Electronically Filed
12/28/2018 3:41 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

JACOB ALLEN HICKEY,	)	
	)	**No. 45801**
Petitioner-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CV-2016-5633**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE A. SOUTHWORTH
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JEFF NYE
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR
DEFENDANT-RESPONDENT

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR
PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Jacob Allen Hickey appeals from the district court's summary dismissal of his petition for post-conviction relief. He argues that the district court prematurely dismissed his petition prior to the date the district court set for Hickey to respond to the notice of intent to dismiss. He further argues that his claims should have survived summary dismissal on the merits.

Statement Of The Facts And Course Of The Proceedings

In December 2014, a fifteen-year-old high school student reported to the Nampa Police Department that Jacob Allen Hickey had raped her. (PSI, p.28.[1]) The report set off an investigation that led to Detective Hale of the Nampa Police Department contacting Hickey to arrange a meeting. (PSI, p.37.) Hickey and Detective Hale met in a Burger King parking lot to discuss the allegations against Hickey. (Id.) Hickey denied raping the high school student. (Id.) Detective Hale "asked [Hickey] about taking a polygraph test to clear him from the investigation." (Id.) Hickey "said he would take the test." (Id.) Hickey and Detective Hale scheduled the polygraph examination for approximately one week later. (Id.)

At the scheduled time, Hickey voluntarily came to the police station to take the polygraph. (PSI, p.38.) Detective Palfreyman showed Hickey to the polygraph exam room, read him his Miranda rights, and administered the polygraph test. (PSI, pp.38-42.) Detective Hale watched from the observation room. (PSI, p.38.) After the first

[1] The district court took judicial notice of the PSI. (R., p.205.)

examination, Detective Palfreyman went to the observation room and told Detective Hale that Hickey's denials concerning the rape "definitely showed deception" but Hickey could not hold still. (Id.) Detective Palfreyman said he would try a second polygraph test "just to see if the second run would be similar to the first." (Id.)

When Detective Palfreyman went back to the examination room, Hickey "seemed in sort of a panic and told Det. Palfreyman he couldn't take the test again, that he was supposed to be back to work and should be going." (Id.) "Det. Palfreyman told [Hickey] he would go find [Detective Hale] and let [Detective Hale] know and asked [Hickey] to wait in an[] adjacent room for a minute." (Id.) Hickey went to a second interview room and immediately adjusted the thermostat to "turn[] up the heat because he was so cold." (Id.)

Detective Hale went to the interview room and spoke with Hickey. (PSI, pp.38-39.) During the course of their conversation, Hickey told Detective Hale his version of what had happened with the high school student. (PSI, p.39.) According to Hickey, the high school student "came onto him" and the two of them had sex. (PSI, p.39.) Hickey asked Detective Hale "what was going to happen to him now." (PSI, p.40.) Detective Hale said he "wasn't real sure" and he "would have to talk with the prosecutor." (Id.) After their conversation, Detective Hale walked Hickey to the lobby and told Hickey that he would be in touch with Hickey by phone. (Id.)

The state charged Hickey by Information with lewd conduct with a minor child under sixteen. (R., pp.23-24.) As part of a plea agreement, Hickey pled guilty to an amended charge of felony injury to a child. (R., p.36.) At the sentencing hearing, Hickey's attorney informed the district court that Hickey "does suffer from some mental health

issues": "He has Asperger's. He's autistic. He deals with ADHD." (12/9/2015 Tr., p.31, Ls.10-14.[2]) The district court also had access to an Idaho Standard Mental Health Assessment from 2012 (PSI, pp.53-59), a Mental Health Examination Report from 2015 (PSI, pp.60-62), a GAIN-I Recommendation and Referral Summary (PSI, pp.63-75), and a Psychosexual Evaluation (PSI, pp.76-131), all of which discussed Hickey's cognitive abilities. The district court imposed a sentence of two years fixed and six years indeterminate. (R., p.36.)

Hickey appealed from the district court's judgment, arguing that the district court should have granted him probation and that his sentence was excessive. State v. Hickey, No. 43855, 2016 WL 3452066, at *1 (Idaho Ct. App. June 16, 2016). The Idaho Court of Appeals affirmed Hickey's sentence in an unpublished decision. Id.

On June 16, 2016, Hickey filed, pro se, a petition for post-conviction relief. (R., pp.8-12.) The district court appointed counsel to represent Hickey in the post-conviction proceeding. (R., p.15; see R., p.134.) Hickey's post-conviction counsel filed an Amended Petition for Post-Conviction Relief. (R., pp.185-88.) The district court listed Hickey's post-conviction claims as follows:

> 1. Petitioner was not allowed to discontinue his interview with the police and leave when he indicated he wanted to do so.
> 2. Petitioner was not allowed to consult with an attorney during his custodial interrogation even though he specifically and unequivocally asked to do so.
> 3. Because of his developmental disability, petitioner was coerced and/or misled in making a false confession to police.
> 4. Because of his developmental disability, Petitioner did not enter his guilty plea knowingly and voluntarily. Rather, Petitioner believed he was not entering a guilty plea and that he was going to have the opportunity for a jury trial in his criminal case.

[2] The transcript of the sentencing hearing is located on pages 88-112 of the record.

5. Because of his developmental disability, Petitioner was not mentally capable of forming the *mens rea* necessary to be guilty of committing any crime.
6. Ineffective assistance of counsel:
    a. My public defender did not represent me the way I wished.
    b. My public defender refused to present the proper evidence.
    c. My counsel failed to attempt to obtain an I.C. § 18-211 examination.
    d. My counsel failed to present evidence to the court that I am disabled.
    e. My counsel failed to adequately advise me that I was entering a guilty plea to felony injury to a child on October 9, 2015 at my District Court Arraignment.

(R., p.226 (footnote omitted).)

Hickey also provided the district court with an affidavit in support of his post-conviction petition. (R., pp.150-52.) Hickey attached five exhibits to his affidavit.

Exhibit A was a Psychological Assessment from 2009. (R., pp.154-58.) The assessment concluded that "overall [Hickey] is functioning within the 'low average' range of intelligence compared to others of his chronological age." (R., p.158.)

Exhibit B was an Idaho Standard Mental Health Assessment from 2012. (R., pp.159-65.) The assessment indicated that Hickey graduated from high school, lived with his girlfriend, and had worked at a waterpark and in fast food restaurants. (R., pp.159, 161.) According to the author of the assessment, "[t]he defendant showed no signs of any gross thought disorder. His answers pertained to the questions asked and were organized." (R., p.162.) "Intellectually, this writer would likely put him in the low-normal range based on answers regarding general knowledge, abstract thinking, and his ability to respond to scenario-based judgment situations." (R., p.163.)

Exhibit C was a Report of Adaptive Behavior Testing from 2014. (R., pp.166-69.) The report spoke to Hickey's "Broad Independence," which the report defined as "a

measure of overall adaptive behavior based on an average of four different areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills." (R., p.166.) According to the report, Hickey's "Broad Independence . . . is comparable to that of the average individual at age 10 years 8 months." (Id.)

