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McNeil v. State Appellant's Brief Dckt. 45766

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LLOYD HARDIN MCNEIL,	)	
	)	**NO. 45766**
Petitioner-Appellant,	)	
	)	**ADA COUNTY NO. CV-PC-14-15680**
v.	)	
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE DEBORAH A. BAIL
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Additonal Authorities

STATEMENT OF THE CASE

Nature of the Case

Lloyd Hardin McNeil appeals from the district court's judgment summarily dismissing his second amended petition for post-conviction relief. On appeal, he contends the district court erred by dismissing his petition because an evidentiary hearing was necessary to resolve genuine issues of material fact on three of his ineffective assistance of counsel claims. He respectfully requests that this Court vacate the district court's judgment and remand this case for an evidentiary hearing.

Statement of Facts and Course of Proceedings

In early 2012, a jury found Mr. McNeil guilty of voluntary manslaughter, arson, and grand theft. (*See* No. 39881 R., pp.256–59.[1]) The district court sentenced him to an aggregate sentence of fifty-four years, with twenty-five years fixed. (No. 39881 R., pp.261–63.) Mr. McNeil appealed, and the Court of Appeals affirmed his judgment of conviction and sentence. *See State v. McNeil*, 155 Idaho 392 (Ct. App. 2013). The Idaho Supreme Court denied Mr. McNeil's petition for review and issued a Remittitur on February 24, 2014.[2]

On August 19, 2014, Mr. McNeil filed a pro se petition and affidavit for post-conviction relief. (R., pp.7–32.) He raised numerous ineffective assistance of counsel claims, claimed the prosecutors suborned false testimony and withheld discovery, and asserted a violation of his due

[1] Contemporaneous with this brief's filing, Mr. McNeil has filed a motion for judicial notice of certain documents and transcripts contained in the record from Mr. McNeil's previous direct appeal: No. 39881 (Ada County No. CR-FE-2011-6449). Citations to certain documents in the record in No. 39881 will refer to the page number of the document in the clerk's record and designate the docket number 39881.

[2] The Remittitur was initially issued on December 2, 2013, but the Court granted Mr. McNeil's motion to accept an untimely petition for review. Thereafter, the Court denied his petition for review and issued the second Remittitur in February.

process rights for the denial of a psychological evaluation before and after trial. (R., p.8.) As for ineffective assistance of counsel, he raised thirty-four claims. (R., pp.9–31.) For relief, he requested a new trial or a reduced sentence. (R., p.9.) The district court appointed counsel to represent him. (R., p.44.)

In September 2014, the district court took judicial notice of the charging document, transcript of the jury trial, grand jury transcript, verdict forms, judgment and commitment, the Court of Appeals' opinion, and the remittitur. (R., p.46.) Also in September, the State answered and alleged Mr. Neil's petition failed to state any grounds upon which relief could be granted. (R., pp.48–50.) In addition, conflict counsel provided notice of his appearance as the attorney of record for Mr. McNeil. (R., p.52.)

In October 2014, Mr. McNeil wrote a pro se letter to the district court outlining his issues with conflict counsel, requesting his removal from the case, and requesting the appointment of new counsel. (R., pp.54–55.) One month later, Mr. McNeil filed a pro se response to the State's Answer. (R., pp.57–60.) Another month later, in early December 2014, Mr. McNeil filed a pro se motion to appoint new counsel, again outlining his issues with conflict counsel. (R., pp.63–66.) On December 10, 2014, the district court held a hearing, and Mr. McNeil was not present. (R., p.70.) The district court ordered Mr. McNeil's counsel to file an amended petition by March 9, 2015. (R., p.70.)

In February 2015, Mr. McNeil filed a second pro se motion to appoint new counsel. (R., pp.71–75.) On March 9, 2015, Mr. McNeil's counsel filed an amended petition for post-conviction relief. (R., pp.77–86.) It stated the grounds for relief as: "[I]neffective assistance of counsel, potential prosecutorial misconduct, and denial of due process rights. Petitioner alleges a failure to disclose the entirety of the Decedent's telephone log. There could be exculpatory text

messages." (R., p.78.) The petition raised twenty-six claims of ineffective assistance of counsel. (R., pp.78–86.) Later in March 2015, Mr. McNeil filed a third pro se motion to appoint new counsel. (R., pp.110–14.) In April 2015, the State answered the amended petition, arguing (1) Mr. McNeil failed to state a claim upon which relief can be granted, (2) claims that could be raised on direct appeal were procedurally barred, and (3) the two prongs for ineffective assistance of counsel claims were not satisfied. (R., pp.160–62.) In July 2015, the district court held a hearing on Mr. McNeil's motions for new counsel. (*See* Tr.) Following a discussion with Mr. McNeil and his counsel, his counsel remained on the case. (*See* Tr.)

On October 23, 2015, Mr. McNeil, through counsel, filed a second amended petition for post-conviction relief. (R., pp.169–87.) This petition raised fifteen claims of ineffective assistance of counsel. (R., pp.169–87.) It also included affidavits and other exhibits in support of the claims. (R., pp.189–241.) Mr. McNeil signed the petition as true. (R., p.188.)

In December 2015, the State answered and raised the same three affirmative defenses as its prior answer. (R., pp.242–44.) The State also moved for summary dismissal. (R., pp.245–46; *see also* R., pp.247–52 (brief in support).) In February 2016, Mr. McNeil responded in opposition. (R., pp.253–260.) In April 2016, Mr. McNeil moved for a status conference. (R., p.262.) The district court did not set the matter for a hearing.

In July, August, and September 2016, the district court ordered the preparation of various transcripts from the underlying criminal case. (R., pp.264–82.) Also in September 2016, the State moved to conduct limited discovery and depose Mr. McNeil and his trial attorneys. (Aug.

R.,[3] pp.1–3.) Mr. McNeil objected to the State's motion. (R., pp.283–84.) The district court did not rule on the discovery motion.

