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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

LLOYD HARDIN McNEIL,	)	
	)	**No. 45766**
Petitioner-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CV-PC-2014-15680**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Lloyd Hardin McNeil appeals from the district court's order summarily dismissing his second amended petition for post-conviction relief. McNeil argues the district court erred by dismissing three of McNeil's claims that his trial counsel provided ineffective assistance of counsel.

Statement Of The Facts And Course Of The Proceedings

On March 1, 2012, a jury convicted Lloyd Hardin McNeil of voluntary manslaughter, arson, and grand theft after the state presented evidence that McNeil killed his girlfriend, stole her diamond ring, and tried to burn her body to cover up his crime. (No. 39881 R., pp.257-59.[1]) The victim's mother testified that she had given a diamond ring to the victim as a family heirloom prior to the victim's death and that the victim was very fond of the ring. (Vol. I Tr., p.224, L.2 – p.225, L.21, p.226, Ls.5-7.[2]) An appraiser told the jury the ring was worth $4450. (Vol. I Tr., p.1032, Ls.5-20.) The state presented evidence that McNeil had a woman with whom he had an "intimate relationship" pawn the victim's diamond ring the same day the victim was killed. (Vol. II Tr., p.61, Ls.9-13; see

[1] Consistent with McNeil's opening brief, citations to documents in the record of McNeil's underlying criminal case will refer to the page number of the document in the clerk's record and designate the docket number 39881. (Appellant's brief, p.1 n.1.) Both the district court and this Court took judicial notice of the documents in the underlying criminal case on which the state relies. (See R., p.46; 11/7/2018 Order Granting Motion for Judicial Notice.)

[2] The transcript of the jury trial is split into two volumes. The state cites the transcript that contains all of the trial except for the proceedings on February 23, 2012, and February 24, 2012, as Volume I and the separate transcript of those two days as Volume II. Both the district court and this Court took judicial notice of all trial transcripts. (See R., p.46; 11/7/2018 Order Granting Motion for Judicial Notice.)

Vol II Tr., p.50, Ls.10-16, p.219, L.4 – p.220, L.5.) The woman testified that she lied about the origin of the ring to the pawn shop and the pawn shop paid $500 for the ring. (Vol. II Tr., p.50, L.24 – p.51, L.6.)

The state also presented evidence showing that McNeil gave inconsistent explanations as to how he came into possession of the ring. McNeil told the woman who pawned the ring for him that the ring originally belonged to him, he gave the ring to the victim when they were engaged, and the victim gave it back after they broke up. (Vol. II Tr., p.48, L.19 – p.49, L.17.) But McNeil told another woman that the victim gave him the ring to pay off debts the victim allegedly owed McNeil. (Vol. I Tr., p.705, Ls.13-19, p.708, L.12 – p.709, L.7.) The jury did not believe either of McNeil's stories and convicted him of grand theft.[3] (No. 39881 R., p.259.)

The district court sentenced McNeil to an aggregate sentence of fifty-four years, with twenty-five years fixed. (No. 39881 R., pp.261-63.) McNeil appealed arguing, among other things, that the state presented insufficient evidence for the voluntary manslaughter conviction. See State v. McNeil, 155 Idaho 392, 395-96, 313 P.3d 48, 51-52 (Ct. App. 2013). The Idaho Court of Appeals found sufficient evidence to support the voluntary manslaughter conviction and also rejected McNeil's other assignments of error. See id. at 403, 313 P.3d at 59.

On August 19, 2014, McNeil filed a pro se petition for post-conviction relief alleging a myriad of claims. (R., pp.7-33.) The district court appointed counsel to represent McNeil in his post-conviction proceedings. (R., p.44.) On March 9, 2015, with the

[3] The convictions for voluntary manslaughter and arson were supported by additional evidence not relevant to this appeal.

assistance of counsel, McNeil filed an amended petition for post-conviction relief. (R., pp.77-109.) On October 23, 2015, again with the assistance of counsel, McNeil filed a second amended petition for post-conviction relief. (R., pp.169-241.) McNeil asserted nineteen claims, only three of which McNeil presses on appeal: Claim nine alleged that trial counsel provided ineffective assistance by failing to discover a video that "may have shown the decedent attempting to pawn her ring." (R., p.182.) Claim fourteen alleged that trial counsel provided ineffective assistance by failing to take proper action after learning that a juror had seen McNeil "in the back seat of a County Sheriff's vehicle." (R., p.186.) Claim fifteen alleged that trial counsel provided ineffective assistance by failing to take proper action after learning that McNeil "witnessed a juror speaking with a member of the victim's family." (R., p.186.)

On December 21, 2015, the state moved for summary disposition on McNeil's petition. (R., pp.245-46.) The state argued that, as to all of McNeil's ineffective assistance claims, McNeil "fail[ed] to raise a genuine issue of material fact regarding both deficient performance and prejudice." (R., p.245.) Specifically as to claims fourteen and fifteen, the state argued that "[t]hese issues are groundless" because "[i]t is apparent the jury did not abandon its role as fact finder in this case" given that "[t]hey returned a verdict on a lesser included offense." (R., p.251.)