Exhibit D was a Medical, Social and Developmental Assessment Summary from 2015. (R., pp.170-82.) As its name suggests, the Medical, Social and Developmental Assessment Summary simply summarized evaluations that Hickey had in the past using information gathered from an interview with Hickey and his mother and other records. (Id.)

Exhibit E was an Annual DD Eligibility Approval Notice from 2015. (R., pp.183-84.) The notice informed Hickey that the Idaho Department of Health and Welfare "determined you qualify for developmental disability services" and provided Hickey his individualized budget. (R., p.183.) The notice did not explain the basis for Hickey's eligibility for developmental disability services. (See R., pp.183-84.)

On October 26, 2017, the district court filed a Notice of Intent to Dismiss Petition. (R., pp.225-32.) The district court put Hickey on notice that it intended to dismiss all of his claims and gave its reasons for doing so. (Id.) The district court planned on dismissing claims 1 and 2 because "Hickey fails to support claims 1 and 2 with admissible evidence" and because, "upon entry of a valid plea, all non-jurisdictional defenses are waived." (R., pp.228-29.) The district court planned on dismissing claims 3, 4, and 5 because Hickey did not present admissible evidence to support his allegations regarding the extent of his developmental disabilities, and the record contradicted Hickey's allegations. (R., p.229.)

The district court planned on dismissing "claims 6(a), (b), and (e) [because] Hickey fails to provide any factual showing that his public defender did not represent him the way he wished, refused to present evidence, or inadequately advised him he was entering a guilty plea." (R., p.231.) The district court also noted that the transcripts in the record contradicted Hickey's allegations. (Id.) The district court planned on dismissing claims 6(c) and (d) because the district court had already denied a mental competency evaluation in the post-conviction proceeding on the basis that it could "find[] no indication he lacked the capacity to understand the proceedings against him or to assist in his defense." (Id.) The notice of intent to dismiss also informed Hickey that he had until November 13, 2017, to respond. (R., p.232.)

On November 13, 2017, Hickey filed a motion asking for additional time to file a response to the notice of intent to dismiss. (R., pp.236-38.) Hickey explained that he wanted the additional time to gather evidence, including an affidavit from Hickey's former attorney and a complete evaluation of Hickey "in order to determine his I.Q., his age level in comprehending information, his ability to make informed decisions as it relates to the criminal justice matters, and his ability to assist in his own defense if a jury trial was ordered in this matter." (R., p.237.)

On November 29, 2017, the district court entered an Order Extending Time to File Response to Notice of Intent to Dismiss Petition. (R., pp.240-41.) The order stated that "the time for Petitioner's counsel to file a response to the Notice of Intent to Dismiss Petition in this matter shall be extended to the 15 day Fecember [sic], 2017 by 5:00 o'clock p.m." (R., p.240.)

On December 22, 2017, the state filed a Motion for Entry of Dismissal. (R., pp.242-43.) The state asked the district court to dismiss Hickey's petition because "[t]he Petition has failed to provide material evidence to controvert the Court's Notice of Intent to Dismiss, and the time has ran expired on the extension." (R., p.243.)

On January 12, 2018, the district court entered an Order Dismissing Petition for Post-Conviction Relief. (R., pp.245-46.) The district court noted that, although it had "extended the time to file a response to December 15, 2017," Hickey had failed to file anything before December 15, 2017, and failed to respond in any way to the state's motion to dismiss. (R., p.246.) The district court dismissed Hickey's petition. (R., pp.246, 248.)

On January 25, 2018, Hickey filed a Motion for Reconsideration asking the district court to reconsider the dismissal of his post-conviction petition. (R., pp.250-57.) Hickey's motion made no mention of his failure to file a response in the time allotted by the district court. (See id.) Instead, Hickey spent the entire motion arguing that his claims for post-conviction relief should survive summary dismissal on the merits. (See id.) To support his claims related to the police interview, Hickey pointed to his affidavit. (R., pp.252-53.) To support his claims related to his developmental disability, Hickey claimed the evidence showed "that he has the understanding capacity of a person at the age of 10 years and 8 months." (R., p.255.) To support his ineffective assistance of counsel claims, Hickey pointed to his affidavit and argued that his trial counsel should have discovered that he was developmentally disabled. (R., pp.256-57.)

On March 14, 2018, the district court entered an Order Denying Plaintiff's Motion for Reconsideration. (R., pp.271-82.) The order did not rely on the untimeliness of Hickey's response. (See id.) Instead, the district court addressed the merits of Hickey's

response contained in his motion for reconsideration. (See id.) The district court rejected Hickey's contention that the evidence showed that "he has the 'understanding capacity' of a person at the age of 10 years and 8 months." (R., p.276 ("This statement is false.").) "Hickey attached as Exhibit C a report of adaptive behavior testing, measuring functional independence—not 'understanding capacity.'" (Id.) The district court also rejected Hickey's claim that he had "diminished cognitive abilities" as "unsupported by the record." (R., p.277.) The district court pointed out numerous places in the record that indicated Hickey had, at worst, low-average intelligence. (R., pp.276-77.)

The district court also found that, based on the transcripts of the change-of-plea hearing and the sentencing hearing, Hickey's allegation that he did not enter his plea knowingly and voluntarily found no support in the record. (R., pp.277-78.) Finally, the district court also found no support in the record for Hickey's contention that he had been in custody during the interrogation. (R., pp.278-79.)

Hickey timely appealed from the Final Judgment dismissing his petition for post-conviction relief. (R., pp.264-67.)

ISSUES

Hickey states the issues on appeal as:

I. Did the district court err in summarily dismissing Mr. Hickey's petition for post-conviction relief?

II. Did the district court err in denying Mr. Hickey's motion for reconsideration of the order summarily dismissing his petition for post-conviction relief?

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Hickey failed to show that the district court dismissed his petition for post-conviction relief prior to the date the district court set for Hickey to respond to the notice of intent to dismiss?

II. Has Hickey failed to show that the district court erred in denying his motion to reconsider the order dismissing his petition for post-conviction relief?

ARGUMENT

I.
The District Court Did Not Prematurely Dismiss Hickey's Petition For Post-Conviction Relief

A. Introduction

The district court did not dismiss Hickey's petition for post-conviction relief prior to the date the district court set for Hickey to respond to the notice of intent to dismiss. For the first time on appeal, Hickey claims that the district court extended his time to respond to the notice of intent to dismiss to February 15, 2018. That is neither what the district court's order said nor what any party or the district court believed in the proceeding below. Moreover, Hickey responded to the notice of intent to dismiss in his motion for the district court to reconsider the dismissal of his petition, and the district court addressed the merits of Hickey's response in its order denying the motion to reconsider. In short, Hickey has asserted on appeal an argument he waived in the district court that is based on an incorrect reading of the record to address an issue that is moot. He is entitled to no relief.

