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

PATRICK LEE O'NEIL,	)	
	)	**No. 46496-2018**
Petitioner-Appellant,	)	
	)	**Bannock County Case No.**
v.	)	**CV-2017-5047**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Patrick Lee O'Neil appeals from the summary dismissal of his petition for post-conviction relief. He asserts that the district court abused its discretion by denying his request for counsel.

Statement Of The Facts And Course Of The Proceedings

In May of 2016, Patrick Lee O'Neil pled guilty to two counts of delivery of a controlled substance (heroin and methamphetamine). (R., pp. 41-44.) He was sentenced on August 15, 2016. (R., pp. 51-54.) The district court imposed unified, concurrent terms of twelve years with five years fixed. (R., pp. 5, 86.[1]) At the same time, it suspended the sentence and placed O'Neil on supervised probation for a period of seven years. (R., p. 52.) In addition to other conditions of probation, O'Neil was required to "participate in and successfully complete the Bannock County Problem Solving Court." (Id.) He did not file a direct appeal of his conviction and sentence. (Appellant's brief, p. 1.)

The district court subsequently received a Report of Probation Violation. (R., pp. 59-60.) The report—authored by Raynee Myler, O'Neil's probation officer associated with his probation in the underlying criminal case (R., pp. 56-58), and his parole officer associated with his parole from a 2011 conviction for grand theft by possession of stolen property (R., pp. 10-12)—stated

[1] Confusingly, the Minute Entry & Judgment of Conviction in the record reflects a "unified term of 10 years of which five years are fixed with a subsequent indeterminate term of seven years on each count to run concurrently." (R., p. 52.) But there is no dispute that O'Neil was sentenced to concurrent terms of five years fixed and seven indeterminate. (R., pp. 5, 32.) That is also the sentence that the district court later re-instated after revoking O'Neil's probation. (R., pp. 62-65.)

that O'Neil "has admitted to and tested presumptive positive for methamphetamines six times since October 7, 2016," he admitted to using drugs, and he failed to report for required drug testing (R., p. 57). He was therefore "officially terminated from the Bannock County Diversion Court on Wednesday November 30, 2016, for failure to follow program rules." (Id.)

O'Neil repeatedly admitted the allegations in the Report of Probation Violation and accepted the recommendation that he be terminated from the Problem Solving Court. (R., pp. 59-60, 62.) Based on that admission, the district court found that O'Neil violated the terms of his probation. (Id.) On February 17, 2017, after a disposition hearing, the district court concluded that O'Neil's "conduct and actions in violating the terms and conditions of probation require a conclusion that [he] is no longer entitled to the privilege afforded him by the Court's granting of probation in this case." (R., p. 63.) The district court therefore revoked his probation, re-instated his sentence, and remanded him into custody. (R., pp. 63-64.)

O'Neil then filed a direct appeal arguing that the district court abused its discretion in revoking his probation and re-instating the underlying sentence, which argument the Court of Appeals rejected. State v. O'Neil, Unpublished Opinion No. 640 (Idaho App. Nov. 8, 2017).

On December 22, 2017, O'Neil filed a petition for post-conviction relief with supporting affidavit. (R., pp. 5-27.) The petition included a request that counsel be appointed to represent him. (R., p.23.[2]) It purports to assert five broad claims as bases for relief:

(a) ineffective counsel from John Souza and Craig Parrish (attached)

[2] The petition states that, if he desires that an attorney be appointed, he must "fill out a Motion for the Appointment of Counsel and supporting affidavit, as well as a Motion and Affidavit fee waiver." (R., p. 23.) If he did so, that motion is not in the record. While he later requested an attorney in association with two attempts to appeal, they did not seek appointment of post-conviction counsel. (R., pp. 71-79, 104-11.) However, the district court considered that O'Neil had properly requested post-conviction counsel and ruled on the request. (R., pp. 88-91.)

(b) Raynee Myler perjured herself multiple times, threatened me and was my neighbor (attached)
(c) prosecutor used false testimony that he/she knew or had reason to believe was false (attached)
(d) my plea was induced by promises that were not kept
(e) police/prosecution witheld favorable information from the defense.

(R., p. 6 (verbatim).) He identified the alleged ineffectiveness of counsel as involving the allegations that:

(a) John Souza hates me for refusing to lie for his then client Derek Sanders (Ex #5 transcripts involving my claim)
(b) Craig Parrish promised me nothing more than a rider would be argued for by prosecution
(c) He promised me a full discovery even went as far to tell me he put it on my property
(d) advised me P.O could be changed because she was my neighbor

(R., p. 23 (verbatim).)