About five months later, in February 2017, Mr. McNeil filed a fourth pro se motion for new counsel and moved for a hearing. (R., pp.289–93.) In this motion, Mr. McNeil alleged his counsel failed to cite pertinent case law, was a key witness for the evidentiary hearing, and let his relationship with Mr. McNeil's trial attorneys "take precedence" over the best interests of his client. (R., p.289.) He further alleged his counsel had multiple conversations with trial counsel, which made him a witness for post-conviction proceedings, his counsel made no attempt to inquire as to why the district court had not made any "significant rulings" on the case since July 2015, and new counsel would be in his best interests. (R., pp.290–91.) In April 2017, Mr. McNeil, through counsel, filed a supplemental brief in support of his second amended petition and a request for an evidentiary hearing. (R., pp.294–301.)

About four months later, in September 2017, the district court filed a notice of intent to dismiss.[4] (R., pp.303–27.) Mr. McNeil responded with argument and additional exhibits, and the

[3] Contemporaneous with this brief's filing, Mr. McNeil has filed a motion to augment the record with the State's motion to conduct limited discovery. This document appears to have been inadvertently omitted from the record on appeal.

[4] Out of the fifteen ineffective assistance of counsel claims, the district court ruled Claims 1, 2, 3, 4, 7, and 8 failed on the first prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In Claim 1, for example, Mr. McNeil alleged his counsel was ineffective for stipulating to the admission at trial of the victim's 911 call reporting domestic violence from Mr. McNeil, even though the district court had ruled before trial that "the bulk" of the 911 call was inadmissible evidence. (R., pp.171–75, 311–12.) Similarly, in Claim 2, Mr. McNeil alleged his counsel was ineffective for failing to call a fire expert, who had prepared a report for counsel opining an arson determination was "premature" and disputing the position of the victim's body. (R., pp.175–77.) Likewise, in Claim 3, Mr. McNeil alleged his counsel was ineffective for failing to object to parts of an interrogation video in which Mr. McNeil invoked his right to remain silent. (R., pp.177–78.) This Court held in *Crawford v. State*, 160 Idaho 586 (2016), that the petitioner bears the burden to show that trial counsel's decision was "made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *Id.* at 593 (citation omitted). This Court further held, "in the absence of such a

State replied. (R., pp.328–68, 369–78.) On January 19, 2018, the district court issued an order dismissing the petition. (R., pp.379–83.) On January 30, 2018, the district court issued a final judgment dismissing the petition for post-conviction relief with prejudice. (R., p.384.) Mr. McNeil timely appealed. (R., pp.385–87.)

showing, this Court presumes" counsel's decision was "driven by tactical or strategic decision making." *Id.* Here, the district court ruled Mr. McNeil failed to show trial counsel's decisions were not strategic or tactical. (R., pp.311–16, 319–21, 379–80.)

ISSUE

Did the district court err when it summarily dismissed Mr. McNeil's second amended petition for post-conviction relief?

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. McNeil's Second Amended Petition For Post-Conviction Relief

A. Introduction

Mr. McNeil contends the district court erred when it summarily dismissed his second amended petition because an evidentiary hearing was necessary to resolve genuine issues of material fact. Specifically, there were genuine issues of fact in three of Mr. McNeil's ineffective assistance of counsel claims: (1) trial counsel was ineffective for failing to investigate the victim's recent attempt to pawn her ring (Claim 9); (2) trial counsel was ineffective for failing to inform the judge that a juror saw Mr. McNeil in the back of a police officer's vehicle during trial (Claim 14); and (3) trial counsel was ineffective for failing to move for a mistrial after a juror was seen speaking with the victim's uncle during trial (Claim 15). Mr. McNeil submits the district court should have held an evidentiary hearing on these three claims.

B. Post-Conviction Jurisprudence & Standard Of Review

A petition for post-conviction relief is civil in nature. *State v. Dunlap*, 155 Idaho 345, 361 (2013).

> Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Grube v. State*, 134 Idaho 24 (2000). Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

Charboneau v. State, 144 Idaho 900, 903 (2007).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the petitioner must generally show that (1) his attorney's performance did not meet "an objective standard of reasonableness," and (2) his attorney's deficient performance prejudiced him. *Id.* at 687–88.

The district court can summarily dismiss or grant a petition for post-conviction relief if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(b), (c). "In considering summary dismissal of an application for post-conviction relief, the trial court must accept as true verified allegations of fact in the application or in supporting affidavits, no matter how incredible they may appear, unless they have been disproved by other evidence in the record." *Dunlap v. State*, 126 Idaho 901, 909 (Ct. App. 1995). The district court is "required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions." *Charboneau*, 144 Idaho at 903. Any disputed facts are construed in favor of the non-moving party, and "all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Vavold v. State*, 148 Idaho 44, 45 (2009). A petition for post-conviction relief based on a claim of ineffective assistance of counsel will "survive a motion for summary dismissal if the petitioner establishes: (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 petitioner's case." *Pratt v. State*, 134 Idaho 581, 583 (2000). If a genuine issue of material fact is presented, an evidentiary

hearing must be conducted to resolve the factual issues. *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002).

> On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.

Charboneau, 144 Idaho at 903. Because the evaluation of a motion for summary disposition does not involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court reviews a district court's summary dismissal order de novo. *Muchow v. State*, 142 Idaho 401, 402–03 (2006).

C. The District Court Erred In Summarily Dismissing Claims 9, 14, And 15 Because There Were Genuine Issues Of Material Fact

Construing all facts and inferences in Mr. McNeil's favor, he maintains the district court erred by dismissing three of his ineffective assistance of counsel claims. He established genuine issues of material fact as to whether counsel's performance was deficient and whether that performance prejudiced him. As such, the district court should have held an evidentiary hearing to resolve these claims. Each claim is addressed in turn below.

1. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Investigate A Defense To The Grand Theft Charge

Mr. McNeil's ninth claim of ineffective assistance of counsel was that his trial counsel failed to investigate a defense to the charge of grand theft. Mr. McNeil submits the district court erred by dismissing this claim because there are genuine issues of material fact as to trial counsel's deficient performance and prejudice.