B. Standard Of Review

Hickey incorrectly suggests that this Court should apply the same standard of review on this issue as it does when reviewing the substance of a district court's summary dismissal of a post-conviction petition. (See Appellant's brief, p.6.) The issue here, however, is whether the district court's order extending the time in which Hickey could respond to the notice of intent to dismiss gave Hickey until December 15, 2017, or until February 15, 2018. (See Appellant's brief, pp.7-8.) The district court read its own order as extending the time only until December 15, 2017. (R., p.246.) The interpretation of an unambiguous court order presents a question of law over which the appellate court

exercises free review. Suchan v. Suchan, 113 Idaho 102, 106, 741 P.2d 1289, 1293 (1987); Sun Valley Ranches, Inc. v. Prairie Power Coop., 124 Idaho 125, 131, 856 P.2d 1292, 1298 (Ct. App. 1993). The interpretation of an ambiguous court order, on the other hand, presents a question of fact. Suchan, 113 Idaho at 106, 741 P.2d at 1293. Where the order is reasonably subject to conflicting interpretations, the appellate court must accept the trial court's interpretation, particularly when the trial court is interpreting its own order, unless that interpretation is clearly erroneous. Id. at 107-08, 741 P.2d at 1294-95.

"Justiciability issues, such as mootness, are freely reviewed." State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010).

C. The District Court Did Not Prematurely Dismiss Hickey's Petition for Post-Conviction Relief Because The District Court Dismissed The Petition After Hickey Did Not Respond By The Court-Ordered Deadline

Hickey's argument that the district court dismissed his petition prior to the date the district court set for Hickey to respond is moot, waived, and meritless. First, the issue of whether the district court prematurely dismissed Hickey's petition is moot. "'An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded' by judicial relief." Barclay, 149 Idaho at 8, 232 P.3d at 329 (quoting Koch v. Canyon Cnty., 145 Idaho 158, 163, 177 P.3d 372, 377 (2008)).

Even if, as Hickey suggests, the district court initially erred by dismissing his petition prior to the date the district court set for Hickey to respond, that issue is moot because Hickey took the opportunity to respond in his motion for reconsideration (R., pp.250-57), and the district court addressed Hickey's response on the merits in its order denying Hickey's motion (R., pp.271-81). Put differently, even if the district court took the procedural misstep Hickey alleges, the proper remedy would be for this Court to

remand to allow Hickey an opportunity to respond to the notice of intent to dismiss and to allow the district court to determine whether, in light of Hickey's response, summary dismissal was warranted. But that remedy would provide no relief at all: Hickey *already* responded to the notice of intent to dismiss in his motion for reconsideration (R., pp.250-57), and the district court *already* decided in its order denying Hickey's motion that, even in light of Hickey's response, Hickey's claims could not avoid summary dismissal (R., pp.271-81). Indeed, Hickey spent half of his opening brief in this appeal explaining, in his view, how the district court erred when it addressed the merits of his response. (See Appellant's brief, pp.9-16.) Because a ruling in Hickey's favor on this issue would provide no relief, the issue is moot. See Barclay, 149 Idaho at 8, 232 P.3d at 329.

Second, Hickey waived his argument that the district court prematurely dismissed his petition prior to the date the district court set for Hickey to respond by not asserting that argument in the district court. See State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (holding that when a party "fail[s] to advance [an] argument below . . . it is not properly before this Court on appeal"). Although Hickey is adamant on appeal that the district court prematurely dismissed his petition (Appellant's brief, pp.6-8), he did not present that argument to the district court at any time. His motion for reconsideration addressed why Hickey believed the district court was wrong as to the merits of his claims, but it is silent as to an untimely dismissal. (See R., pp.250-57.) Hickey has thus waived this argument. See Garcia-Rodriguez, 162 Idaho at 275, 396 P.3d at 704.

Third, even setting aside Hickey's insurmountable procedural hurdles, his entire argument is based on an incorrect reading of the record. Hickey asserts that "[t]he district court's order states it is extending the time for counsel to respond to the petition to February

15, 2017." (Appellant's brief, p.8.) Hickey then infers that "[t]he year 2017 is presumably a typographical mistake, as the order was signed on November 29, 2017." (Id.) That might be a reasonable inference, except that the district court's order does not actually say what Hickey claims. The district court's order extending the time in which Hickey could respond to the notice of intent to dismiss says that Hickey had until "Fecember [sic] 15, 2017." (R., p.240.) In light of what the record actually says, Hickey's argument reduces to the strange claim that the district court mistyped "ecember" instead of "ebruary" and "2017" instead of "2018." The far more reasonable explanation, of course, is that the district court simply mistyped a single letter: "F" instead of "D" for the month of December.

Hickey's record-stretching claim on appeal is all the more curious because he apparently understood below that the district court meant December 15, 2017. Despite the state moving to dismiss Hickey's petition on the basis that he did not respond to the notice of intent to dismiss by "December 15th, 2017" (R., pp.242-43), Hickey did not file a response to object to the state's motion. And despite the district court expressly stating in its order dismissing Hickey's petition that it had only extended Hickey's time to respond until "December 15, 2017" (R., pp.245-46), Hickey's motion for reconsideration made no mention of a premature dismissal or February 15, 2018 (see R., pp.250-57). His silence in the district court not only waived the argument he has now raised on appeal for the first time (as explained above), it also confirms the unreasonableness of his position on appeal: no one involved at the district court level, including Hickey himself, believed the district court had extended Hickey's time to respond to February 15, 2018. Because Hickey's

argument that the district court prematurely dismissed his petition is moot, waived, and meritless, he is entitled to no relief on this issue.

II.
The District Court Properly Summarily Dismissed Hickey's Petition For Post-Conviction Relief

A. Introduction

The district court properly dismissed all of Hickey's post-conviction claims after considering Hickey's response to the notice of intent to dismiss. The district court properly dismissed claims 1 and 2, which relate to his police interview. Hickey waived these claims when he entered a guilty plea to felony injury to a child. Hickey also failed to present admissible evidence showing that he was in custody at the time of the police interview.

The district court properly dismissed claims 3, 4, and 5, which relate to Hickey's developmental disability. Hickey failed to present admissible evidence to support his allegation that he had the understanding capacity of a ten-year-old child. On the contrary, the undisputed facts show that Hickey fell within the low-average range of intelligence. The district court properly dismissed claim 3 for the additional reason that Hickey failed to present admissible evidence showing any police coercion. The district court properly dismissed claim 4 for the additional reason that the transcripts in the underlying criminal proceeding contradict Hickey's allegation that he understood he would have had a trial even if he pled guilty. The district court properly dismissed claim 5 for the additional reason that Hickey failed to present admissible evidence that he was not competent to stand trial, which is different than evidence that he just had a low-average IQ.