O'Neil identified the relief he was seeking as, "To be re-sentenced with retained jurisdiction and/or reduced sentence (like prosecution said he wasn't against) to be considered in light of new developments. An opportunity for new trial w/new counsel." (R., p. 24 (verbatim).)

In his supporting affidavit, O'Neil alleged that Ms. Myler: (1) incorrectly stated that he had been convicted of drug trafficking (R., p. 7); (2) incorrectly stated that he was subject to a parole violation in December of 2015 (id.); (3) omitted various facts regarding one occasion on which he was drug tested (R., p. 8); and, (4) made misrepresentations regarding her attempts to assist O'Neil to establish Social Security benefits (R., pp. 13-14).

He alleged that the prosecutor "used false testimony that he/she knew or had reason to believe was false. (by allowing Myler to say whatever she felt instead of what she knew.)" (R., p. 19 (verbatim).) He also alleged that the prosecutor "withheld fact that upon my entry into program there was no exclusive medical provider for participants and when there was talk of it

the first place spoke of (before free clinic) failed to make successful agreement with Wood Court." (R., p. 21 (verbatim). See also R., p. 20 ("Myler spoke of having free clinic as a Wood Court provider, she and prosecution both knew upon my entry into program there was only talk of exclusive provider. So I was left with no help but later received 2 of 5 meds from free clinic as that was all they would do for me" (verbatim)).

Finally, he alleged that his attorney, Craig Parrish, made inaccurate representations regarding his plea agreement, and that the "Police/prosecution" withheld the identities of certain informants from the defense. (R., p. 21.)

The state answered (R., pp. 28-30), and filed a motion for summary dismissal (R., pp. 66-67), brief in support (R., pp. 31-40), and supporting exhibits (R., pp. 41-65). The state argued primarily that O'Neil's claims were untimely because they challenged only the conviction and sentence. (R., pp. 38-39.) It also argued that O'Neil had waived claims that could have been but were not raised in a direct appeal from his conviction and sentence, or in his appeal from the revocation of his probation. (R., p. 39.) Last, the state argued that O'Neil's allegations were conclusory, unsupported, and did not state cognizable post-conviction claims. (Id.)

O'Neil did not respond to the motion for summary dismissal, but instead filed an appeal prior to the district court ruling on the state's motion. (R., pp. 71-74.) That appeal was dismissed for lack of any appealable judgment. (R., pp. 80-83.)

The district court entered an order denying O'Neil's request for appointment of counsel and dismissing his petition. (R., pp. 85-103.) It found that O'Neil failed to raise even the possibility of a valid claim because he was attacking the underlying conviction and sentence, which claims were untimely. (R., pp. 98-102.) O'Neil timely appealed. (R., pp. 104-07.)

ISSUE

O'Neil states the issue on appeal as:

> Did the district court abuse its discretion when it denied Mr. O'Neil's motion for appointment of counsel, because some of the issues in the petition are related to the revocation of probation and therefore timely?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has O'Neil failed to establish that the district court erred when it denied his motion for appointment of counsel because his pleadings did not show the possibility of a valid claim?

ARGUMENT

O'Neil Has Failed To Show Error In The Denial Of His Motion For Counsel And The Summary Dismissal Of His Petition Because His Petition Did Not Show The Possibility Of A Valid Claim

A. Introduction

The district court concluded that O'Neil's claims were frivolous, denied the motion for appointment of counsel on that basis, and summarily dismissed his petition. (R., pp. 85-103.) It did so based on its conclusion that the claims were untimely because O'Neil was challenging only his judgment and sentence. (R., pp. 98-102.) O'Neil argues on appeal that the district court erred because some of his claims "relate to the revocation of probation, not the original conviction and sentencing," and were therefore timely. (Appellant's brief, p. 16.) He identifies three such issues, each involving an allegation that the state presented false testimony or "withheld" information. (Appellant's brief, pp. 13-16.) He claims that: (1) Raynee Myler, his parole/probation officer, made false statements or withheld certain information; (2) the prosecutor knowingly put on false testimony by permitting Ms. Myler to address the district court at the disposition hearing; and, (3) the prosecution withheld information regarding the Bannock County Problem Solving Court (Wood Court). (Id.)