In Mr. McNeil's second amended petition, he alleged his trial counsel "was ineffective for ignoring Petitioner as he tried to share information regarding the decedent's rings." (R., p.182.) He alleged the victim "had tried to pawn her personal property on an earlier occasion. This included the family heirloom rings." (R., p.182.) Mr. McNeil submitted, "A review of a pawnshop video recording may have shown the decedent attempting to pawn her ring." (R., p.182.) Mr. McNeil alleged he was prejudiced because a video of the victim trying to pawn the ring would have rebutted the inference that she "would have been reluctant to part with a family heirloom." (R., p.182.) This would "rebut[ ] the inference that Petitioner possessed the rings with the intent to steal them." (R., p.183.) In support of this claim, Mr. McNeil included an affidavit from an investigator. This affidavit stated in relevant part:

> 2) I was asked . . . investigate factual matters that are relevant to the Petitioner's claim for ineffective assistance of counsel.
>
> 3) One such matter was to determine if there was video surveillance at a local pawnshop.
>
> 4) The purpose of the assignment was to determine if there was video, if it was kept in the ordinary course of business and to find out how long video was kept.
>
> 5) The Petitioner was hopeful there was video. He wanted it to rebut the state's argument that he stole some highly sentimental heirloom jewelry from the decedent. The Petitioner believes video evidence of the decedent at the pawnshop could have aided his defense. If she were attempting to pawn these valuable items, then she may not be have been emotionally attached to them. Therefore, opening up an alternate explanation as to why the Petitioner possessed them.
>
> 6) The Petitioner said Trial Counsel was unwilling to pursue this assignment. He said they did not have video because they operate as a fence for stolen property.
>
> 7) I interviewed Matt Isaak of Vista Pawn.
>
> 8) He indicated to me four years ago Vista Pawn utilized video. It included the interior of their store. Furthermore, he indicated archival video was stored for forty-five days.
>
> 9) I believe video was available at the time Trial Counsel had the case.

> 10) Petitioner explained to me she tried to pawn the ring on February 18, 2011, the same day she tried to kill herself by swallowing a bottle of Tylenol.

(R., pp.229–30.)

In its notice of intent to dismiss, the district court rejected this claim for failing to present admissible evidence and failing to meet the *Strickland* standard. (R., pp.321–22.) First, the district court stated that the affidavit from the investigator was not admissible evidence because it was hearsay. (R., p.321.) Second, the district court reasoned that, even if Mr. McNeil provided admissible evidence of Vista Pawn's video surveillance, the victim's (Natalie Davis) attempt to pawn her ring on February 18, 2011, "would not have made a difference in the outcome of trial." (R., p.321.) The district court explained:

> First, any video of Vista Pawn on February 18, 2011, would have been destroyed by the time McNeil was indicted on May 10, 2011, more than 45 days later. Second, such evidence would have been irrelevant and inadmissible. Perhaps it would have been if McNeil had made the argument that he obtained the ring from a pawn shop rather than prying the ring from Natalie's cold, dead finger. However, he did not. Any evidence that Natalie had attempted to pawn her ring was not relevant, thus inadmissible. To show counsel was deficient by failing to investigate, the petitioner is required to make a showing that the specific line of inquiry would have affected the outcome of the jury trial. In this case, it would not have. Therefore, McNeil cannot establish his counsel was ineffective for failing to investigate whether there was evidence to show Natalie had attempted to pawn her ring in the past.

(R., pp.321–22 (citation omitted).)

In response, Mr. McNeil argued this evidence that the victim gave him the ring and would not be reluctant to part with it would have rebutted the charge of grand theft. (R., p.335.) He explained that the victim "was not in good financial condition." (R., p.335.) He also argued the pawnshop video would have corroborated the victim's desire to pawn the ring. (R., p.335.) In addition, Mr. McNeil included an affidavit regarding his possession of the ring and his communication with trial counsel about the ring:

> 17.) On March 30, 2011, I had my first meeting with Trial Counsel and a private investigator. I was informed I would be charged with murder, arson and grand theft. They told me decedent's estranged mother had made claims an heirloom diamond ring was missing. I explained to my defense team that decedent had given me that ring for a partial payment on a long-standing debt. I specified we had gone to Vista Pawn on February 18, 2011, to pawn her ring. She agreed to do this as a means of paying down a portion of her debt to me. Vista Pawn offered her three hundred dollars ($300.00) for it. This was not a fair price. Decedent didn't have the appraisal paperwork. I told her I would reduce her debt by one thousand dollars ($1000.00) if she gave the ring to me to sell. I took possession of her ring at the counter inside Vista Pawn.
>
> 18.) I asked Trial Counsel's private investigator to determine if video could be obtained from Vista Pawn. His response was "That place (Vista Pawn) is a fence." "They don't have cameras, because they don't want any record of what goes on in there." He left me with the impression he was unwilling to bother investigating the existence of video.

(R., p.343.) Another affidavit from a friend of Mr. McNeil's stated that, in the summer or fall of 2010, when Mr. McNeil and the victim lived with him, he witnessed an argument where the victim threw the ring at Mr. McNeil to pay her debts to him. (R., pp.352–53.) More importantly, Mr. McNeil included an affidavit from a Vista Pawn employee. This affidavit stated:

> 1) My name if [sic] Randy Evans and I have been employed at Vista Pawn since before February of 2011.
>
> 2) I am familiar with our video surveillance video system as it was back in 2011.
>
> 3) Private Investigator Peter M. Smith called me and asked me the following question: On March 30.2011 if I had come to you in search of surveillance video from February 18.2011 would you have been able to supply me with such video?
>
> 4) I am aware that the video from February 18.2011 still would have been available as of March 30.2011.
>
> 5) Had Mr. Smith showed up looking for the video we would have held the video from February 18 and supplied him with it under subpoena.

(R., p.355.) Based on this evidence, Mr. McNeil asked the district court not to dismiss this claim. (R., p.335.)

The district court rejected Mr. McNeil's failure to investigate claim. (R., pp.380, 383.) However, in the district court's order dismissing the petition, the district court did not provide any specific reason for dismissing this claim. (*See* R., pp.379–83.) Considering Mr. McNeil provided admissible evidence to address the shortcomings identified by the district court, the district court presumably dismissed the claim for the other reason identified in its notice to dismiss: the failure to make a prima facie showing of deficient performance and prejudice. (R., pp.321–22.) Mr. McNeil submits the district court's dismissal was in error.