The district court properly dismissed all of Hickey's ineffective assistance claims. Hickey has waived most of the ineffective assistance claims he presented to the district

court by failing to raise them in his opening brief. Hickey's new claim on appeal that his counsel provided ineffective assistance by failing to investigate the details of the police interview is not properly before this Court because Hickey did not state that claim in his petition or argue it to the district court. The district court properly dismissed Hickey's claim that his counsel provided ineffective assistance by failing to request a competency evaluation because Hickey has failed to present admissible evidence showing deficient performance or prejudice. Specifically, the undisputed evidence shows that the district court would have rejected a motion for a competency evaluation, given that the district court did reject a motion for a competency evaluation in the post-conviction proceedings. Furthermore, Hickey failed to present admissible evidence showing prejudice because he has presented no evidence showing that he was mentally incompetent at the time he entered his guilty plea. The district court properly dismissed Hickey's separate claim that his counsel provided ineffective assistance by failing to present evidence of his developmental disability to the district court because Hickey failed even to allege in what context his counsel should have presented that evidence and to what end.

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. Hickey Has Failed To Show The District Court Erred By Summarily Dismissing His Petition For Post-Conviction Relief

The district court properly dismissed Hickey'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." Id. 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.

1. The District Court Properly Dismissed Claims 1 And 2 Because Hickey Waived These Claims When He Entered His Guilty Plea And Failed To Provide Evidence To Support These Claims

The district court properly dismissed claims 1 and 2. Claim 1 alleged that Hickey was not allowed to leave the police interview room when he asked to do so, and claim 2 alleged that Hickey was not allowed to consult an attorney during his interrogation even though he asked to do so. In the notice of intent to dismiss, the district court gave two independent rationales for dismissing both of these claims: (1) Hickey waived these claims

when he entered a guilty plea and (2) Hickey failed to support these claims with admissible evidence. (R., pp.228-29.) Either rationale justified the dismissal of claims 1 and 2.

First, the district court properly dismissed claims 1 and 2 because Hickey waived these claims when he entered his guilty plea. "A valid plea of guilty, voluntarily and understandingly given, waives all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." State v. Al-Kotrani, 141 Idaho 66, 69, 106 P.3d 392, 395 (2005). If a defendant wants to plead guilty and preserve an issue, he must "enter a conditional plea of guilty, reserving the right to challenge any specified adverse ruling on appeal." Id. A post-conviction action may not be used to present a claim that was "knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction." I.C. § 19-4908; see Griffith v. State, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App. 1992) (affirming dismissal of post-conviction claim regarding discovery violation because defendant waived the claim by pleading guilty in the underlying criminal proceeding); Stone v. State, 108 Idaho 822, 825-26, 702 P.2d 860, 863-64 (Ct. App. 1985) (affirming dismissal of post-conviction claim regarding illegal search because defendant waived the claim by pleading guilty in the underlying criminal proceeding).

Hickey waived any claim related to his interview with the police when he pled guilty to felony injury to a child. He did not enter a conditional plea and acknowledged on his guilty plea advisory form that he did not "reserve[e] [his] right to appeal any pre-trial issues." (R., p.28.) Because Hickey pled guilty in the underlying criminal case and did not specifically reserve the right to raise claims related to his interview with the police, he cannot raise post-conviction claims related to his interview with the police. See I.C. § 19-4908; Griffith, 121 Idaho at 375, 825 P.2d at 98; Stone, 108 Idaho at 825-26, 702 P.2d at

863-64. He has thus waived claims 1 and 2, both of which relate to his interview with the police. (R., p.186.)

On appeal, the only argument Hickey could muster to refute the district court's determination that he waived claims 1 and 2 by pleading guilty is that "Mr. Hickey may have a viable claim for *ineffective assistance of counsel* notwithstanding his guilty plea." (Appellant's brief, p.11 (emphasis added) (citing only ineffective assistance of counsel cases).) Hickey is correct that his guilty plea does not waive ineffective assistance of counsel claims. See Al-Kotrani, 141 Idaho at 69, 106 P.3d at 395 (observing that, when a defendant enters an unconditional guilty plea, "the real issue is whether the Defendant received the effective assistance of counsel when deciding to enter an unconditional plea of guilty," which "is a matter better addressed in a proceeding for post-conviction relief"). But that is entirely beside the point here because neither claim 1 nor claim 2 is an ineffective assistance of counsel claim. (See R., p.186.) The district court therefore properly dismissed claims 1 and 2 as waived.

Second, the district court properly dismissed claims 1 and 2 because they were not supported by the record. "Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings [or] if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims . . . ." Schultz v. State, 153 Idaho 791, 796, 291 P.3d 474, 479 (Ct. App. 2012). "[T]he court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." Self v. State, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). With respect to the merits of claims 1 and 2, Hickey challenges only the district court's conclusion that Hickey

did not present admissible evidence showing he was in custody at the time of the police interview.[3] (Appellant's brief, pp.11-12.)

As the district court found, Hickey's claim that he was in custody during the police interview is "unsupported by the record." (R., p.278.) Whether a suspect is in custody is "determined by 'whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" State v. James, 148 Idaho 574, 576-77, 225 P.3d 1169, 1171-72 (2010) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). "To determine whether custody has attached, 'a court must examine all of the circumstances surrounding the interrogation.'" Id. (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)). "The test is an objective one and 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation.'" Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

The undisputed evidence shows that "Hickey's freedom was never restrained" during the police interview. (R., p.280.) Hickey arrived voluntarily at the police station to

[3] Hickey's failure to present admissible evidence to show he was in custody at the time of the police interview is fatal to claim 2—his claim that the police should have stopped questioning him and allowed him to consult with an attorney when he asked for an attorney. See State v. Hurst, 151 Idaho 430, 436, 258 P.3d 950, 956 (Ct. App. 2011) ("We likewise hold that a person may not invoke a Fifth Amendment right to counsel, with the prophylactic effect of cutting off questioning without an attorney present, if the person is not in custody."). It is not necessarily fatal to claim 1—Hickey's claim that he was not allowed to leave the interview room, which has more of a Fourth Amendment flavor. See State v. Pilik, 129 Idaho 50, 52, 921 P.2d 750, 752 (Ct. App. 1996) ("Although the concepts of [Fourth Amendment] seizure and [Fifth Amendment] custody may be similar, they are not . . . interchangeable."). With respect to claims 1 and 2, however, Hickey only argues on appeal that the district court erred in finding he did not present admissible evidence showing he was in custody. (Appellant's brief, pp.11-13.) He has thus waived any other argument related to the merits of claims 1 and 2. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.").

take a polygraph examination. (PSI, p.38.) He moved from room to room in the police station of his own volition. (Id.) He voluntarily took the polygraph examination with Detective Palfreyman, and no evidence suggests any other police were present.[4] (PSI, pp.38-39, 42-43.) Detective Palfreyman read Hickey his Miranda rights. (PSI, p.42.) Even though Detective Palfreyman intended to administer a second polygraph examination, he immediately stopped when Hickey indicated he needed to go to work. (PSI, p.38.) Detective Palfreyman "*asked* [Hickey] to wait in an adjacent room for a minute" while he found Detective Hale. (Id. (emphasis added).) Hickey walked to a different interview room where he felt (and was) free to adjust the thermostat. (PSI, 38.)