O'Neil's argument fails to establish that the district court abused its discretion when it denied his request for appointment of counsel and dismissed his petition.[3] The district court correctly concluded that O'Neil's petition does not show the possibility of a valid claim. O'Neil

[3] O'Neil does not directly challenge the summary dismissal of his post-conviction claims. But the state concedes that if O'Neil was entitled to be represented by appointed counsel, he was entitled to that representation prior to summary dismissal of his claims. Conversely, because "the threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition," Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), if the district court properly concluded O'Neil's claims did not merit appointment of counsel, they were properly dismissed.

does not dispute that many of his allegations are untimely. Even the issues that he argues are timely because they concern the revocation of his probation are either wholly unrelated to the revocation of his probation, are at best only tangentially so, or directly conflict with the record. The claims on which O'Neil focuses on appeal, like the claims that he acknowledges are untimely, are frivolous. This Court should therefore affirm.

B. Standard Of Review

"The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court." Green v. State, 160 Idaho 657, 658, 377 P.3d 1120, 1121 (Ct. App. 2016). "Although the appointment of counsel is discretionary, counsel 'should' be appointed when there is the possibility of a valid claim; failure to do so is an abuse of discretion." Andrus v. State, 164 Idaho 565, 433 P.3d 665, 669 (Ct. App. 2019) (quoting Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014)).

C. O'Neil Has Not Shown That The District Court Abused Its Discretion By Denying His Request For Appointment Of Counsel

"'The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim.'" Shackelford v. State, 160 Idaho 317, 325, 372 P.3d 372, 380 (2016) (quoting Murphy, 156 Idaho at 393, 327 P.3d at 369). "In determining whether the appointment of counsel would be appropriate, 'every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.'" Melton v. State, 148 Idaho 339, 342, 223 P.3d 281, 284 (2009) (quoting Charboneau v. State, 140 Idaho 789, 794, 102 P.3d 1108, 1113 (2004)). To determine whether a petitioner has raised the possibility of a valid claim, the Court considers "whether the appointment of counsel

would have assisted him in conducting an investigation into facts not in the record and whether a reasonable person with adequate means would have been willing to retain counsel to conduct that further investigation into the claim." Melton, 148 Idaho at 342, 223 P.3d at 284. If the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

The application of these standards to the facts of this case shows that the district court properly denied O'Neil's request for appointment of counsel. Each of O'Neil's claims is either an untimely challenge to his conviction and sentence or, even if an attempt at a timely challenge to the revocation of his probation, is so tangentially related to the revocation of his probation as to be patently frivolous.

There is no dispute that O'Neil attempted to assert untimely claims related to his conviction and sentence.[4] He alleged, for example, that his attorney was ineffective because he made false promises about the plea agreement (R., p. 23), that his guilty plea was induced by those false promises (R., p. 6), that his attorney "promised a full discovery" (R., p. 23), and that

[4] Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. Under Idaho Code § 19-4902(a), to be timely, a post-conviction proceeding must be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." The district court in the underlying criminal case entered the initial judgment of conviction and sentenced O'Neil on August 15, 2016. (R., pp. 51-54.) O'Neil did not file a direct appeal of his conviction and sentence. (Appellant's brief, p. 1.) To assert any claim for post-conviction relief related to his judgment and sentence, O'Neil had to do so before September 26, 2017. O'Neil's petition was stamped as filed by the district court on December 22, 2017 (R., p. 5), and was signed by O'Neil on December 18, 2017 (R., p. 22).

the prosecution withheld the identities of certain informants (R., p. 21). The district court properly concluded that many of O'Neil's claims are untimely and therefore not even possibly valid. See Hust v. State, 147 Idaho 682, 686, 214 P.3d 668, 672 (Ct. App. 2009) (untimely claims are frivolous and not possibly valid). O'Neil does not argue otherwise on appeal.

Thus, this appeal concerns only the issues that O'Neil argues are timely because they are addressed to the revocation of his probation. In particular, he points to allegations that Raynee Myler, his parole/probation officer, made various misrepresentations, that the prosecutor wrongfully permitted her to do so, and that the prosecutor withheld certain information regarding the nature of the Bannock County Problem Solving Court (Wood Court). (Appellant's brief, pp. 13-16). That is, he argues that his petition alleges that the state presented false evidence and withheld favorable evidence in relation to the revocation of his probation.