Effective assistance of counsel includes the duty of trial counsel "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

> The American Bar Association (ABA) standards reflect prevailing norms of practice and are guides in determining the nature and extent of the duty to investigate:
>
> > Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.
>
> ABA Standards for Criminal Justice, The Defense Function, § 4–4.1 (3d ed. 1993) (emphasis added); *Mitchell v. State*, 132 Idaho 274, 279–80 (1998)

Murphy v. State, 143 Idaho 139, 146 (Ct. App. 2006).

> In assessing the reasonableness of counsel's investigation, [this Court] consider[s] not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Stevens v. State, 156 Idaho 396, 412–13 (Ct. App. 2013) (citations omitted). "The failure of an attorney to properly investigate a case may constitute a deficiency in representation." *Plant v. State*, 143 Idaho 758, 762 (Ct. App. 2006). "If a defendant succeeds in establishing that counsel's performance was deficient, [he] must also prove the prejudice element by showing that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Murphy*, 143 Idaho at 145 (quoting *Strickland*, 466 U.S. at 694).

Here, Mr. McNeil has made a prima facie showing of deficient performance. Mr. McNeil provided admissible evidence that, on March 30, 2011, he informed trial counsel that the victim had given him the ring before her death. (R., p.343.) Mr. McNeil also told trial counsel that his possession of the right occurred inside Vista Pawn on February 18, 2011. (R., p.343.) In addition, Mr. McNeil provided admissible evidence that he asked trial counsel on March 30, 2011, to determine if Vista Pawn had video surveillance from February 18, and trial counsel refused. (R., p.343.) The video would have corroborated Mr. McNeil's explanation that he and the victim went to Vista Pawn to pawn the ring and she gave it to him at the store. Moreover, Mr. McNeil provided admissible evidence from a Vista Pawn employee, which confirmed trial counsel could have obtained the February 18 video surveillance on March 30. (R., p.355.) In light of this evidence, it was objectively unreasonable for Mr. McNeil's trial counsel to fail to contact Vista Pawn for its February 18 video surveillance. Trial counsel had an obligation to explore all avenues relevant to the merits of the grand theft charge. *Murphy*, 143 Idaho at 146. The fact that the victim had recently tried to pawn the ring and then given it to Mr. McNeil (as opposed to Mr. McNeil stealing the ring) would be extremely relevant to disprove the charge of grand theft. And, a surveillance video showing Mr. McNeil at Vista Pawn with the victim—and possibly her giving the ring to him—would lend significant credibility to this defense at trial. Reasonable

professional judgment would include requesting the video from Vista Pawn to investigate this potential defense. Trial counsel's failure to properly investigate a viable defense to grand theft is deficient performance. Mr. McNeil has therefore established a genuine issue of material fact on deficiency.

Second, Mr. McNeil has made a prima facie showing of prejudice. There is a reasonable probability that, but for trial counsel's failure to investigate, the result of the trial would have been different. If trial counsel had investigated and obtained a video showing Mr. McNeil and the victim at Vista Pawn, this evidence would have provided a defense to the charge of grand theft. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Mr. McNeil "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Accordingly, Mr. McNeil does not need to show with a certainty that this failure to investigate altered the outcome for grand theft. He need only show it is reasonably probable. Mr. McNeil has met that standard based on the investigation that trial could should have conducted and the evidence that could have been obtained from Vista Pawn. Accordingly, Mr. McNeil has established a genuine issue of material fact on prejudice.

In summary, Mr. McNeil submits the district court erred by summarily dismissing this claim. First, Mr. McNeil provided admissible evidence to support it. (*See* R., pp.343, 355.) Second, Mr. McNeil has made a prima facie showing of ineffective assistance of counsel. Contrary to the district court's reasoning, the fact that the victim recently attempted to pawn her ring to pay Mr. McNeil and then gave the ring to Mr. McNeil is highly relevant to the charge of grand theft. (R., p.322.) Testimony from Mr. McNeil and the Vista Pawn video would have been admissible evidence at trial. (R., p.322.) Further, the district court required Mr. McNeil "to make

a showing that the specific line of inquiry would have affected the outcome of the jury trial." (R., p.322.) This is a higher burden than required by *Strickland*. Applying the proper legal standard, and construing all facts and inferences in Mr. McNeil's favor, this claim of ineffective assistance of counsel requires an evidentiary hearing to resolve the genuine issues of material fact on deficient performance and prejudice.

2. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Inquire With A Juror Who Observed Mr. McNeil In Police Custody During Trial

Mr. McNeil's fourteenth claim of ineffective assistance of counsel was that his trial attorney failed to inform the district court and conduct an inquiry with a juror upon that juror seeing Mr. McNeil in the back of a police car during trial. Mr. McNeil submits the district court erred by dismissing this claim because there are genuine issues of material fact as to his trial counsel's deficient performance and prejudice.

In his second amended petition, Mr. McNeil alleged his trial counsel was ineffective for failing to engage in any action upon learning one of the jurors had seen Mr. McNeil in the back of a police car. (R., p.186.) He alleged, "Trial Counsel was ineffective for failing to alert the judge, make a proper record, and ask the court to conduct an inquiry after Petitioner learned and reported to his attorney that a juror had seen Petitioner in the back seat of a County Sheriff's vehicle." (R., p.186.) He alleged he was prejudiced because his "right to a fair trial was compromised" and "the jury/juror could assume he was guilty because he was in custody and support a conviction." (R., p.186.)

In its notice of intent to dismiss, the district court first identified Mr. McNeil "failed to describe how he 'learned' a juror observed him in the back of the patrol vehicle." (R., p.325.) The district stated, "McNeil does not claim that while in the vehicle, he saw a juror in his case.