Detective Hale went to the interview room, and no evidence suggests any other police were present.[5] (PSI, pp.38-39.) Detective Hale and Hickey had a two-way conversation: Detective Hale asked Hickey about what had happened with the high school student, and Hickey asked Detective Hale about "what was going to happen to him now." (PSI, pp.38-40.) After their conversation, Detective Hale walked with Hickey to the lobby and told Hickey that he would be in touch by telephone. (PSI, p.40.) Hickey then left the police station. (Id.)

Nothing about Hickey's interaction with the detectives suggests that he was in custody at any time during the interviews. Although the interviews took place at a police station, "the fact that an interview takes place at a police station is not controlling for a custody analysis." State v. Huffaker, 160 Idaho 400, 405, 374 P.3d 563, 568 (2016). The detectives never forced Hickey to move to—or not to move from—any specific location.

[4] Detective Hale watched the polygraph from an observation room. (PSI, p.38.)

[5] Detective Palfreyman watched the interview from an observation room. (PSI, p.43.)

And, as the district court observed, "[t]he detective[s] said nothing that would lead Hickey to believe he was under arrest." (R., p.281.)

The statements that Hickey points to in his affidavit are insufficient to create a genuine issue of material fact as to whether Hickey was in custody. (See Appellant's brief, pp.12-13.) Hickey stated in his affidavit: "I wanted to stop my interview with the police and leave the room I was in. However, I was not allowed to do so by the police." (R., p.151.) Hickey's mere desire to stop the interview, which Hickey does not even claim he expressed to the detectives, did not put him in custody. See James, 148 Idaho at 576-77, 225 P.3d at 1171-72. Furthermore, Hickey did not give any details regarding or explain what he meant by "I was not allowed to do so by the police." (R., p.151); see Charboneau, 144 Idaho at 903, 174 P.3d at 873 ("A court . . . need not accept the petitioner's conclusions."). He did not, for example, describe any actions the detectives took or commands the detectives stated to keep him from leaving the room. (See id.) Because Hickey failed to present evidence of specific facts that would cause a reasonable man in Hickey's situation to believe he was in custody, the district court did not err in summarily dismissing claims 1 and 2.

2. The District Court Properly Dismissed Claims 3, 4, And 5 Because Hickey Failed To Provide Admissible Evidence To Support These Claims

The district court properly dismissed claims 3, 4, and 5, all of which were based on Hickey's alleged intellectual deficit, because the record does not support these claims. "Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law." Schultz, 153 Idaho at 796, 291 P.3d at

479. "[T]he court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." Self, 145 Idaho at, 580, 181 P.3d at 506. The district court properly dismissed claims 3, 4, and 5 because Hickey failed to prove his allegation that he had the understanding capacity of a ten-year-old child. In addition, Hickey failed to present necessary evidence specific to each claim.

a. The district court properly dismissed claims 3, 4, and 5 because Hickey failed to present admissible evidence showing he had the understanding capacity of a person at the age of ten years and eight months.

The district court properly dismissed claims 3, 4, and 5 because Hickey failed to present admissible evidence showing the kind of disability that would allow for post-conviction relief. Claims 3, 4, and 5 all rest on the premise that Hickey "has the understanding capacity of a person at the age of 10 years and 8 months." (R., p.255; see Appellant's brief, p.13 ("Mr. Hickey's allegations that he has diminished cognitive abilities and the understanding capacity of a ten-year-old are supported by the record.").) But, as the district court correctly found, "[t]his statement is false" because "[n]othing in the record states Hickey has the 'understanding capacity' of an almost eleven-year-old child." (R., p.276.)

Hickey's claim that he has the understanding capacity of a ten-year-old child arises from a misinterpretation of the Report of Adaptive Behavior Testing that Hickey attached to his petition as Exhibit C. (See R., pp.166-69.) The report actually states that Hickey's "*functional independence* is . . . comparable to that of the average individual age 10 years 8 months." (R., p.166 (emphasis added).) The author of the report reached that conclusion after administering a test called the "Scales of Independent Behavior—Revised." (R.,

p.166 (underline omitted).) The test evaluates an individual's "Broad Independence," which the report defined as "a measure of overall adaptive behavior based on an average of four different areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills." (R., p.166.) The report does not even purport to describe Hickey's intelligence or understanding capacity. (See R., pp.166-69.)

The evaluations attached to Hickey's petition that did evaluate intelligence or understanding capacity all concluded that Hickey fell within the average range, albeit on the lower end. For example, the author of the Psychological Assessment, which Hickey attached to his petition as Exhibit A, concluded that "[t]he results of [Hickey's] current intellectual assessment revealed that overall he is functioning within the 'low average' range of intelligence compared to others of his chronological age." (R., p.158.) And the author of the Idaho Standard Mental Health Assessment, which Hickey attached to his petition as Exhibit B, reached a similar conclusion: "Intellectually, this writer would likely put him in the low-normal range based on answers regarding general knowledge, abstract thinking, and his ability to respond to scenario-based judgment situations." (R., p.163.)

Furthermore, the two evaluations most contemporaneous to Hickey's police interview and guilty plea found no cognitive impairments. According to the GAIN-I Recommendation and Referral Summary, "Hickey scored in the no/minimal range of the Cognitive Impairment Screen at the time of evaluation. The staff observed minimal indications of developmental disabilities and no evidence of cognitive impairment." (PSI, p.68.) The psychologist who conducted Hickey's psychosexual evaluation reached a similar conclusion:

> Speech flowed at an average rate, with good articulation and normal intonation. Expressive and receptive language skills were within normal limits. Thought content was rational, linear, and goal directed, with no indication of delusions or hallucinations. He was oriented to time, place, person, and situation. Attention, concentration, and memory seemed to be within normal limits. Based on behavioral observations, there were no indications of cognitive deficits that would preclude the examinee's involvement in the psychosexual evaluation.

(PSI, p.80.) Because Hickey failed to provide admissible evidence to show he had the understanding capacity of a ten-year-old child and the record contradicts that allegation, the district court did not err in dismissing Hickey's claims 3, 4, and 5, which are premised on that allegation.

Hickey asserts that he "attached to his affidavit documentation that he . . . had borderline intellectual functioning." (Appellant's brief, p.13.) But he fails to mention that the author of the Idaho Standard Mental Health Assessment included that as a "Rule Out" diagnosis. (R., p.164.) As explained elsewhere in the record, "[t]he term 'rule out' indicates the strong probability of a diagnosis that must be confirmed by a licensed professional." (PSI, pp.63-64.) Hickey presented the district court no evidence that the rule-out diagnosis of borderline intellectual functioning was confirmed by a licensed professional. Furthermore, the rule-out diagnosis was made in June 2012—*three years* prior to Hickey's interview with the police and guilty plea. (R., p.164; PSI, pp.37-38.) Subsequent evaluations of Hickey that were more contemporaneous to Hickey's police interview and guilty plea listed his diagnoses and omitted borderline intellectual functioning. (See R., p.170; PSI, p.64.)