The allegations identified by O'Neil as concerning the revocation of his probation in fact have little or nothing to do with it. "In a probation revocation proceeding two questions are posed: (1) Did the probationer violate the terms of his probation? (2) If so, does the violation justify revoking the probation?" State v. Hall, 114 Idaho 887, 888, 761 P.2d 1239, 1240 (Ct. App. 1988). O'Neil admitted his probation violations (R., pp. 59-60, 62), and does not challenge those admissions on appeal. Based on those admissions, the district court concluded that O'Neil's "actions in violating the terms and conditions of probation require a conclusion that [he] is no longer entitled to the privilege afforded him by the Court's granting of probation in this case." (R., pp. 63-64.) The alleged misrepresentations by Ms. Myler, as well as the information allegedly "withheld" by the state, are unrelated to the remaining question whether those violations justify revoking probation. Only one of the alleged misrepresentations is even remotely related to the disposition hearing and there is no reasonable possibility that any affected

that proceeding. The information allegedly withheld by the prosecution was more available to O'Neil than to the prosecution and, by O'Neil's own admission, was discussed at the disposition hearing. Even if the Court construes the allegations as "concerning" the revocation of his probation, so as to be timely, the claims are patently frivolous and do not give rise to the possibility of a valid post-conviction claim. This Court should affirm.[5]

1. Allegations That Raynee Myler "Perjured Herself" And The Prosecutor Presented "False Testimony" Thereby

O'Neil claims that his parole/probation officer, Raynee Myler, "'perjured herself multiple times.'" (Appellant's brief, pp. 13-14 (quoting R., p. 6).) He points to four instances of alleged perjury. First, he claims that Ms. Myler mistakenly reported a parole violation in December of 2015. (Appellant's brief, p. 14.) Second, he claims that she incorrectly stated that he was convicted of drug trafficking. (Id.) Third, he claims that she "contacted his treatment facility about having the facility UA him, and he failed one of the four administered tests." (Id.) Fourth, he claims that she made "comments about setting up many appointments for him to get his social security," while in fact she "only set up one appointment, which was premature." (Appellant's

[5] In addition to arguing that O'Neil's claims are untimely, the state argued below that they should be dismissed as conclusory, as unsupported by admissible evidence, as lacking in any legal support, and as "not cognizable under the UPCPA." (R., pp. 36-37, 39.) If this Court determines that some of O'Neil's claims are timely, it can nevertheless affirm the district court on that alternative basis. See Shackelford, 160 Idaho at 326, 372 P.3d at 381 ("[Petitioner] failed to raise the possibility of a valid claim, so any error by the district court [in dismissing the petition and denying request for appointment of counsel] could not have been significant enough to warrant reversal. [Petitioner's] substantial rights were not violated by any alleged error so I.R.C.P. 61 requires the Court to disregard the error."); Ridgley v. State, 148 Idaho 671, 676-77, 227 P.3d 925, 930-31 (2010) (noting that "[w]here the lower court reaches the correct result, albeit by reliance on an erroneous theory, this Court will affirm the order on the correct theory," and affirming summary dismissal of post-conviction claims on alternative basis); Row v. State, 135 Idaho 573, 579-80, 21 P.3d 895, 901-02 (2001) (holding that, though district court erred in dismissing petition for the reason it did, dismissal was nevertheless appropriate on alternative grounds raised below).

brief, pp. 14-15.) O'Neil further claims that the "'Prosecutor used false testimony that he/she knew or had reason to believe was false. (by allowing Myler to say whatever she felt instead of what she knew).'" (Appellant's brief, pp. 15-16 (quoting R., p. 19).)

"In the context of post-conviction relief, the applicant bears the burden not only to prove a constitutional violation, but also to demonstrate that he suffered some resulting prejudice that would entitle him to relief." Nelson v. State, 157 Idaho 847, 856, 340 P.3d 1163, 1172 (Ct. App. 2014). "The State cannot convict a person with testimony known to be false or allow the testimony to go uncorrected." State v. Wheeler, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)). "A defendant establishes a *Napue* violation upon showing: (1) the testimony was false; (2) the prosecutor knew or should have known it was false; and (3) the testimony was material." Id. Testimony or evidence is material just in case there is a "'reasonable likelihood'" that it affected the outcome of the proceeding. United States v. Houston, 648 F.3d 806, 814 (9th Cir. 2011) (quoting Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005)).

There is no reasonable likelihood that any of the "testimony" identified by O'Neil affected the outcome of the proceeding. Indeed, only the allegation that Ms. Myler represented the number of meetings she arranged to establish O'Neil's Social Security benefits had anything to do with the revocation proceedings, and only tangentially so. Even setting aside the conclusory nature of O'Neil's allegations that the relevant representations were false and the prosecutor was aware or should have been aware that they were, see Grant v. State, 156 Idaho 598, 606, 329 P.3d 380, 388 (Ct. App. 2014) (holding that conclusory allegations did not give rise to even the possibility of a valid claim), the alleged misrepresentations were immaterial to the revocation proceeding. They do not show the possibility of a valid post-conviction claim.