On September 5, 2017, the district court issued a notice of intent to dismiss McNeil's petition. (R., pp.303-27.) The district court acknowledged that notice was typically unnecessary where, as here, the state had moved to summarily dismiss the petition, but observed that the state did not move to dismiss all of McNeil's claims. (R., p.304.) The district court informed McNeil that it would dismiss claim nine because

McNeil had only presented inadmissible hearsay to support the claim and had not shown a reasonable investigation would have made a difference in the outcome of the trial. (R., pp.321-22.) The district court informed McNeil that it would dismiss claim fourteen because McNeil failed to support his claim with admissible evidence or show that the alleged deficient performance prejudiced McNeil. (R., pp.325-26.) The district court informed McNeil that it would dismiss claim fifteen because McNeil failed to adequately specify the grounds for relief and did not properly support his claim. (R., p.326.)

On September 25, 2017, McNeil filed a response to the district court's notice of intent to dismiss and attached supplemental affidavits. (R., pp.328-68.) As relevant to claim nine, McNeil's own affidavit stated that, in his first meeting with trial counsel on March 30, 2011, McNeil asked trial counsel's private investigator to see if Vista Pawn had video from February 18, 2011, because he had gone with the victim to Vista Pawn on February 18 and "took possession of her ring at the counter inside Vista Pawn." (R., p.343.) McNeil also presented an affidavit from an employee of Vista Pawn that stated "the video from February 18.2011 [sic] still would have been available as of March 30.2011[sic]." (R., p.355.)

As relevant to claim fourteen, McNeil's own affidavit stated:

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

(R., p.347.)

As relevant to claim fifteen, McNeil's own affidavit stated:

> . . . 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.

(Id.)

On January 19, 2018, the district court dismissed McNeil's petition for post-conviction relief because "he still has failed to present key evidence that is necessary to make a prima facie claim for post-conviction relief." (R., p.379; see R., p.384.) McNeil timely appealed. (R., pp.385-87.)

ISSUE

McNeil states the issue on appeal as:

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

(Appellant's brief, p.6.)

The state rephrases the issue as:

Has McNeil failed to show that the district court erred when it dismissed his second amended petition for post-conviction relief?

ARGUMENT

The District Court Properly Dismissed McNeil's Second Amended Petition For Post-Conviction Relief

A. Introduction

The district court properly dismissed McNeil's second amended petition for post-conviction relief. On appeal, McNeil challenges the dismissal of only three claims. (Appellant's brief, p.7.) He has failed to show the district court erred.

The district court properly dismissed McNeil's claim that his trial counsel provided ineffective assistance by failing to investigate Vista Pawn. McNeil failed to present admissible evidence to make a prima facie showing of prejudice for at least two reasons: First, McNeil failed to present admissible evidence showing, as McNeil alleged, that a reasonable investigation into Vista Pawn would have produced a video. Second, McNeil failed to present admissible evidence showing that the content of the alleged video would have changed the outcome of the trial. Instead, McNeil's position all along, including on appeal, has been only that the video "*might*" have shown the victim trying to pawn her ring or giving her ring to McNeil. (R., p.335; see R., p.182 ("*may have*"); Appellant's brief, p.14 ("*possibly*") (all emphases added).) That is insufficient to show prejudice.

The district court properly dismissed McNeil's claim that his trial counsel provided ineffective assistance by failing to take action when McNeil told him that a juror had seen McNeil in the back of a police car. "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, 365 P.3d 1050, 1059 (Ct. App. 2015) (emphasis in original). McNeil has failed to present admissible evidence showing, or even to allege, *actual* prejudice

beyond the mere allegation that a juror saw him in the back of a police car. Without more, McNeil cannot show his trial counsel should have brought the issue to the district court's attention or that doing so would have changed the outcome of the trial.

The district court properly dismissed McNeil's claim that his trial counsel provided ineffective assistance by failing to take action when McNeil told his trial counsel that McNeil saw a juror speaking with a member of the victim's family. McNeil relies entirely on a presumption of prejudice created by the U.S. Supreme Court in the jury tampering context. (See Appellant's brief, pp.25-31.) But the Court has made clear that only a "private communication . . . about the matter pending before the jury" triggers the presumption. Remmer v. United States, 347 U.S. 227, 229 (1954). McNeil has made no allegation, much less presented admissible evidence to show, that the alleged conversation between the decedent's relative and the juror was "about the matter pending before the jury." Id. Thus, he cannot claim the benefit of the presumption.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of 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 v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

C. The District Court Properly Dismissed Claims Nine, Fourteen, And Fifteen Because McNeil Failed To Present Admissible Evidence To Make A Prima Facie Showing On Each Claim

The district court properly dismissed McNeil's petition for post-conviction relief. An "applicant for post-conviction relief must prove by a preponderance of evidence the

allegations upon which the application for post-conviction relief is based." Charboneau, 144 Idaho at 903, 174 P.3d at 873. The application must "*specifically* set forth the grounds upon which the application is based." I.C. § 19-4903 (emphasis added). "The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included." Charboneau, 144 Idaho at 903, 174 P.3d at 873.

"Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact." Id.; see I.C. § 19-4906(b), (c). "A 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, 174 P.3d at 873. The district court may dismiss an application for post-conviction relief without holding an evidentiary hearing where the allegations "are clearly disproved by the record of the original proceeding" or "do not justify relief as a matter of law." Id.

The two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), governs post-conviction claims for ineffective assistance of counsel. Dunlap v. State, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015). "To prevail on such a claim, the applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). "'[I]n order to survive a motion for summary dismissal, post-conviction relief claims based upon ineffective assistance of counsel must establish the existence of material issues of fact as to' both *Strickland* prongs." Dunlap, 159 Idaho at 296, 360 P.3d at 305 (quoting State v. Dunlap, 155 Idaho 345, 383, 313 P.3d 1, 39 (2013)).

"When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." Payne, 146 Idaho at 561, 199 P.3d at 136. "'There is a strong presumption that counsel's performance fell within the wide range of professional assistance.'" Id. (quoting State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999)).

1. The District Court Properly Dismissed Claim Nine Because McNeil Failed To Present Admissible Evidence Showing A Reasonable Investigation Into Vista Pawn Would Have Changed The Outcome Of The Trial

The district court properly dismissed McNeil's claim that his trial counsel provided ineffective assistance by failing to investigate whether the victim tried to pawn her ring on February 18, 2011. To prevail on a claim that trial counsel conducted an inadequate investigation, a petitioner "must establish that the inadequacies complained of would have made a difference in the outcome." Thomas v. State, 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008). "It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case." Id. McNeil alleged in his amended petition that, if trial counsel had conducted a reasonable investigation, he would have found a video from Vista Pawn that "may have shown the decedent attempting to pawn her ring." (R., pp.182-83.) But he failed to present admissible evidence showing a reasonable investigation would have changed the outcome of the trial in at least two critical respects.

First, McNeil failed to present admissible evidence showing a reasonable investigation would have produced the alleged video. The district court stated in its notice of intent to dismiss that it planned on dismissing McNeil's claim because he had not

presented admissible evidence showing the video still would have existed at the time of a reasonable investigation. (See R., pp.321-22.) In response, McNeil presented an affidavit from Randy Evans of Vista Pawn in which Evans stated "that the video from February 18.2011 [sic] still would have been available as of March 30.2011 [sic]." (R., p.355.) McNeil also attached his own affidavit in which he stated that he had his "first meeting with Trial Counsel and a private investigator" on March 30, 2011. (R., p.343.) McNeil states that he told his trial counsel that he went with the victim "to Vista Pawn on February 18, 2011, to pawn her ring" and "asked Trial Counsel's private investigator to determine if video could be obtained from Vista Pawn." (R., p.343.)

McNeil's supplemental affidavits did not remedy the district court's problem with McNeil's claim. McNeil presented admissible evidence showing that the video would have been available up to March 30, 2011—the same day he had his first meeting with trial counsel and requested that trial counsel determine whether Vista Pawn had a video—but he did not present admissible evidence that the video would have been available at any time after that date. Although McNeil's counsel had a duty "to make reasonable investigations," Strickland, 466 U.S. at 691, that does not mean, and McNeil has cited no authority to suggest, trial counsel had an obligation to investigate Vista Pawn the very same day McNeil made his request. See Eddington v. State, 162 Idaho 812, 823, 405 P.3d 597, 608 (Ct. App. 2017) ("The duty to investigate requires only that counsel conduct a reasonable investigation."). In fact, given that the meeting on March 30 was McNeil's "first meeting with Trial Counsel" in a case where McNeil "would be charged with murder, arson and grand theft" (R., p.343), investigating McNeil's defense to the grand theft charge would not have even been the most pressing concern. Because trial counsel still could have

performed a reasonable investigation into Vista Pawn after March 30, 2011, and McNeil presented no admissible evidence showing that the video would have been available after March 30, 2011, McNeil has failed to show a reasonable investigation would have produced the video. He has thus failed to make a prima facie showing that a reasonable investigation would have changed the outcome of the trial. Accord Kelly v. Cassaday, No. 4:13 CV 1231 JMB, 2016 WL 8674163, at *10 (E.D. Mo. May 27, 2016) ("Although Kelly allegedly advised his attorney of the video's existence prior to its destruction, he failed to 'plead that counsel could have obtained the video prior to its destruction with reasonable investigation.'").

Second, even if McNeil's trial counsel could have recovered the video, McNeil failed to allege, much less present admissible evidence to show, that the content of the video would have made a difference in the outcome of the trial. With respect to the content of the video, McNeil alleged in his petition only that the video "*may have* shown the decedent attempting to pawn her ring." (R., pp.182-83 (emphasis added).) That is insufficient on its face. See Thomas, 145 Idaho at 769, 185 P.3d at 925 ("It is not sufficient merely to allege that counsel *may have* discovered a weakness in the state's case." (emphasis added)).

The evidence McNeil presented to support his claim fares no better. McNeil claims in his affidavit that he and the victim went to the pawn shop on February 18, 2011, that the victim decided not to pawn the ring for the amount offered, and that McNeil "took possession" of the ring in exchange for his forgiveness of $1000 of the victim's debt. (R., p.343.) According to McNeil, this all happened "at the counter inside Vista Pawn." (Id.)