More to the point, Hickey failed to present any evidence to the district court to show that an individual of Hickey's age diagnosed with borderline intellectual functioning is so severely intellectually disabled that he has the understanding capacity of a ten-year-old

child. On the contrary, the same individual who listed the rule-out diagnosis of borderline intellectual functioning commented specifically that, intellectually, Hickey belongs in the "low-normal range." (R., p.163.)

Hickey also tries to rely on the fact that he "qualified for developmental disability services." (Appellant's brief, p.13.) But nothing in the record indicates how he qualified for disability services or whether it had anything to do with his intellectual ability. The letter from the Idaho Department of Health and Welfare simply states that Hickey was qualified; it does not explain what developmental disability made him eligible and says nothing about his intellectual ability. (See R., pp.183-84.)

At most, the evidence presented to the district court showed that Hickey was in the "low average" or "low-normal" range of intelligence three-to-six years prior to his police interview and guilty plea. (R., pp.158, 163; see Appellant's brief, p.13 ("Mr. Hickey attached to his affidavit documentation that he was in the 'low average' range of intelligence . . . .").) That is insufficient to support claims 3, 4, or 5.

b. The district court properly dismissed claim 3 for the additional reason that Hickey failed to allege, much less present evidence to support, any specific facts showing police coercion.

The district court also properly dismissed claim 3 because Hickey did not allege specific facts or present evidence supporting his claim that the police coerced a confession. "Conclusory allegations, unsupported by specific facts, do not raise a genuine issue of material fact and will not preclude summary dismissal." Pratt v. State, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000); see I.C. § 19-4903 (mandating that post-conviction petition "specifically set forth the grounds upon which the application is based"). Hickey made only the conclusory allegation that "petitioner was coerced and/or misled in making a false

confession to police." (R., p.186.) He did not allege how the police misled him or what the police did that constituted coercive conduct.[6] (See R., p.186.)

Although Hickey alleges that the coercion happened "[b]ecause of his developmental disability" (R., p.186), the mere fact that Hickey had a developmental disability says nothing about the police officers' conduct and cannot, standing alone, prove that his interview was coercive. See Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."). Hickey has not provided any authority for the proposition that interviewing an individual with low-average intelligence is per se coercive conduct, and the U.S. Supreme Court has effectively held the opposite. See Connelly, 479 U.S. at 159-67 (holding confession not coerced merely because "the mental state of the defendant, at the time he made the confession, interfered with his 'rational intellect' and his 'free will'").

Even setting aside Hickey's allegation problems, Hickey failed to present sufficient evidence to the district court to avoid summary dismissal. See Schultz, 153 Idaho at 796, 291 P.3d at 479 ("Claims may be summarily dismissed . . . if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims . . . ."). Hickey's affidavit, which was the only evidence attached to his petition that in any way described the circumstances of the police interview, simply states: "Because of

[6] Notably, Hickey did not present any evidence to the district court showing that any law enforcement personnel misrepresented the law, and any misrepresentation of fact, which Hickey also failed to specifically allege or support with evidence, did not rise to the level of coercion. See State v. Davila, 127 Idaho 888, 892, 908 P.2d 581, 585 (Ct. App. 1995) ("Confessions derived during the course of interrogations have been upheld as voluntary, notwithstanding misrepresentations of facts by the police . . . .").

my disabilities I did not understand what was going on during my interview with police. I feel the police made me say things that were not true during the interview." (R., p.152.) Hickey's "feel[ing]" that the police coerced him is insufficient to make a prima facie showing that his confession was coerced. See Connelly, 479 U.S. at 167. Because Hickey failed to allege specific facts or present evidence to show the police engaged in coercive activity, the district court properly dismissed his claim that the police coerced his confession.

c. The district court properly dismissed claim 4 for the additional reason that the record of the original proceeding showed Hickey understood that he would not have a trial if he entered a guilty plea.

The district court also properly dismissed claim 4 because the record of the original proceeding showed that Hickey understood he would not have a trial if he entered a guilty plea. "Allegations contained in the application are insufficient for granting relief when . . . they are clearly disproved by the record of the original proceedings . . . ." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); see McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) ("If the record conclusively disproves an essential element of a post-conviction claim, summary dismissal is appropriate."). In claim 4, Hickey alleged that he did not enter his plea voluntarily because he "believed he was not entering a guilty plea and that he was going to have the opportunity for a jury trial in his criminal case." (R., p.186.) He attempted to support that claim by alleging in his affidavit that he "thought [he] was going to be released from jail and [he] would have a trial later on." (R., p.152.) The district court properly dismissed claim 4 because the record of the original proceeding clearly disproves Hickey's allegation.

The transcript of the change-of-plea hearing disproves Hickey's allegation that he understood he would receive a trial if he pled guilty. The district court specifically asked Hickey—not just once, but twice—if he understood that he would not have a trial if he pled guilty. (10/9/2015 Tr., p.12, Ls.6-8, p.16, Ls.3-4.[7]) Hickey answered yes to both questions. (10/9/2015 Tr., p.12, L.9, p.16, L.5.) The district court also explained to Hickey that, if Hickey pled guilty, "[y]ou give up your right to be confronted by witnesses, to cross-examine them, and present evidence and testimony in your own defense." (10/9/2015 Tr., p.12, Ls.16-18.) The district court then explained exactly what that meant: "In other words, you won't have a trial. Here's the witness stand. People won't be up there testifying against you, and you won't be cross-examining them, and you won't be calling witnesses in your own defense to the trial." (10/9/2015 Tr., p.12, Ls.19-23.) Hickey told the district court that he understood. (10/9/2015 Tr., p.12, Ls.24-25.) Because the undisputed evidence shows that the district court informed Hickey multiple times that he would not have a trial if he pled guilty, and Hickey responded multiple times that he understood, the district court properly dismissed claim 4.

d. The district court properly dismissed claim 5 for the additional reason that Hickey failed to present admissible evidence showing he was not mentally capable of forming the mens rea *of any crime.*

The district court properly dismissed Hickey's claim that he could not form the *mens rea* to commit a crime. For starters, claim 5 is not a cognizable post-conviction claim. "[A] collateral attack on the sufficiency of the evidence (had the state been required to produce evidence) is not permissible in a habeas corpus or post-conviction proceeding relating to a conviction based upon a valid guilty plea." Clark v. State, 92 Idaho 827, 833,

[7] The transcript of the change-of-plea hearing is on pages 72-87 of the record.