McNeil does not include an affidavit from whoever purports to [have] personal knowledge the juror observed him in the back of the patrol vehicle." (R., p.325.) The district court concluded Mr. McNeil "failed to support his claim with admissible evidence." (R., p.325.) The district court then reasoned:

> Even if McNeil had offered admissible evidence that a juror had seen him in a police vehicle, he would have still had to offer evidence that incident actually prejudiced his case. In order to show that a mistrial should have been granted, McNeil must show that the juror saw him in his prison garb and that sighting actually prejudiced his case. "A juror's inadvertent sighting of a defendant in jail attire or restraints outside of the courtroom is not so inherently prejudicial that it negates a petitioner's obligation to make a prima facie showing of actual prejudice." *Bias v. State*, 159 Idaho 696, 705 (Ct. App. 2015), *review denied* (Mar. 3, 2016) (citing *State v. Hyde*, 127 Idaho 140, 148 (Ct. App. 1995) (holding that defendant was not prejudiced when jurors witnessed him in full restraints in hallway); *see also State v. Hardy*, 283 P.3d 12, 23 (Ariz. 2012) (holding that because a juror's inadvertent exposure to the defendant in restraints or jail garb outside the courtroom is not inherently prejudicial, the defendant must show actual prejudice)). McNeil has failed to allege facts to show he was actually prejudiced by the juror seeing him in the police vehicle or any facts to support a presumption of prejudice. Without that evidence there is no basis for a conclusion that his attorney was deficient for not making a record of the matter and moving the Court for a mistrial. McNeil's claim failed to make a prima facie showing under *Strickland*.

(R., pp.325–26.) In short, the district court held Mr. McNeil did not support his claim with admissible evidence and, even if he did, he failed to show deficient performance or prejudice.

In Mr. McNeil's response to the district court's notice, he provided an affidavit on the juror's observation of him and his communication with trial counsel. He averred that he saw jurors on "two different occasions" while being transported.[5] (R., p.347.) He explained:

> The first time I was in the presence of a female juror on the sidewalk. She was three feet from me. I was in the back of a police vehicle. We made eye contact, and she turned to the woman (non-juror) that was walking with her and mouthed, "That's him". I brought this to the attention of Trial Counsel. They said they addressed it with the Judge. The court's response was, "This seems like a

[5] The second occasion is addressed below in Part 3.

> vigilante group, I think they would've brought something like that to me." No record was made.

(R., p.347.)

After receiving this evidence, the district court again rejected this ineffective assistance of counsel claim. The district court determined Mr. McNeil failed to make any allegation of prejudice:

> A juror's inadvertent sighting of a defendant in jail attire or restraints outside of the courtroom is not so inherently prejudicial that it negates the obligation to make a prima facie showing of actual prejudice, so as to warrant hearing on a petition for post-conviction relief premised on ineffective assistance of counsel for failure to move for mistrial. [*Bias*, 159 Idaho 696].

(R., p.381.) As such, the district court summarily dismissed this claim. (R., p.383.)

Now on appeal, Mr. McNeil argues the district court erred by dismissing this claim and should have held an evidentiary hearing to resolve the genuine issues of material fact. Mr. McNeil argues his attorney's failure to conduct an inquiry with this juror was deficient performance and that deficient performance prejudiced him.

First, Mr. McNeil provided admissible evidence that a juror saw him in the back of a police car. Mr. McNeil's allegation that a juror saw him "is a fact within his personal knowledge, to which he attested through sworn documents, and thus constitutes admissible evidence." *Bias*, 159 Idaho at 705 (citing *Baldwin v. State*, 145 Idaho 148, 155 (2008)). "This fact, if true, constitutes a prima facie showing sufficient to justify an evidentiary hearing" to determine whether the juror who saw him was prejudiced by her observation. *Id.*

Second, Mr. McNeil argues a juror's viewing of a defendant in the back of a police car during trial violates his due process right to a fair trial. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal

justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)). To protect the presumption of innocence, a defendant cannot be compelled to attend trial in prison or jail clothing, including visible handcuffs or shackles. *State v. Slater*, 136 Idaho 293, 301 (Ct. App. 2001). "Many jurisdictions have likewise held or implied that informing the jury that a defendant is in jail is improper because it may raise an inference of guilt." *State v. Harrison*, 136 Idaho 504, 506 (Ct. App. 2001) (citing cases). Mr. McNeil submits a juror's view of the defendant in the back of a police car is akin to viewing the defendant in jail attire, observing handcuffs, or learning the defendant was in jail. The defendant's presence in the back of a police car similarly informs the jury the defendant is in custody. It is a "reminder of the accused's condition" and creates an "unacceptable risk" of "impermissible factors coming into play" in the jury's decision. *Williams*, 425 U.S. at 504–05. Based on this case law, Mr. McNeil argues a juror's observation of a defendant in the back of a police car is subject to the same legal standards as an observation of jail attire and restraints or other knowledge of custody.

Because Mr. McNeil provided sufficient evidence of the juror's observation, and this observation can violate a defendant's right to a fair trial, the next question is whether Mr. McNeil established genuine issues of material fact on whether his trial counsel was deficient upon learning of the juror's observation and whether the deficient performance prejudiced him. Mr. McNeil has satisfied both prongs of the *Strickland* standard.

To show deficient performance, a petitioner must show his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687. The Sixth Amendment right to effective counsel is dependent on "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* at 688 (citations omitted). The "proper

measure of attorney performance remains simply reasonableness under prevailing professional norms" including, but not limited to, American Bar Association standards. *Id.* at 688–89. A criminal defendant has a right to an impartial jury. *See Ross v. Oklahoma*, 487 U.S. 81, 85–86 (1988). A defendant may move for a mistrial at any time during the trial "when there occurs during the trial, either inside or outside the courtroom, an error or legal defect in the proceedings, or conduct that is prejudicial to the defendant and deprives the defendant of a fair trial." Idaho Criminal Rule 29.1(a). Here, in light of the evidence presented by Mr. McNeil, he has made a prima facie showing of deficient performance. Mr. McNeil informed his trial counsel of a potentially biased juror, and his trial counsel failed to engage in the proper action, such as requesting the district court voir dire the juror and moving for a mistrial, if necessary. Trial counsel's notification of the district court, apparently in chambers, without requesting any inquiry with that juror was objectively unreasonable. (*See* R., p.347 ("Trial Counsel . . . said they addressed it with the Judge. The court's response was, 'This seems like a vigilante group, I think they would've brought something like that to me.' No record was made.").) By failing to inquire upon this juror's bias, and move for a mistrial if necessary, Mr. McNeil has made a prima facie showing trial counsel engaged in deficient performance.