But McNeil presented no admissible evidence showing that Vista Pawn's video surveillance system would have captured the counter where all of this allegedly occurred.

McNeil attached to his amended petition an affidavit from an investigator who recounted a conversation with a Vista Pawn employee who told the investigator that the video "included the interior of their store." (R., p.230.) The district court rejected that evidence, however, as inadmissible "hearsay." (R., p.321.) McNeil did not challenge that finding in the district court or on appeal. And the affidavit from the Vista Pawn employee that McNeil used to remedy his hearsay problem is silent on the coverage of the video system. (See R., p.355.) In short, McNeil offered the district court his version of what happened at a counter in Vista Pawn on February 18, 2011, and then asked the district court to speculate that an unseen (and unseeable) video would have been a made-for-jury replay of the events described in his affidavit. (See R., p.335 (McNeil arguing to the district court that "[t]he video from the pawn store *might* have corroborated the decedent's desire to pawn the ring") (emphasis added).) That is insufficient to save him from summary dismissal. See Thomas, 145 Idaho at 769, 185 P.3d at 925.[4]

On appeal, McNeil concedes he can only speculate whether the video would have showed the victim handing him the ring in the pawn shop. (Appellant's brief, p.14 (claiming the video showed them at the pawn shop "and *possibly* her giving the ring to

[4] This is not to suggest McNeil could have only survived summary dismissal by performing the impossible task of presenting the district court with a long-since destroyed video. He could have, for example, presented the district court with an affidavit from a Vista Pawn employee describing the areas of the pawn shop the video camera would have captured on February 18, 2011, and then, if true, explained in his own affidavit that the events he described from February 18, 2011, took place within that area. Instead, he presented an affidavit from a Vista Pawn employee that stated only there would have been a video from February 18, 2011. (See R., p.355.)

him" (emphasis added).) He argues, however, that just the "video showing Mr. McNeil at Vista Pawn with the victim . . . would lend significant credibility to this defense at trial." (Id.) But McNeil did not present admissible evidence showing the video would have captured him and the victim *at all*.

Even if McNeil had presented admissible evidence to that effect, a video just showing McNeil and the victim at a pawn shop could not have "len[t] significant credibility to this defense at trial" because McNeil did not present "this defense" at trial. McNeil presented no evidence to the jury that the victim had tried to pawn her heirloom diamond ring in the past or had given McNeil the ring in a pawn shop. During the state's case in chief, the jury heard two contradictory explanations from McNeil as to how he came into possession of the ring. One woman testified that McNeil told her the ring belonged to him in the first instance and the victim just gave it back "after they broke up." (Vol. II Tr., p.49, Ls.12-17.) McNeil told another woman that the victim gave him the ring as payment on a debt. (Vol. I Tr., p.708, L.12 – p.709, L.7.) A video just showing McNeil and the victim at a pawn shop on February 18, 2011, hardly corroborates either of these explanations.

Based on the evidence McNeil presented to the district court, he could have only used a video of him and the victim at a pawn shop to corroborate the defense that the victim sold him the ring in a pawn shop if he had testified at trial. (See R., p.343.) But McNeil exercised his constitutional right not to testify at the trial. (Vol. I Tr., p.1035, L.7 – p.1037, L.9.) And neither his petition nor his affidavit even alleges that he would have made a different decision had his trial counsel found a video just showing him and the victim at a pawn shop on February 18, 2011. Cf. Adams v. State, 161 Idaho 485, 500, 387 P.3d 153,

168 (Ct. App. 2016) (finding affidavits did not save petitioner from summary dismissal, in part, because petitioner "failed to show that either witness would have been available to testify").

In sum, McNeil failed to make a prima facie showing on Strickland's second prong. McNeil failed to produce admissible evidence showing a reasonable investigation would have produced the Vista Pawn video. And even if a reasonable investigation would have produced the Vista Pawn video, McNeil failed to present admissible evidence showing that the content of the video would have changed the outcome of the trial. Summary dismissal of McNeil's claim was thus proper.

2. The District Court Properly Dismissed Claim Fourteen Because McNeil Failed To Make A Prima Facie Showing Under Strickland

The district court properly dismissed McNeil's claim that his "Trial Counsel was ineffective for failing to alert the judge, make a proper record, and ask the court to conduct an inquiry after . . . a juror had seen Petitioner in the back seat of a County Sheriff's vehicle." (R., p.186.) In the notice of intent to dismiss, the district court informed McNeil that he could not survive summary dismissal on this claim because he had not alleged a factual basis for the claim or the prejudice that resulted. (R., pp.325-26.) In response, McNeil presented his own affidavit that stated the juror saw McNeil in the back of a police vehicle while he was being transported. (R., p.347.) The district court found McNeil's affidavit "failed to cure the deficits pointed out in the Court's Notice of Intent to Dismiss" because "McNeil failed to make any allegation of prejudice." (R., p.381.) The district court was correct.