452 P.2d 54, 60 (1969); see I.C. § 19-4901. Hickey's claim that he was not mentally capable of forming the *mens rea* is a sufficiency of the evidence claim. See I.C. § 18-207(1), (3) (stating that "[m]ental condition shall not be a defense to any charge of criminal conduct" but that the defendant can present evidence "on the issue of any state of mind which is an element of the offense"). Because Hickey pled guilty, he cannot obtain relief in post-conviction proceedings on the basis that the state presented insufficient evidence of his state of mind. See Clark, 92 Idaho at 833, 452 P.2d at 60.

In any event, the district court properly dismissed claim 5 because Hickey did not present any evidence to the district court showing that he was incapable of forming the *mens rea*. "Claims may be summarily dismissed . . . if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims . . . ." Schultz, 153 Idaho at 796, 291 P.3d at 479. None of the evaluations of Hickey presented to the district court expressly state, or even suggest, that Hickey could not form the *mens rea* of any crime. In fact, the evaluations that spoke to Hickey's cognitive abilities and were most contemporaneous with Hickey's crime, the GAIN-I report and psychosexual evaluation,[8] found "no evidence of cognitive impairment." (PSI, p.68; see PSI, p.80.)

[8] The Medical, Social and Developmental Assessment Summary presented to the district court was the most contemporaneous report. (R., p.170.) But that report is silent as to Hickey's intelligence. The report does state, however, that Hickey had been gainfully employed working a "'cattle job'" until he was injured at work, that Hickey "resides in his own home with two roommates," and that "[n]o issues with his living situation are reported." (R., p.172.) Although the report also confirms that a year earlier a "SIBR was completed and resulted in a broad independence of 10 years 8 months" (R., p.178), Hickey has provided no evidence or authority to suggest that a broad independence score can prove an individual is incapable of forming the *mens rea* of a crime, let alone that his broad independence score would suffice.

Moreover, as explained above, see supra Part I.2.a., even the older evaluations only showed that Hickey fell within the "low average" or "low-normal" range of intelligence. Hickey neither presented evidence nor cited authority for the proposition that low-average intelligence proves an inability to form the necessary *mens rea*. And the notion that a lack of intelligence, standing alone, is sufficient to prove the inability to form the *mens rea* of a crime is incompatible with U.S. Supreme Court precedent: "Those mentally retarded persons who meet the law's requirements for criminal responsibility *should be tried and punished when they commit crimes*." Atkins v. Virginia, 536 U.S. 304, 306 (2002) (emphasis added). Notably, Hickey's low-average intelligence and IQ score of 82, evaluated years before the crime in this case occurred (R., pp.154-55, 158), do not even put Hickey in the "mentally retarded" category, much less absolve him of criminal responsibility altogether. See Atkins, 536 U.S. at 309 n.5 (observing that "IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition"). Because Hickey failed to present admissible evidence to the district court showing he could not form the *mens rea* required for his crime, the district court properly dismissed claim 5.

3. The District Court Properly Dismissed All Of Hickey's Ineffective Assistance Of Counsel Claims Because Hickey Failed To Present Evidence Showing Deficient Performance And Prejudice

The district court properly dismissed Hickey's ineffective assistance of counsel claims because Hickey failed to present the necessary evidence to support his claims. A petitioner seeking post-conviction relief on the basis of ineffective assistance of counsel "must prove that counsel's performance was deficient and the deficiency prejudiced the case." Dunlap v. State, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004). "To show a deficiency

the [petitioner] must show the attorney's representation fell below an objective standard of reasonableness." Id. To prove prejudice where the conviction resulted from a plea, the petitioner "'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

Hickey asserted five claims of ineffective assistance of counsel in his petition for post-conviction relief. (R., pp.186-87.) On appeal, Hickey presses only three claims. (Appellant's brief, p.15.) Hickey has waived any claim not argued in his opening brief, including claims 6(a), 6(b), and 6(e). Zichko, 129 Idaho at 263, 923 P.2d at 970 ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.") None of the claims Hickey argues on appeal warrant relief.

a. Hickey's ineffective assistance claim related to the police interview is not properly before this Court.

Hickey claims, without citation to the record, that "[h]e alleged his attorney did not properly investigate the circumstances surrounding his interrogation and did not present this evidence to the district court (presumably through a motion to suppress)." (Appellant's brief, p.15.) That is simply not true. Neither Hickey's Petition for Post-Conviction Relief nor his Amended Petition For Post-Conviction Relief makes any mention of such a claim. (See R., pp.8-11, 185-87.) Hickey cannot secure post-conviction relief based on a claim not included in his petition. See I.C. § 19-4903 (mandating that post-conviction petition "specifically set forth the grounds upon which the application is based"); I.C. § 19-4908 ("All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application."). Furthermore, Hickey did not argue this claim to the district court. His Motion For Reconsideration—the filing in which Hickey

made his post-conviction arguments to the district court—is devoid of any argument supporting such a claim. (See R., pp.250-57.) This Court cannot consider an argument that Hickey did not make to the district court in support of a claim he did not include in his petition for post-conviction relief. See State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) ("We have long held that '[a]ppellate court review is limited to the evidence, theories and arguments that were presented below.'" (quoting Nelson v. Nelson, 144 Idaho 710, 714, 170 P.3d 375, 379 (2007)).

Even if Hickey had raised this claim in the district court, the district court would have summarily dismissed it for lack of evidence. See Schultz, 153 Idaho at 796, 291 P.3d at 479 ("Claims may be summarily dismissed . . . if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims . . . ."). Hickey's failure even to articulate what evidence he believes his trial counsel would have found if he had "properly investigate[d] the circumstances surrounding his interrogation" (Appellant's brief, p.15) means he cannot possibly "show that there is a reasonable probability that, but for counsel's error[], he would not have pleaded guilty and would have insisted on going to trial," Dunlap, 141 Idaho at 59, 106 P.3d at 385. Because Hickey cannot show prejudice from the alleged deficient performance, he could not have obtained relief on this claim even if he had properly raised it. See id.

b. The district court properly dismissed Hickey's claim that his attorney provided ineffective assistance by failing to seek a competency evaluation.

The district court properly dismissed Hickey's claim that his attorney provided ineffective assistance of counsel by failing to file a motion with the district court asking for a competency evaluation. "'Where the alleged deficiency is counsel's failure to file a

motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the [*Strickland*] test.'" State v. Payne, 146 Idaho 548, 562, 199 P.3d 123, 137 (2008) (alteration in original) (quoting Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995)). Here, there can be no doubt that any motion filed by Hickey's trial counsel seeking a competency evaluation would not have been granted because Hickey's post-conviction counsel filed a motion seeking a competency evaluation and the district court denied it. (R., pp.207-16.) The district court found "nothing to entertain a good faith belief that Mr. Hickey was mentally incompetent at the time of the offense, the entry of his plea or his sentencing." (R., p.215.) Hickey has not challenged on appeal the district court's order denying a mental health examination. Thus, Hickey's trial counsel could not have provided ineffective assistance by not filing a motion seeking a competency evaluation because "the motion, if pursued, would not have been granted by the trial court." Payne, 146 Idaho at 562, 199 P.3d at 137.