a. Reference To December, 2015 Parole Violation

O'Neil claims that Ms. Myler incorrectly stated that he had a parole violation in December of 2015. (R., p. 7.) In support, he attached a Report of Parole Violation authored by Ms. Myler, which states that there was such a violation. (R., p. 11.) That Report of Parole Violation was related to O'Neil's parole from a 2011 conviction for "Grand Theft by Possession of Stolen Property" (R., p. 10), and is distinct from the Report of Probation Violation that was also authored by Ms. Myler and concerns the probation violations that gave rise to the revocation of his probation in the underlying case (R., pp. 56-58). Though O'Neil attached the Report of Parole Violation to his petition to support the claim that Ms. Myler made a misrepresentation regarding a December 2015 parole violation (R., pp. 11-12), there is nothing to suggest that this Report of Parole Violation was submitted to or considered by the district court in the underlying criminal case.

Nevertheless, the Report of Probation Violation—which was considered by the district court (R., p. 63)—likewise includes an off-hand reference to a parole violation in December of 2015 (R., p. 57). Regardless of the accuracy of the claim, a parole violation pre-dating the charges and conviction in the underlying criminal case (see R., p. 31 (noting that charges were filed on January 6, 2016)) is wholly unrelated and immaterial to the much-later probation violations to which O'Neil admitted and the revocation of his probation based on those probation violations. O'Neil presented no evidence suggesting that the state or the district court relied in any way on the allegedly incorrect statement that O'Neil violated his parole in 2015. O'Neil's claim that the revocation of his probation was based on a false assertion that he committed a relatively minor parole violation years earlier is frivolous.

b. Reference To Drug Trafficking

O'Neil claims that Ms. Myler incorrectly stated that he was convicted of "drug trafficking" on August 15, 2016. (R., p. 7.) Again, O'Neil is apparently referring to the Report of Parole Violation to substantiate this claim, not the Report of Probation Violation that the district court considered. The Report of Parole Violation states: "On July 9, 2015, Patrick O'Neil was charged with two counts of Delivery of a Controlled Substance. On November 29, 2015, Patrick O'Neil was charged with Drug Trafficking, Marijuana. Mr. O'Neil was convicted of these crimes on August 15, 2016." (R., p. 10.) By "these crimes" Ms. Myler apparently meant the two counts of Delivery of a Controlled Substance, of which O'Neil was convicted on August 15, 2016 in the underlying criminal case. (R., pp. 51-54.) O'Neil was charged with trafficking in marijuana, just as Ms. Myler states, but it appears that that charge was dismissed by the prosecutor in January of 2016. iCourt Portal, State v. O'Neil, Bannock County Magistrate Court, Case No. CR-2015-16958.

Again, though, the district court revoked O'Neil's probation based on violations to which he admitted and that occurred well after August 15, 2016. Even if the Report of Parole Violation mistakenly suggests that O'Neil was convicted of trafficking in marijuana at the same time he was convicted in the underlying criminal case, and even if, contrary to fact, there was some reason to believe, or even an allegation, that the district court considered the Report of Parole Violation, the statement has nothing to do with the revocation of O'Neil's probation. O'Neil's claim based on this allegation is likewise frivolous.

c. Withholding Information Regarding UA Testing

O'Neil relates an occasion on which he was drug tested at Ms. Myler's request, suggests that the occasion demonstrates that Ms. Myler was "unprofessional" and "vindictive[]" towards

him, and suggests that she perjured herself by "omitting." (R., pp. 8-9.) On the occasion in question, as related by O'Neil, he initially tested positive, and then tested "clean." (Id.) He does not explain when the occasion occurred, to whom Ms. Myler should have related it, or why. Nor does O'Neil cite any law on appeal to suggest that Ms. Myler "perjured" herself by failing to volunteer the information, at some unstated time and for some unstated reason. The allegation is wholly immaterial to the revocation of his probation. Whether Ms. Myler was "unprofessional" towards O'Neil on this occasion has nothing to do with his admitted probation violations, nor does Ms. Myler's attitude toward O'Neil on this occasion in any way mitigate those violations or suggest that the revocation of his probation was not warranted. Though nothing in the account suggests that Ms. Myler was unprofessional or vindictive towards O'Neil on this or any other occasion, whether she was or not is immaterial to the revocation of his probation.

d. Statement Regarding Meetings To Establish Social Security Benefits

Finally, O'Neil alleges that Ms. Myler made a misrepresentation regarding his attempts to secure Social Security benefits. (R., pp. 13-14.) He quotes Ms. Myler as stating that: "'I set up many appointments for [O'Neil] to actually attend to our payee through Gateway to get social security set-up because he didn't have it set-up at all.'" (R., p. 13 (quoting R., p. 15 (Tr., p. 40, Ls.10-16)).) According to O'Neil, Ms. Myler did make an appointment for him to establish Social Security benefits, but he was told when he attended that the appointment was premature. (Id.) There is some inconsistency between Ms. Myler's statement and his own only if O'Neil is read as asserting that Ms. Myler made one and only one appointment for him to establish his Social Security benefits, and even then the alleged misrepresentation involves only the number of appointments she made for him. (Id. (claiming that Ms. Myler made "one appointment," while quoting Ms. Myler as stating that she made "'many appointments'").)