The Idaho Court of Appeals has expressly held that "[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, 365 P.3d 1050, 1059 (Ct. App. 2015) (emphasis in original) (affirming summary dismissal of claim that "all jurors" saw petitioner in a jail-issued jumpsuit); see State v. Hyde, 127 Idaho 140, 148, 898 P.2d 71, 79 (Ct. App. 1995) (holding that defendant was not prejudiced when jurors witnessed him in full restraints in hallway). Despite the district court expressly citing Bias and informing McNeil of the requirement that he must make a prima facie showing of *actual* prejudice (R., pp.325-26), McNeil failed to articulate any form of prejudice in his supplemental affidavit (R., p.347). Summary dismissal of his claim was thus appropriate under Bias.

Moreover, the district court did not err in finding that McNeil failed to allege any particular prejudice in his petition. McNeil merely alleged that "[p]etitioner's 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.) That is precisely the type of conclusory statement the district court need not accept in a petition for post-conviction relief. See Charboneau, 144 Idaho at 903, 174 P.3d at 873 ("A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions."). Because McNeil failed to allege with any particularity, much less present admissible evidence to support, that the juror seeing him in the police car actually prejudiced him, the district court properly dismissed his claim that trial counsel provided ineffective assistance by failing to raise the sighting with the district court, make a record, and request an inquiry.[5] See Bias, 159 Idaho at 705, 365 P.3d at 1059.

[5] Notably, McNeil's allegation in his petition that trial counsel "fail[ed] to alert the judge" is contradicted by his own affidavit. (R., p.186.) He states in his affidavit that trial counsel "addressed it with the Judge." (R., p.347.)

McNeil argues that his presentation of an affidavit saying a juror saw him in the police car "'constitutes a prima facie showing sufficient to justify an evidentiary hearing' to determine whether the juror who saw him was prejudiced by her observation." (Appellant's brief, p.18 (quoting Bias, 159 Idaho at 705, 365 P.3d at 1059).) McNeil's reliance on Bias is misplaced. In Bias, the court explained that Bias "had to show that the jurors that allegedly saw him were empaneled on his jury *and* that he was actually prejudiced as a result." 159 Idaho at 705, 365 P.3d at 1059 (emphasis added). "*As to the first requirement*," the court explained that Bias's allegation that jurors saw him "constitutes a prima facie showing sufficient to justify an evidentiary hearing to determine whether the jurors that allegedly saw him were empaneled on his jury." Id. (emphasis added). "*However*," the court explained that "*as to the second requirement*, Bias does not allege that he was prejudiced nor does he present additional facts that would support such a presumption." Id. (emphases added). Because Bias failed on the second requirement, the court affirmed the district court's summary dismissal of Bias's claim without an evidentiary hearing. Id. Bias thus stands for the proposition that a factual assertion that a juror saw the petitioner in custody outside of the trial, standing alone, is not sufficient to survive summary dismissal. See id. Put simply, McNeil quotes Bias for a proposition it plainly contradicts.[6]

McNeil also argues that a juror seeing him in the back of a police car has the same effect "as an observation of jail attire and restraints." (Appellant's brief, p.19.) That may be true, but it makes no difference here. The district court did not dismiss McNeil's claim

[6] For the same reason, and because Bias did not address improper jury contact with a third party at all, McNeil's reliance on Bias for claim fifteen is also misplaced. (See Appellant's brief, p.24.)

on the basis that McNeil described himself only as sitting in the back of a police car with no mention of a jail-issued jumpsuit or restraints. (See R., pp.325-26.) More importantly, accepting McNeil's argument as true puts him squarely within the holding of Bias, where the petitioner *did* allege that "'all jurors witnessed [him] being led to [the] courthouse in [his jail-issued] orange jumpsuit'" and "'at least one (1) juror saw [him] in [his] jail uniform and in shackles.'" 159 Idaho at 704, 365 P.3d at 1058 (brackets in original).

In an effort to get out from under Bias's dispositive weight, McNeil argues that the Strickland analysis should apply differently here because Bias claimed ineffective assistance for failing to request a mistrial whereas McNeil claimed ineffective assistance 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." (Appellant's brief, pp.19-22.) That is a distinction without a difference under Strickland. Regardless of whether this Court focuses on trial counsel's failure to inquire with the juror or trial counsel's failure to move for a mistrial, Strickland still requires McNeil to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See 466 U.S. at 694. Because a fruitless inquiry of the juror could not have changed the outcome of the trial, McNeil can only satisfy Strickland's prejudice prong by making a prima facie showing that the inquiry would have led to evidence sufficient for the district court to declare a mistrial (i.e., "*actual* prejudice"). Bias, 159 Idaho at 705, 365 P.3d at 1059 (emphasis in original). That puts him in the exact same position as the petitioner in Bias and squarely beneath Bias's dispositive weight. See id.

