of Mr. Brown, it is clear that Mr. Brown advised the petitioner as to the possibility his sentences would be ordered to be served consecutively, and that Mr. Brown informed the petitioner that this meant he would have to serve his sentence in the Jerome case before serving his sentence in the Gooding case.
6. Because Mr. Brown advised the petitioner that he would be subject to consecutive sentences, the petitioner has failed to show that Mr. Brown’s representation fell below an objective standard of reasonableness. Therefore, Mr. Brown’s performance was not deficient and the petitioner has failed to meet the first prong of the *Strickland* test.

7. Even if counsel was ineffective, the petitioner has not presented any evidence of how he was prejudiced. The petitioner has not shown to the court that his ultimate sentence in his Gooding County case exceeded 10 years when it was run consecutively. There is no showing that his sentence exceeded the punishment described by the court during plea colloquy.
8. In his Verified Amended Petitioner for Post-Conviction Relief, the petitioner prays for the court to allow him to withdraw his guilty plea. “A motion to withdraw a guilty plea brought after sentencing will be granted only to correct manifest injustice.” *State v. Thomas*, 154 Idaho 305, 307, 297 P.3d 268, 270 (2013) (citing *State v. Flowers*, 150 Idaho 568, 571, 249 P.3d 367, 370 (2011); *State v. Heredia*, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (2007)).
9. “If a plea was not taken in compliance with constitutional due process standards, which require that a guilty plea be made voluntarily, knowingly, and intelligently, then ‘manifest injustice’ ...will be established as a matter of law.” *State v. Thomas*, 154 Idaho 305, 307, 297 P.3d 268, 270 (2013) (citing *State v. Heredia*, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (2007); *State v. Stone*, 147 Idaho 330, 333, 208 P.3d 734, 737 (Ct.App.2009); *State v. Shook*, 144 Idaho 858, 859, 172 P.3d 1133, 1134 (Ct.App.2007); *State v. Huffman*, 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct.App.2002)).
10. “The possibility that a sentence will be made consecutive to a prior sentence is a direct consequence of a guilty plea, of which the defendant must be informed in order to ensure that the plea is voluntary, knowing, and intelligent. *State v. Thomas*, 154 Idaho 305, 307-308, 297 P.3d 268, 270-271 (2013) (citing *State v. Flummer*, 99 Idaho 567, 568-69, 585

P.2d 1278, 1279–80 (1978); *Shook*, 144 Idaho at 859, 172 P.3d at 1134; *Huffman*, 137 Idaho at 887–88, 55 P.3d at 880–81).

11. “It is not essential, however, that the defendant be informed directly by the court at the plea hearing.” *State v. Huffman*, 137 Idaho 886, 888, 55 P.3d 879, 881 (Ct. App. 2002).
12. “[W]hen a judge understates the maximum sentence during plea colloquy, and later sentences the defendant within the range of punishment described during the colloquy, such error is subject to harmless error review.” *State v. Thomas*, 154 Idaho 305, 308, 297 P.3d 268, 271 (2013).
13. “When a defendant attempts to withdraw his plea in such a case after the sentence has been imposed, the defendant bears the burden of demonstrating that although he received no greater sentence than was explained to him during the plea colloquy, he was prejudiced to such an extent that manifest injustice will occur unless he is permitted to withdraw his plea.” *State v. Thomas*, 154 Idaho 305, 308, 297 P.3d 268, 271 (2013).
14. The petitioner was informed that he faced a maximum period of incarceration of up to 10 years. The petitioner was sentenced to 0 years fixed and 5 years indeterminate in Gooding, to be served consecutive to a sentence in Jerome County but the defendant has failed to prove that his total sentence when run consecutively to the Jerome County case exceeded 10 years.
15. Because the petitioner has not presented any evidence or argument that would demonstrate how he was prejudiced when he failed to prove he has received a greater sentence than that of which he was forewarned, the error is harmless. Therefore, the petitioner has not demonstrated that manifest injustice will result if he is not permitted to withdraw his plea. *State v. Thomas, supra*.

16. Thus, even if counsel were ineffective, the petitioner has failed to prove he suffered any prejudice and therefore, this case fails to meet the second prong of the *Strickland* test.

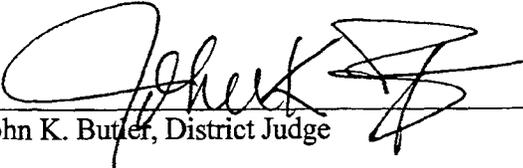
VI.

CONCLUSION AND ORDER

For the reasons stated above, the petitioner has failed to prove by a preponderance of the evidence that his trial counsel was deficient and the claim for post-conviction relief is hereby DENIED and the Amended Petition for Post-Conviction Relief is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 23 day of June, 2017.



John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 27 day of June, 2017, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postage paid, and/or hand-delivered to the following persons:

Steven McRae
Attorney for Petitioner
P.O. Box 1233
Twin Falls, Idaho 83303-1233

Matt Pember
Gooding County Prosecutor



Deputy Clerk