O'Neil does not explain how the number of appointments Ms. Myler arranged for him to establish Social Security benefits is in any way relevant to the district court's decision to revoke his probation. According to O'Neil, his counselor at Wood Court, Tazmin Cleaver, testified "at length" that "Wood Court was a bad fit" for him, that they "weren't ready for [him]," and he "was not appropriately medicated for more than 75% of time in Wood Court." (R., p. 19.) That is, O'Neil apparently attempted to argue that his probation violations were mitigated, or that they did not warrant revocation of his probation, because of alleged inadequacies at Wood Court, including the failure to ensure he was adequately medicated. As reflected in the short portion of a transcript in the record, the district court's interest in O'Neil's Social Security benefits concerned whether the benefits could have been used to pay for his medications. (R., p. 15 (Tr., p. 40, Ls.17-25).) Ms. Myler responded that she did not know and turned her attention to other means by which O'Neil could have secured his medications. (Id.)

At best, then, O'Neil's Social Security benefits were relevant as a potential alternative means by which O'Neil could have secured his medications. But Ms. Myler specifically stated that she did not know whether they could have been used in that way. No reasonable person with adequate means would have been willing to retain counsel to investigate a post-conviction claim based on the allegation that, while Ms. Myler stated that she made multiple appointments for O'Neil to establish Social Security benefits, she in fact made only one such appointment. That is particularly so when the Social Security benefits were at best tangentially related to the probation violations.

e. Allegation That The Prosecutor Presented False Testimony

O'Neil claims that the "'Prosecutor used false testimony that he/she knew or had reason to believe was false. (by allowing Myler to say whatever she felt instead of what she knew).'"

(Appellant's brief, pp. 15-16 (quoting R., p. 19).) The only allegations of "false testimony" are those discussed above. As discussed above, none of them provides a basis for post-conviction relief. But for the alleged misrepresentation regarding meetings to establish Social Security benefits, they are wholly unrelated to the disposition hearing or the revocation of O'Neil's probation. Even that allegation is only tangentially related to the disposition hearing, is immaterial to the district court's determination to revoke O'Neil's probation, and does not show the possibility of a valid claim.

O'Neil's allegation that the prosecutor "had reason to believe" that Ms. Myler made misrepresentations is also conclusory and implausible. See Grant, 156 Idaho at 606, 329 P.3d at 388 (holding that conclusory allegations were properly dismissed as failing to raise even the possibility of a valid claim). The prosecutor had no reason to know that the first three representations were even made, much less that they were misrepresentations: two occur in a Report of Parole Violation that there is no reason to believe would have been before the district court or the prosecutor, while another involves Ms. Myler "omitting" to provide certain information regarding an occasion on which O'Neil passed a drug test, which occasion was not (and there is no reason to believe should have been) addressed at the disposition hearing. The final instance of allegedly "false testimony" concerned only the inconsequential issue how many appointments Ms. Myler attempted to make to help O'Neil secure Social Security benefits, and there is nothing to suggest that the prosecutor knew or should have known that she made one appointment and not several.

2. Allegation That Prosecutor Withheld Information Regarding Wood Court

O'Neil argues that his affidavit raises the possibility of a valid claim because, "Mr. O'Neil's petition and the supporting affidavits supplied information that there was no exclusive

medical provider for Wood Court, and he was not appropriately medicated in most of his time in Wood Court." (Appellant's brief, pp. 17-18.) He claims that "prosecution witheld [sic] fact that upon my entry into program there was no exclusive medical provider for participants and when there was talk of it the first place spoke of (before free clinic) failed to make successful agreement with Wood Court." (R., p. 21 (verbatim). See also R., p.20 ("Myler spoke of having free clinic as Wood Court provider, she and prosecution both knew upon my entry into program there was only talk of exclusive provider. So I was left with no help but later received 2 of 5 meds from free clinic as that was all they would do for me.").)