McNeil also tries to distinguish Bias on the basis that he alleged in his petition that his "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; see Appellant's brief, p.22.) But the court in Bias did not say that a mere allegation would have been sufficient. See 159 Idaho at 705, 365 P.3d at 1059 ("Bias does not allege that he was prejudiced by this situation *nor does he present additional facts that would support such a presumption*.") (emphasis added). In addition to being wrong, that interpretation of Bias would also conflict with the well-established requirement that, to avoid summary dismissal, "[t]he application must include affidavits, records, or other evidence supporting its allegations." Charboneau, 144 Idaho at 903, 174 P.3d at 873. In any event, as explained above, the allegation in McNeil's petition is conclusory and thus insufficient on its face. See id. ("A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions.").

In short, the district court warned McNeil that he needed to supplement his petition with admissible evidence of actual prejudice to avoid summary dismissal (R., pp.325-26), and McNeil's supplemental affidavit made no mention of prejudice (R., p.347). Accordingly, the district court properly dismissed McNeil's claim. (R., p.381.)

3. The District Court Properly Dismissed Claim Fifteen Because McNeil Failed To Make A Prima Facie Showing Under Strickland And McNeil Received The Requisite Notice Prior To Claim Fifteen's Dismissal

The district court properly dismissed McNeil's claim that "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.) The district court informed McNeil that it planned on dismissing his claim because "[t]he claim is not properly supported." (R., p.326.) In response, McNeil supplemented his petition with his own affidavit in which he stated that he "saw a male

juror in front of the courthouse . . . speaking to a man whom we had earlier identified as the decedent's uncle." (R., p.347.) The district court found McNeil's description of the encounter insufficient to support a prima facie showing of prejudice. (R., pp.381-83.) On appeal, McNeil does not even claim to have presented admissible evidence showing *actual* prejudice. (See Appellant's brief, pp.25-31.) Instead, he asserts that he presented sufficient evidence to the district court to raise a "presumption of prejudice." (Id.) He is wrong.

"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 . . . ." Remmer v. United States, 347 U.S. 227, 229 (1954) (emphasis added); see State v. Rodriguez, 93 Idaho 286, 290, 460 P.2d 711, 715 (1969) (finding no prejudice where "the conversation that transpired did not relate to any subject related to the trial"). Allegations of prosaic communications, "such as 'chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator'"—do not trigger the presumption. Godoy v. Spearman, 861 F.3d 956, 967 (9th Cir. 2017).

For example, in Remmer, the U.S. Supreme Court held a private communication offering money to a juror in return for a specific verdict and an F.B.I. investigation into the bribe raised a presumption of prejudice. 347 U.S. at 229. The defendant in Remmer alleged that he learned after trial that an unnamed individual told a juror "that he could profit by bringing in a verdict favorable to the petitioner." Id. at 228. The defendant also alleged that the juror reported the statement to the judge who, unbeknownst to the defendant, had the F.B.I. investigate the alleged bribe. Id. The Court held the defendant's allegations required an evidentiary hearing because the private communication from the

unnamed individual and the F.B.I. contact, which were both "about the matter pending before the jury," raised a presumption of prejudice. Id. at 229-30.

Similarly, in Godoy, the Ninth Circuit held a juror's continuous contact with a third party concerning the ongoing case triggered the presumption. 861 F.3d at 969-70. The habeas petitioner in Godoy presented the district court with an affidavit from an alternate juror stating that "Juror 10 'kept continuous communication' with her 'judge friend' 'about the case' '[d]uring the course of the trial' and 'disclose[d] to the jury what he said.'" Id. at 969. The court held that the allegations and affidavit required an evidentiary hearing because the private communications were about the case and thus raised a presumption of prejudice. Id.; see Mattox v. United States, 146 U.S. 140, 150-51 (1892) (finding prejudice where newspaper read to jury said defendant had been tried for murder before, that the evidence against him in the current case was strong, and that his friends had given up hope and bailiff commented to jury "that this was the third person [the defendant] had killed").

Remmer, Mattox, and Godoy all support the district court's finding here that McNeil failed to present admissible evidence sufficient to raise the presumption of prejudice. The third party communications in all three cases were, at least allegedly, "about the matter pending before the jury." Remmer, 347 U.S. at 229; see Mattox, 146 U.S. at 150-51; Godoy, 861 F.3d at 969. Here, however, McNeil has not even alleged, much less presented admissible evidence showing, that the conversation between the juror and the decedent's uncle had anything to do with the ongoing trial. (See R., pp.186-87, 347.) Instead, McNeil simply alleges that he "saw a juror in front of the courthouse . . . speaking to . . . the decedent's uncle." (R., p.347.) Accepting McNeil's allegations as true, he has shown nothing more than "a garden variety encounter" between a juror and a third-party.

(R., p.383.) That is insufficient to raise a presumption of prejudice.[7] See Remmer, 347 U.S. at 229 (holding only that "any private communication . . . *about the matter pending before the jury* is . . . deemed presumptively prejudicial") (emphasis added); Godoy, 861 F.3d at 967 (observing that prosaic communications "such as 'chance contacts between witnesses and jury members'" do not trigger the presumption). Because McNeil failed to present admissible evidence sufficient to raise a presumption of prejudice, the district court did not err by dismissing his claim for post-conviction relief.

To the extent McNeil relies on the Idaho Supreme Court's Rodriguez decision, his reliance is misplaced. (See Appellant's brief p.30.) In Rodriguez, the defendant moved for a new trial based on "the separation of the jury and their association with the State's witness." 93 Idaho at 290, 460 P.2d at 715. The court observed that, "[w]here the defendant in a murder case shows the jury have separated after having been sworn to try the case, he has made a sufficient prima facie showing to entitle him to a new trial." Id. As the court made clear, that rule arose from a statute in place at the time that mandated separation of the jury for a murder trial. See id. at 289-90 & n.2, 460 P.2d at 714-15 & n.2 (quoting the version of I.C. § 19-2126 applicable in 1969). The court acknowledged that the defendant had carried his burden under the rule by showing the jury had eaten lunch

[7] McNeil erroneously suggests that Remmer stands for the proposition that an evidentiary hearing is required any time a court does not know what happened between a juror and a third party. (See Appellant's brief, p.26.) The Court made clear when it addressed the case after remand that the lack of information, standing alone, neither triggered the presumption nor justified a hearing: "It was the paucity of information relating to the entire situation *coupled with the presumption which attaches to the kind of facts alleged by petitioner* which, in our view, made manifest the need for a full hearing." Remmer v. United States, 350 U.S. 377, 379-80 (1956) (emphasis added). As explained above, McNeil did not allege "the kind of facts alleged by the petitioner" in Remmer. 350 U.S. at 379-80.

with one of the state's witnesses, but found the error harmless because "the conversation that transpired did not relate to any subject related to the trial." Id. at 290, 460 P.2d at 715.

The jury-separation rule from Rodriguez does not apply here. The statute underlying the jury-separation rule has since been amended and now leaves jury separation "in the discretion of the court." I.C. § 19-2126 (2008). The district court did not order that McNeil's jury remain separated throughout the trial, and McNeil did not raise any issue with that decision—at the time of trial or at any time since. Instead, the district court repeatedly admonished the jury not to talk to anyone about the case:

> Please don't talk to anybody about the case. Don't let anyone talk to you about the case. Please don't talk to the lawyers or any witnesses in the case.

(Vol. I Tr., p.117, Ls.2-6.[8])

> What you could do is, you could tell people you are on a jury trial. You could tell them the name of the case and that it is a murder case. That you will be needed probably for the next three weeks, or if it goes faster, that will be good. You won't be in session on Mondays.
>
> So you can go ahead and tell them that much, but don't tell them more about that.

(Vol. I Tr., p.158, Ls.7-14.)

> When the closing arguments are done, that's when the case will be submitted to you for your deliberations. Until that time, please don't discuss the evidence in the case among yourselves or with anyone else. The reason for that is we don't want you to begin your discussions with each other about the evidence until you have heard all the evidence.
>
> So don't discuss this case even among yourselves until it's fully submitted to you. Please don't discuss the case at home. Please don't share your insights or assessments on any kind of social media.
>
> You know, don't put it your [sic] Facebook pages, or whatever, and don't discuss it with family, friends, or co-workers, and don't let anybody talk about the case with you.

[8] The decedent's uncle was not a witness at the trial.

(Vol. I Tr., p.164, L.12 – p.165, L.3.)

> Please remember, don't talk about the case with anyone, don't let anyone talk about the case with you, and you really are going to have to avoid any online or regular news accounts of any type, as well as any news accounts at all.
>
> So please remember, don't talk about the case. Don't let anybody talk to you about it.

(Vol. I Tr., p.185, Ls.2-9.)

McNeil presented no admissible evidence showing any member of the jury failed to follow the district court's instructions, and this Court always starts by presuming the opposite. See State v. Hall, 161 Idaho 413, 429, 387 P.3d 81, 97 (2016) ("We must presume that the jury followed the jury instructions in arriving at their verdict.") (quotations omitted). Thus, to the extent Rodriguez shines any light on this case, it confirms that McNeil failed to present sufficient evidence to raise the presumption of prejudice because he failed even to allege that the juror violated the district court's instructions by having a discussion with the decedent's uncle "about the matter pending before the jury." Remmer, 347 U.S. at 229; see Rodriguez, 93 Idaho at 290, 460 P.2d at 715 (holding jury-separation error harmless because "the conversation that transpired did not relate to any subject related to the trial").

Turner v. Louisiana, 379 U.S. 466 (1965), is even further afield. In Turner, the Court found improper jury contact violated due process where the state's two key witnesses were also assigned to take charge over the jury and "had in fact freely mingled and conversed with the jurors in and out of the courthouse during the trial." 379 U.S. at 467-73. The Court observed that it did not matter whether the witnesses discussed the case with the jury because "the credibility which the jury attached to the testimony of these two key

witnesses must inevitably have determined whether [the defendant] was to be sent to his death." Id. at 473. The Court continued: "[w]e deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial—an association which gave these witnesses an opportunity . . . to renew old friendships and make new acquaintances among the members of the jury." Id. at 473. The defendant had shown *actual* (i.e., not presumed) prejudice because "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.