Finally, Mr. McNeil must show prejudice. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. The "reasonable probability" standard is a less than a preponderance of the evidence:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are

> somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Id. at 694. Mr. McNeil has made this showing. There is a reasonable probability, but for trial counsel's deficient performance in failing to inquire with a potentially biased juror, that the result of the trial would have been different. As explored above, a defendant has a right to a fair trial, and the juror's observation of Mr. McNeil in the back of a police car creates a risk of a verdict based on bias and prejudice. Therefore, Mr. McNeil has shown a genuine issue of material fact as to prejudice from his trial counsel's deficient performance.

In examining prejudice, Mr. McNeil submits the district court erred by requiring him to prove actual prejudice to a degree higher than a "reasonable probability." The district court referenced *Bias*, and stated Mr. McNeil failed to show prejudice because he did not show the juror was actually prejudiced against him. (R., p.381.) In *Bias*, the petitioner claimed his trial counsel was ineffective for failing to move for a mistrial after prospective jurors saw him being led into the courthouse in jail attire. 159 Idaho at 704–05. The Court of Appeals stated, "To prevail on a motion for a mistrial, Bias would have had to show that the jurors that allegedly saw him were empaneled on his jury and that he was actually prejudiced as a result." *Id.* at 705 (citing *State v. Slater*, 136 Idaho 293, 301–02 (Ct. App. 2001)). The Court of Appeals held Bias did not meet this burden:

> . . . . Bias does not allege that he was prejudiced by this situation nor does he present additional facts that would support such a presumption. A juror's inadvertent sighting of a defendant in jail attire or restraints outside of the courtroom is not so inherently prejudicial that it negates a petitioner's obligation to make a prima facie showing of *actual* prejudice. *State v. Hyde*, 127 Idaho 140, 148 (Ct. App. 1995) (holding that defendant was not prejudiced when jurors witnessed him in full restraints in hallway); *see also State v. Hardy*, 283 P.3d 12, 23 (Ariz. 2012) (holding that because a juror's inadvertent exposure to the

> defendant in restraints or jail garb outside the courtroom is not inherently prejudicial, the defendant must show actual prejudice).
>
> Therefore, Bias has not made a prima facie showing as to the prejudice requirement for the district court to grant a mistrial. The court did not err in determining Bias did not present a genuine issue of material fact on this claim.

Bias, 159 Idaho at 705. Here, however, Mr. McNeil did not argue his trial counsel was ineffective for failing to move for a mistrial only. Mr. McNeil alleged his trial counsel was ineffective for failing to inquire with the juror at all—a predicate to determine if the juror was actually biased and thus moving for a mistrial. Therefore, it was error to require Mr. McNeil to prove the juror was actually biased and that he would have succeeded on a motion for a mistrial. At the summary dismissal stage, Mr. McNeil only had to show a reasonable probability that, but for the error (the failure to inquire with the juror), the result would have been different. Mr. McNeil has met that burden. Further, Mr. McNeil submits he properly alleged that he was prejudiced by the situation, in contrast to *Bias*. He stated in his petition that "right to a fair trial was compromised" because "the jury/juror could assume he was guilty because he was in custody and support a conviction." (R., p.186.) Therefore, unlike *Bias*, Mr. McNeil has made a prima facie showing of prejudice sufficient to overcome summary dismissal.

In summary, the district court erred by dismissing this claim of ineffective assistance of counsel without an evidentiary hearing. Construing all facts and inferences in Mr. McNeil's favor, Mr. McNeil has established genuine issues of material fact due to counsel's ineffective assistance in failing to voir dire a potentially biased juror.

3. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Inform The District Court And Move For A Mistrial Based On A Juror Communicating With The Victim's Uncle During Trial

Mr. McNeil's fifteenth claim of ineffective assistance of counsel was that his trial counsel failed to inform the district court and move for a mistrial after a juror was seen speaking with the

victim's uncle during the trial. Similar to Mr. McNeil's fifteenth claim, Mr. McNeil submits the district court erred by dismissing this claim because there are genuine issues of material fact as to his trial counsel's deficient performance and prejudice.

In his second amended petition, Mr. McNeil alleged his trial counsel was ineffective for failing to "alert the judge, make a proper record, and ask the court to conduct an inquiry after Petitioner witnessed a juror speaking with a member of the victim's family." (R., p.186.) Mr. McNeil further explained that he reported this communication to trial counsel, but trial counsel told him that it "may result in a mistrial, and he did not want to retry the case." (R., p.186.) Mr. McNeil alleged he was prejudiced because his "right to a fair trial was compromised." (R., p.187.)

In the district court's notice of intent to dismiss, the district court determined Mr. McNeil failed to set forth this claim with specificity. (R., p.326.) The district court stated: "Conclusory statements are insufficient to support post-conviction relief. McNeil was in custody during the trial. There are no specifics provided. There are no opportunities for juror to speak with any courtroom observers during trial." (R., p.326.) The district court concluded, "The claim is not properly supported." (R., p.326.)

In response, Mr. McNeil provided admissible evidence to support his claim. He stated,

> The second time,[6] I saw a male juror in front of the courthouse. He was speaking to a man whom we had earlier identified as the decedent's uncle. I brought it to the attention of Trial Counsel. Trial Counsel's response was, "I can't take that to Judge Bail it will cause a mistrial and I don't want to retry this case." The second chair seemed surprised by my attorney's lack of concern. I would describe her as wide-eyed but she said nothing.

(R., p.347.)

[6] The first time Mr. McNeil saw a juror was discussed in Part 2.