The complaint here seems to be that, prior to his entrance into the Wood Court program, there was "talk" (by some unnamed person or people) of access to an "exclusive medical provider," which talk turned out to be inaccurate when he entered the program. So read, the allegation does not concern the revocation of O'Neil's probation, but is directed to his plea agreement, sentencing, and/or placement in probation. O'Neil appears to believe that his placement in a diversionary program required access to an "exclusive medical provider," which it did not have. The suggestion is that he did not get the benefit of his plea agreement, or someone reneged on a promise regarding his probation, because he did not have such access. If that is O'Neil's allegation, the complaint has nothing to do with the revocation of his probation and is an untimely attack on his conviction and sentence.

Alternatively, O'Neil might be read as alleging that, quite apart from any representations regarding the Wood Court program made prior to his entry into that program, the prosecution withheld certain information at the disposition hearing regarding alleged deficiencies in the program, which deficiencies would have mitigated his probation violations, making revocation of

his probation unjustified. If that is the allegation, it conflicts directly with the record and is unsupported by any case law.

So understood, O'Neil is most charitably read as asserting that the prosecutor committed a Brady violation. "The United States Supreme Court held in *Brady v. Maryland*, [373 U.S. 83, 87 (1963),] that suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material to either the guilt or punishment of the accused, regardless of the good faith or bad faith of the prosecution." Thumm v. State, No. 45290, 2019 WL 848061, at *14 (Idaho Feb. 22, 2019). See also State v. Ward, 135 Idaho 68, 72, 14 P.3d 388, 392 (Ct. App. 2000) ("A defendant's due process rights are violated where the prosecution fails to disclose exculpatory evidence that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). "Evidence is material for purposes of a due process analysis if there is a reasonable probability that disclosure of the undisclosed evidence would have resulted in a different outcome in the proceeding." Thumm, 2019 WL 848061, at *14. See also State v. Lankford, 162 Idaho 477, 503, 399 P.3d 804, 830 (2017) ("'Reasonable probability of a different result is shown when the suppression undermines confidence in the outcome of the trial." (internal quotation omitted)).

But O'Neil does not argue or cite any case law to suggest that Brady applies in the context of a probation revocation hearing. See, e.g., United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997) (noting that appellant "cited no authority for applying *Brady* to a probation revocation proceeding and there is law to the contrary"); United States v. Nix, No. 208CR00283RCJPAL6, 2017 WL 2960520, at *2 (D. Nev. July 11, 2017) (holding that "while *Brady* applies to prosecutors in the guilt phase of criminal proceedings, the Probation

Office is not a prosecutor and supervised release revocation hearings are not criminal prosecutions" (internal quotation marks omitted)).

Even if Brady does apply in the context of a probation revocation hearing, the allegations in O'Neil's petition do not raise the possibility of a valid Brady claim.

Any alleged inadequacies in the Wood Court program were as available, in fact, more available, to O'Neil than to the prosecutor. The prosecutor cannot have improperly withheld information that O'Neil possessed. See Thumm, 2019 WL 848061, at *14 ("Thumm cannot establish a *Brady* violation since the defense was aware of the existence of the exculpatory evidence and had the ability to obtain it, because under such circumstances, the evidence cannot be considered to have been 'suppressed' by the State.").

In fact, O'Neil himself claims that the alleged inadequacies of Wood Court were in fact raised by him before the district court. He alleges that Tazmin Cleaver, his counselor at Wood Court, addressed the court "at length" and stated that "Wood Court was a bad fit" for him, that they "weren't ready for [him]," and he "was not appropriately medicated for more than 75% of time in Wood Court." (R., p. 19.) O'Neil also addressed the district court. (R., p. 63.) While only a small portion of the transcript from the disposition hearing is in the record, even that small portion shows that O'Neil discussed his dissatisfaction with Wood Court. (R., p. 15 (Tr., p. 37, L.2 – p. 39, L.12).) The prosecution could not have "withheld" information from the district court when O'Neil himself presented that information to the district court.

Nor is there a reasonable probability that disclosure of the allegedly undisclosed evidence would have resulted in a different outcome in the proceeding. That is obviously so because, as just noted, the allegedly undisclosed evidence *was* presented to the district court by O'Neil. The district court nevertheless revoked O'Neil's probation, re-instated the underlying sentence, and

the Court of Appeals affirmed. State v. O'Neil, Unpublished Opinion No. 640 (Idaho App. Nov. 8, 2017).

D. O'Neil's Allegations Cannot Be Reimagined As Possibly Valid Claims For Ineffective Assistance Of Counsel

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999).

O'Neil argues on appeal that he "allege[s] facts raising the possibility of a valid claim that counsel was ineffective for not addressing Officer Myler's lies during her comments or her bias against Mr. O'Neil, or for not addressing the prosecution's use of false testimony or withholding of favorable information." (Appellant's brief, p. 18.) For two reasons, that argument fails.