The similarity between Turner and this case begins and ends with an allegation of improper jury contact. The decedent's uncle was not a witness in McNeil's trial—much less a key witness on which the state's entire case hinged. The decedent's uncle was not a deputy sheriff and did not have charge over McNeil's jury. And McNeil alleged nothing more than "a brief encounter" while Turner dealt with "a continuous and intimate association throughout a three-day trial." Id. Perhaps most importantly, McNeil is attempting to show prejudice via the Remmer presumption, but the defendant in Turner did not rely on any presumption, and the Court's decision did not mention Remmer even a single time. See id. The Turner defendant showed *actual* prejudice in the continuous association between the state's key witnesses and the jury. See id. ("[I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ."); id. ("[T]he role that [the witnesses] played as deputies made the association even more prejudicial."). Here, McNeil failed to present the district court with admissible evidence showing "a continuous and intimate association" that would demonstrate prejudice under Turner. Accordingly, Turner does not support McNeil's claim.

McNeil erroneously argues that he did not receive proper notice prior to the dismissal of claim fifteen. (Appellant's brief, pp.24-25.) "[W]here a trial court dismisses a claim based upon grounds other than those offered—by the State's motion for summary dismissal, and accompanying memoranda—the defendant seeking post-conviction relief must be provided with a 20-day notice period." Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010); see I.C. § 19-4906(b), (c). "When a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements." Id. (emphasis in original). McNeil's notice argument fails because (1) the district court dismissed his claim, at least in part, based on the arguments presented by the state in its motion for summary disposition and accompanying brief *and* (2) the district court gave twenty-days' notice prior to dismissing his claim.

First, the state's motion for summary disposition and accompanying brief gave McNeil sufficient notice. On December 21, 2015, the state filed a motion for summary disposition in which it argued that "[p]etitioner's ineffective assistance of counsel claims fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice." (R., p.245.) After explaining Strickland, the state reiterated in its accompanying brief that "[p]etitioner has not provided admissible evidence to overcome [Strickland's] presumption and, even if he had, he has not demonstrated that the outcome of his case would be different." (R., p.248.) The state then made a lack-of-prejudice argument specific to claims fourteen and fifteen: "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."[9] (R., p.251.) The state's argument that McNeil "ha[d] not demonstrated" prejudice (R., p.248) gave McNeil the requisite notice for the district court to dismiss his claim for lack of prejudice (R., pp.381-83). See DeRushe v. State, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) ("Reasonable particularity only requires pointing out that there is a lack of evidence showing prejudice. It does not require explaining what further evidence is necessary, particularly since it may not exist.").[10] And the district court ultimately dismissed this claim, at least in part, on that ground: "In regards to Claim # 15, McNeil failed to describe the juror's contact with [the decedent's] relative so that the presumption of prejudice arose." (R., p.381.)

Second, the district court's notice of intent to dismiss gave McNeil far more than the twenty-days' notice required under the statute. See I.C. § 19-4906(b). On September 5, 2017, the district court issued a Notice of Intent to Dismiss. (R., p.303.) The district court explained precisely what a petitioner must show to survive summary dismissal on an ineffective assistance of counsel claim, including that the petitioner must "establish prejudice" by "show[ing] a reasonable probability that, but for the attorney's deficient

[9] McNeil's assertion on appeal that "[t]his is not an argument of failure to show prejudice" is bewildering given that he clearly understood it to be a an argument of failure to show prejudice in the district court. (Appellant's brief, p.25 n.7.) McNeil's response to this argument in the district court was all about prejudice: "Petitioner argues prejudic[e] . . . [h]e alleges a juror spoke with a member of the victim's family." (R., p.260.) In any event, the state's argument conveyed to McNeil that the state did not think he had shown prejudice because, despite the alleged jury tampering, "the jury did not abandon its role as fact finder in this case." (R., p.251.)

[10] To the extent McNeil is challenging the *sufficiency* of the notice in the state's motion for summary disposition (see Appellant's brief, p.25, n.7), he waived that argument by failing to raise it in the district court. See Kelly, 149 Idaho at 522 & n.1, 236 P.3d at 1282 & n.1 ("As Kelly is attempting to raise the issue of whether the State's MSD and State's Memo, provided Kelly with sufficient notice, for the first time on appeal, we shall not consider it.").

performance, the outcome of the proceeding would have been different." (R., p.310.) The district court informed McNeil that claim fifteen was "not properly supported" because "[c]onclusory statements are insufficient to support post-conviction relief." (R., p.326.) Under any fair reading of the district court's order, the district court gave McNeil notice that it would dismiss this claim unless McNeil presented admissible evidence showing deficient performance and prejudice because the conclusory statements he had presented were insufficient. (See R., pp.303-27.) One-hundred and thirty six days later, as promised, the district court dismissed claim fifteen because "McNeil [did] not make the allegation that anything improper occurred . . ., thus the presumption of prejudice does not attach." (R., p.383.) McNeil thus received timely notice. See I.C. § 19-4906(b).

Because McNeil failed to present admissible evidence to make a prima facie case under Strickland and the state and the district court gave McNeil sufficient notice, the district court properly dismissed claim fifteen.

CONCLUSION

The state respectfully requests this Court affirm the district court's judgment dismissing McNeil's petition for post-conviction relief.

DATED this 25th day of January, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of January, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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JN/dd