After receiving this evidence, the district court rejected this ineffective assistance of counsel claim on a different basis. The district court determined Mr. McNeil alleged nothing more "than a garden variety encounter between the juror and the decedent's uncle." (R., p.383.) The district court ruled this was a "chance encounter," and Mr. McNeil failed to "come forward with evidence of a contact sufficiently improper as to raise a credible risk of affecting the outcome of the case." (R., p.383.) The district court reasoned that his "speculative allegation" was "insufficient to sustain a claim that his jury was impartial or that his counsel was ineffective for failing to request a mistrial." (R., p.383.)

Now on appeal, Mr. McNeil again argues the district court erred by dismissing this claim and should have held an evidentiary hearing to resolve the genuine issues of material fact. Mr. McNeil argues his attorney's failure to move for a mistrial was deficient performance and that deficient performance prejudiced him.

First, Mr. McNeil provided admissible evidence that a juror communicated with a member of the victim's family. Mr. McNeil's allegation that he saw this improper contact "is a fact within his personal knowledge, to which he attested through sworn documents, and thus constitutes admissible evidence." *Bias*, 159 Idaho at 705 (citing *Baldwin v. State*, 145 Idaho 148, 155 (2008)). "This fact, if true, constitutes a prima facie showing sufficient to justify an evidentiary hearing" to explore the improper contact. *Id.*

Next, Mr. McNeil submits the district court erred by dismissing his claim on a new basis than provided in its notice of intent to dismiss. The district court's only basis for dismissal of this claim was Mr. McNeil's failure to provide evidence to support it. (R., p.326.) The district court determined this claim was purely speculative, unspecific, and unsupported by evidence. (R., p.326.) In response, Mr. McNeil presented admissible evidence to support his claim.

(R., p.347.) The district court then dismissed his claim for a different reason: failure to show prejudice. (R., pp.381–83.) Mr. McNeil was entitled to notice of this basis for dismissal and the opportunity to respond. I.C. § 19-4906(b). "Failure to provide such notice and opportunity to be heard may result in reversal of a summary dismissal of a petition for post-conviction relief." *Ridgley v. State*, 148 Idaho 671, 676 (2010) (citing *Saykhamchone v. State*, 127 Idaho 319, 321 (1995)). Here, the district court's failure to give notice requires reversal.[7] Mr. McNeil is entitled to respond to the district court's prejudice basis for dismissal. For this reason alone, this Court should remand this claim.

Looking at the merits of Mr. McNeil's claim, the district court erred because the district court used the wrong standard to evaluate prejudice and, with the correct standard, Mr. McNeil made a sufficient showing. Therefore, this Court should still remand this case for an evidentiary hearing.

As early as 1892, the United States Supreme Court held, "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892). Later, in *Remmer v. United States*, 347 U.S. 227 (1954), the United States Supreme Court reiterated:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish,

[7] The State also did not give notice of dismissal based on prejudice. In the State's brief in support of its motion to dismiss, the State asserted (for both biased juror claims): "These allegations allege ineffective assistance for juror issues. These issues are groundless. It is apparent the jury did not abandon its role as fact finder in this case. They returned a verdict on a lesser included offense." (R., p.251.) This is not an argument of failure to show prejudice.

> after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229 (emphasis added) (citations omitted). In *Remmer*, the defendant learned after trial that a third party tried to bribe a juror and that the FBI had investigated the incident. *Id.* at 228. Upon learning this information, the defendant moved for a new trial. *Id.* at 228–29. The United States Supreme Court acknowledged, "We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Id.* at 229. Even though the record did not show what transpired, the United States Supreme Court nonetheless held, "The integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Id.* Therefore, the United States Supreme Court remanded the case "to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial." *Id.* at 230.

The next year, in *Turner v. Louisiana*, 379 U.S. 466 (1965), the United States Supreme reversed and remanded a case due to improper juror contact. *Id.* at 474. In that case, two of the State's witnesses, who were also deputy sheriffs, were in charge of the jury and had transported them, ate meals with them, conversed with them, and ran errands for them. *Id.* at 468. Although the deputies denied communicating with the jury about the case, the United States Supreme Court still reversed because the "continuous and intimate association" could have influenced the jury's decision, including credibility determinations. *Id.* at 473. The *Turner* Court stated, "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.* at 472 (internal quotation marks omitted). "What happened in this case operated to subvert these basic guarantees of trial by jury." *Id.* at 473. The United States Supreme Court reasoned, "[E]ven if it could be assumed that the deputies never did discuss the case directly with any members of

the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.* Then, in *Smith v. Phillips*, 455 U.S. 209, 217 (1982), the United States Supreme Court held "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," but that determination on whether a juror is impartial must be made at a hearing like the one ordered in *Remmer*. *Phillips*, 455 U.S. at 217.

In accordance with the due process protections identified in *Mattox*, *Remmer*, *Turner*, and *Phillips*, Mr. McNeil is guaranteed an impartial jury and a verdict based solely upon the evidence presented at trial. A juror's communication with the victim's uncle during the trial deprives him of his right to a fair trial. The United States Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215. Mr. McNeil was deprived of this remedy because of his counsel's deficient performance. His counsel's failure to act upon learning of the juror's improper contact was objectively unreasonable. This improper contact was "presumptively prejudicial," *Remmer*, 347 U.S. at 229, and required trial counsel to notify the district court, inquire with the juror, and move for a mistrial. But for counsel's deficient performance in not moving for a mistrial due to this juror's improper contact, there is a reasonable probability the result of the trial would have been different. Construing all facts and inferences in his favor, Mr. McNeil has met his burden to make a prima facie showing of deficient performance and prejudice due to his trial counsel's refusal to notify the district court and move for a mistrial after improper juror contact.

The district court here referenced the presumption of prejudice in *Remmer*, but still rejected Mr. McNeil's claim on prejudice grounds. The district court determined that Mr. McNeil

presented nothing more than a chance encounter, which did not trigger the presumption of prejudice. (R., pp.382–83.) The district court cited to a Ninth Circuit case to support its reasoning, but that decision does not support the district court's position. Rather, it demonstrates that an evidentiary hearing was necessary to resolve this claim.

In *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc), a habeas corpus petitioner alleged that he was entitled to an evidentiary hearing regarding his claim that a juror during the trial communicated with a "judge friend" about the case and passed those responses to the jury. *Id.* at 958–59. The Ninth Circuit stated, "The Court emphasized long ago that due process does not tolerate 'any ground of suspicion that the administration of justice has been interfered with' by external influence." *Id.* at 959 (quoting *Mattox*, 146 U.S. at 149). The Ninth Circuit explained that the trial court must engaged in a "settled two-step framework" for allegations of improper juror contact. *Id.*

> At step one, the court asks whether the contact was "possibly prejudicial," meaning it had a "tendency" to be "injurious to the defendant." [*Mattox*, 146 U.S.] at 150. If so, the contact is "deemed presumptively prejudicial" and the court proceeds to step two, where the "burden rests heavily upon the [state] to establish" the contact was, in fact, "harmless." [*Remmer*, 347 U.S. at 229]. If the state does not show harmlessness, the court must grant the defendant a new trial. *See Remmer v. United States*, 350 U.S. 377, 382 (1956) (*Remmer II*). When the presumption arises but the prejudicial effect of the contact is unclear from the existing record, the trial court must hold a "hearing" to "determine the circumstances [of the contact], the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer*, 347 U.S. at 229–30.

Godoy, 861 F.3d at 959 (third alteration in original). With this framework in mind, the Ninth Circuit first examined three ways in which the lower court had "failed to adhere to this framework." *Id.* at 959, 962–66. Because the lower court's decision in denying relief was contrary to this framework in *Mattox* and *Remmer*, the Ninth Circuit then examined the claim de novo. *Id.* at 966.

In its de novo review, the Ninth Circuit again discussed the framework to evaluate these claims, and herein lies the district court's improper reliance on this case to dismiss Mr. McNeil's petition. The Ninth Circuit first stated that, to meet the "low threshold" of an improper external contact, the defendant "must present 'evidence of an external contact that has a tendency to be injurious to the defendant.'" *Id.* at 967 (internal quotation marks omitted) (quoting *Tarango v. McDaniel*, 837 F.3d 936, 947, 949 (9th Cir. 2016)). Put another way, "[t]he contact must 'raise a credible risk of influencing the verdict' before it triggers the presumption of prejudice." *Id.* (quoting *Tarango*, 837 F.3d at 947). Then, the Ninth Circuit stated, and quoted by the district court here:

> We recognize the practical impossibility of shielding jurors from all contact with the outside world, and also that not all such contacts risk influencing the verdict. *See Tarango*, 837 F.3d at 947 (citing [*Phillips*, 455 U.S. at 217]). Thus, the defendant's burden at step one cannot be met by "[t]hreadbare or speculative allegations" of misconduct. *Id.* Nor do "allegations involving prosaic kinds of jury misconduct," *id.* (internal quotation marks omitted), such as "chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator," *id.* at 951, trigger the presumption. The defendant must present evidence of a contact sufficiently improper as to raise a credible risk of affecting the outcome of the case.

Id. However, the Ninth Circuit went on to explain:

> Among the considerations relevant to this determination are the identity of the outside party and the nature of the contact. . . .
>
> We bear in mind that even such highly troubling contacts [such as contact with government officials] do not *necessarily* raise a presumption of prejudice. At step one, the court considers the full context of the contact to determine whether a credible risk of prejudice exists. Contact with a government officer, for example, will trigger the presumption only if the defendant shows the contact was somehow improper. Similarly, even contact about the case may be insufficient to trigger the presumption if the surrounding circumstances show the contact was innocuous.
>
> Importantly, however, the defendant's burden at step one to show a possibility of prejudice is not onerous. The defendant need only demonstrate a *credible* risk, and the presumption may arise even when "[w]e do not know from th[e] record . . . what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Remmer*, 347 U.S. at 229.

Id. at 967–68. "Once a defendant shows a possibly prejudicial contact, the presumption of prejudice attaches, and the burden shifts to the state to prove the contact was harmless." *Id.* at 968. Ultimately, the Ninth Circuit held the petitioner met this low burden, the State did not make a showing of harmlessness, and therefore the case must be remanded for an evidentiary hearing to determine the "factual basis" for the misconduct and "its prejudicial effect, if any" on the petitioner's verdict. *Id.* at 969–70.

Examining this decision as a whole, *Godoy* does not support the district court's decision to summarily dismiss Mr. McNeil's claim for failure to show prejudice. Mr. McNeil did allege more than a chance encounter in the hallway or at the "only eating establishment in town." *See State v. Rodriguez*, 93 Idaho 286, 290 (1969) (holding the defendant made a prima facie showing for a new trial based on jury separation, but the State met its burden to show harmless error when a State's witness joined the jurors for lunch, the conversation was not related to the trial, and the contact was "practically unavoidable" in that area)). Mr. McNeil alleged that, while being transported during the trial, he saw a male juror speaking with the uncle of the victim outside the courthouse. (R., p.347.) This is evidence of "a contact sufficiently improper as to raise a credible risk of affecting the outcome of the case." *Godoy*, 861 F.3d at 959. The burden is not "onerous," and, even without knowing what was said during the improper contact, the presumption still arises because the nature of the contact: a juror and a member of the victim's family during the trial for the victim's murder. *Id.* at 967–68; *see also Remmer*, 347 U.S. at 229. Moreover, Mr. McNeil's counsel apparently recognized the harmful nature of this contact. Trial counsel believed the district court would have declared a mistrial, but he declined to engage in any reasonable action because he did not "want" to retry the case. (R., p.347.) Therefore, Mr. McNeil

has met his burden of showing prejudice due to his counsel's deficient performance in failing to act upon his knowledge of improper jury contact.

In summary, the district court erred by dismissing this claim without an evidentiary hearing for two reasons: (1) the district court failed to provide Mr. McNeil with notice of the basis for dismissal and (2), examining the merits, Mr. McNeil has established genuine issues of material fact. Mr. McNeil submits that he made a prima facie showing sufficient to overcome summary dismissal.

CONCLUSION

Mr. McNeil respectfully requests this Court vacate the district court's judgment and order dismissing his second amended petition for post-conviction relief and remand this case for an evidentiary hearing.

DATED this 7th day of November, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JCS/eas