First, as O'Neil acknowledges, he does not allege that his counsel was ineffective, that his counsel failed to do those things, or that the failure was prejudicial. (Appellant's brief, p. 18 ("Even though Mr. O'Neil did not raise those particular ineffective assistance of counsel claims

in his petition, he may not have raised them because he, as a pro se petitioner without legal training, was unable to properly articulate those claims.").) He argues that, in light of his pro se status, this Court should ignore the absence of any allegations of ineffective assistance and read those such claims into his petition. (Id.) It is clear, though, that O'Neil knows perfectly well how to allege ineffective assistance of counsel. After his conviction in 2011 for grand theft by possession of stolen property, O'Neil filed a pro se petition for post-conviction relief and motion for appointment of counsel. O'Neil v. State, Opinion No. 40120, 2013 WL 6094343, at *1 (Idaho App. Nov. 20, 2013). That petition was summarily dismissed, and his motion for appointment of counsel denied, because his allegations were conclusory, though they asserted ineffective of counsel. Id. at *5-6 (quoting O'Neil's petition as alleging: "'My counsel was ineffective for entering into an agreement/stipulation for restitution without my knowledge or consent.'"). This is not a case in which a pro se petitioner attempted to assert a claim for ineffective assistance but failed to include some technical pleading requirement; it is a case in which the petitioner made no attempt to assert the claim at all. For all O'Neil says in his petition, his counsel might well have addressed Ms. Myler's alleged bias against him and/or the prosecution's alleged "withholding" of evidence at the disposition hearing.

Next, for the reasons discussed above, even if the Court does read O'Neil's petition as somehow asserting an ineffective assistance of counsel claim, such a claim is not possibly valid.

With respect to the allegation that his attorney was ineffective for failing to address the "withholding" of information by the prosecutor, the only information allegedly withheld involves the supposed inadequacies of Wood Court. (R., p. 21.) O'Neil's own allegations reflect that his attorney put on evidence regarding those alleged inadequacies. (R., p. 19.) Because O'Neil's

attorney presented evidence regarding the alleged inadequacies of Wood Court, he cannot be ineffective for failing to ensure that those alleged inadequacies were before the district court.

As for the alleged misrepresentations by Ms. Myler, as well as her alleged "bias" against O'Neil, any failure by his attorney to address them was a reasonable, tactical choice in light of their irrelevance to the disposition hearing. State v. Yakovac, 145 Idaho 437, 447, 180 P.3d 476, 486 (2008) (holding that "[t]he decision to impeach a witness is a tactical decision," as is "the decision of what evidence should be introduced at trial," resulting in a "'strong presumption' that the decision fell within the acceptable range of choices available to trial counsel" (quoting State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999)). "This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

Again, O'Neil admitted that he violated his probation by testing positive for methamphetamine on six occasions, by using drugs, by missing at least one appointment for drug testing, and by being discharged from the Bannock County Diversionary Court as a result. (R., pp. 57, 62.) The district court based its determination to revoke his probation and re-instate his underlying sentence on those admissions (R., p. 63), which decision the Court of Appeals affirmed, State v. O'Neil, Unpublished Opinion No. 640 (Idaho App. Nov. 8, 2017). None of the alleged misrepresentations, nor the vague allegation that Ms. Myler was biased against O'Neil, in any way cast doubt on those admissions or mitigate the admitted probation violations. Assuming, though O'Neil does not allege, that O'Neil's attorney was aware of the alleged misrepresentations and of O'Neil's view that Ms. Myler had a "bias" against him, but chose not

to address them, that decision was squarely within the acceptable range of choices available. See Fodge v. State, 125 Idaho 882, 887, 876 P.2d 164, 169 (Ct. App. 1994) (holding that counsel was not ineffective for failing to submit polygraph results at sentencing because the results were not relevant to sentencing).

Finally, and for the same reasons, O'Neil cannot show that his counsel's tactical decisions were prejudicial, even if they were deficient. There is no reasonable probability that the district court would have decided not to revoke O'Neil's probation if only it had heard O'Neil's vague allegations that Ms. Myler was biased against him, that she made two misstatements entirely unrelated to his probation violations in a document the court did not review, and that she made only one appointment for him to establish his Social Security benefits rather than several. The information is simply irrelevant to the probation revocation, which was based on O'Neil's admitted probation violations.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 13th day of June, 2019.

/s/ Andrew V. Wake
ANDREW V . WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of June, 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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AVW/dd