Furthermore, Hickey has not presented admissible evidence to show prejudice. To show prejudice, a petitioner claiming his trial counsel provided ineffective assistance by failing to request a competency evaluation must "present[] admissible evidence showing that there is a reasonable probability that he was incompetent at the time he entered his plea." Ridgley v. State, 148 Idaho 671, 678, 227 P.3d 925, 932 (2010).

In Ridgley, the petitioner claimed his trial counsel provided ineffective assistance by failing to seek a competency evaluation. Id. at 677, 227 P.3d at 931. The petitioner presented to the district court a psychological evaluation "noting that [the petitioner] suffers from some indications of depression, post-traumatic stress disorder, and anxiety disorder." Id. at 678, 227 P.3d at 932. The Idaho Supreme Court found that evaluation

insufficient to show prejudice for two reasons: (1) "the report also states that [the petitioner] is 'oriented to person, place and time'" and (2) "the report addressed only [the petitioner's] mental state at the time it was prepared; the report says nothing about [the petitioner's] mental state at the time he entered his plea—nine months earlier." Id. Because the petitioner "did not present an expert's opinion that he was not competent, as defined by I.C. § 18-210, at the time he pled guilty," the Idaho Supreme Court affirmed the summary dismissal of the petitioner's claim. Id. at 678-79, 227 P.3d at 932-33.

Ridgley controls the outcome of Hickey's claim. None of the evaluations Hickey presented to the district court even purport to evaluate whether Hickey was competent at the time he pled guilty on October 9, 2015. Only two of Hickey's reports actually reflect evaluations of his mental state: a psychological assessment and a mental health assessment.[9] (R., pp.150-52.) The psychological assessment was conducted approximately *six years* before he pled guilty and the mental health assessment was conducted more than *three years* before he pled guilty (R., pp.154, 159)—both time frames far longer than the nine-month differential that doomed the petitioner's claim in Ridgley.

Even the most contemporaneous evaluation, recorded in the GAIN-I report, which Hickey did not present to the district court to support his claim, was conducted a full month after Hickey pled guilty. (PSI, p.63.) Presumably, Hickey did not present the GAIN-I report to the district court because, although it shows a diagnosis of alcohol dependence

[9] The Report of Adaptive Behavior Testing, which is dated seventeen months prior to Hickey's guilty plea, only reports Hickey's broad independence score. (R., p.166.) It does not provide any specific commentary on his mental state—let alone his mental state at the time he pled guilty. (See R., pp.166-69.) The Medical, Social and Developmental Assessment Summary, which is dated six months prior to Hickey's guilty plea, only summarizes evaluations that had been conducted in the past, none of which comment on Hickey's mental competency at the time he entered his guilty plea. (R., pp.170-82.)

and rule-out diagnoses of mood disorder, anxiety disorder, and attention deficit hyperactive disorder (R., p.64), the report also states that "[t]he staff observed minimal indications of developmental disabilities and no evidence of cognitive impairment" (R., p.68). Setting aside the timing, the observation in the GAIN-I report that the staff observed "no evidence of cognitive impairment" is fatal to Hickey's claim. See Ridgley, 148 Idaho at 678, 227 P.3d at 932 (affirming dismissal of claim, in part, because the psychological evaluation "states that [the petitioner] is 'oriented to person, place and time'"). Because Hickey "did not present an expert's opinion that he was not competent, as defined by I.C. § 18-210, at the time he pled guilty," the district court properly dismissed his ineffective assistance claim based on his trial counsel's failure to seek a competency evaluation. Id.

c. The district court properly dismissed Hickey's claim that his attorney provided ineffective assistance by failing to present evidence of Hickey's developmental disabilities to the district court.

As a preliminary matter, it is unclear whether Hickey is pursuing this theory as a stand-alone claim for relief or as part of his counsel's alleged ineffective assistance for failing to seeking a mental competency evaluation. In his Amended Petition For Post-Conviction Relief, Hickey alleged two separate but related ineffective assistance claims concerning his developmental disability: claim 6(c) alleged that Hickey's counsel was ineffective for failing to seek a mental competency evaluation and claim 6(d) alleged that Hickey's counsel was ineffective because he "failed to present evidence to the court that I am developmentally disabled." (R., p.187.) The district court notified Hickey that it intended to dismiss both claims 6(c) and 6(d) for the same reasons. (R., p.231.) In his Motion for Reconsideration, Hickey seemed to combine the claims when he argued that the district court should not dismiss 6(c) but made no argument as to 6(d). (R., pp.256-57.)

On appeal, though his intent is not clear, Hickey seems to re-assert claim 6(d) as an independent claim: "[H]is attorney did not attempt to obtain a competency evaluation of him *and* did not present evidence to the district court regarding his developmental disabilities." (Appellant's brief, p.15 (emphasis added).)

Regardless of Hickey's intent on appeal, the district court properly dismissed claim 6(d). To the extent Hickey's opening brief addressed his attorney's failure to present evidence to the district court of his developmental disability as part of claim 6(c), the district court properly dismissed claim 6(c) for the reasons explained above. See supra Part I.3.b. To the extent Hickey intended to argue claim 6(d) as a separate claim in his opening brief, the district court properly dismissed claim 6(d) because Hickey did not present any admissible evidence showing deficient performance and prejudice. See Dunlap, 141 Idaho at 59, 106 P.3d at 385. In fact, in the district court, Hickey failed even to specify in what context he believes his trial counsel should have presented evidence of his developmental disability. (See R., pp.185-87, 250-57.)

Hickey's opening brief on appeal only muddies the water. (See Appellant's brief, pp.15-16.) Hickey cites an unpublished decision in which the Idaho Court of Appeals reversed the summary dismissal of an ineffective assistance of counsel claim based on the failure to present evidence of a developmental disability as a mitigating factor during sentencing. (See Appellant's brief, p.15 (citing Richman v. State, 136 Idaho 457, 35 P.3d 274 (Ct. App. 2001) (unpublished)).) But Hickey quickly concedes that he "is not challenging the length of the sentence he received." (Appellant's brief, p.16.) His decision not to assert that his trial counsel failed to present evidence of his developmental disability at the sentencing hearing makes sense, given that his trial counsel *did* provide evidence of

his developmental disabilities at the sentencing hearing. (12/9/2015 Tr., p.31, Ls.10-14 ("He does suffer from some mental health issues. He has Asperger's. He's autistic. He deals with ADHD.").) And Hickey's PSI included evaluations of his cognitive abilities. (PSI, pp.53-131.) Because Hickey has failed to specify when his trial counsel should have presented evidence of his developmental disability and to what end, the district court properly dismissed claim 6(d) as a stand-alone claim.

CONCLUSION

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

DATED this 28th day of December, 2018.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd