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IN THE SUPREME COURT OF THE STATE OF IDAHO

CUC PHUOC HO,	)	
	)	No. 44415
Petitioner-Respondent,	)	
	)	Blaine Co. Case No.
vs.	)	CV-2016-294
	)	
STATE OF IDAHO,	)	
	)	
Respondent-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's order granting Cuc Phuoc Ho's petition for post-conviction relief. The district court erroneously granted Ho relief on his untimely, unverified post-conviction petition.

Statement Of Facts And Course Of Proceedings

In 2004, in Case No. 2004-962, Ho pled guilty to distribution of marijuana and possession of a controlled substance (cocaine). (See R., p.4; see also Exhibit 3, Appendix H[1].) On October 4, 2004, the court entered a withheld judgment, imposed 60 days in jail, and placed Ho on probation for seven years. (R., p.5.) Ho did not appeal. (See Exhibit 3, Appendix D, pp.6-7; see also R., p.5 ¶ 5.) Three years later, on October 5, 2007, Ho filed a motion to set aside his pleas and enter dismissal pursuant to I.C. § 19-2604. (Exhibit 3, Appendix A.) That motion was never set for hearing, nor ruled upon by the district court. (See Exhibit 3, Appendix D, p.7.) Ho filed a similar motion on May 25, 2012, which the district court granted on June 14, 2012. (Exhibit 3, Appendices B, C.) Ho did not appeal. (See Appendix D, p.7.)

On February 11, 2013, in Blaine County Case No. 2012-2219, Ho pled guilty to unlawful possession of a firearm in violation of I.C. § 18-3316. (Exhibit 1, p.3, Ls.6-7, p.9, L.16 – p.10, L.10, p.11, L.2 – p.31, L.1.) The factual basis for that charge was that Ho, on May 17, 2012, possessed two firearms knowing he

had previously been convicted of two felonies. (Exhibit 1, p.9, Ls.16-23.) On April 16, 2013, the court imposed a unified four-year sentence, with two years fixed, on the unlawful possession charge, but suspended the sentence and placed Ho on probation. (Exhibit 3, Appenix F.)

On June 20, 2016, Ho, with the assistance of counsel, filed an untimely, unverified petition for post-conviction relief raising three ineffective assistance of counsel claims. (R., pp.4-8.) Specifically, Ho's petition states:

> (a) [Counsel] [f]ailed to fully inform [Ho] of the severe immigration consequences of pleading guilty to being a Felon in Possession of a Firearm, and that he would lose his 30 year United States Residency, would be considered an aggravated felon in Immigration proceedings making him ineligible for bond, and that he would not be able to plead any form of relief as a result of the conviction and would be deported.
>
> (b) After [Ho's] prior felony conviction had been dismissed, and his civil rights had been restored, Council [sic] advised [Ho] to plead guilty to being a Felon in Possession of a Firearm, even though this charge should have been dropped when [Ho's] previous felony conviction was dismissed.
>
> (c) Prior counsel filed a Motion to Dismiss in October of 2007 pursuant to a Withheld Judgment entered in 2004, after [Ho] was successfully discharged from probation and had completed all the terms and conditions of his conviction, but never set the matter for hearing. As a direct result, [Ho] received a conviction of being Unlawfully in Possession of a Firearm.

(R., p.7 (capitalization original).)

Ho requested relief in the form of withdrawal of his guilty plea in the 2012 case, "a retroactive grant of a Withheld Judgment and Dismissal in CR-2004-962

---

[1] Exhibit 3 includes several attachments designated as different exhibits. In order to avoid confusion with the exhibits admitted at the post-conviction hearing, the state will refer to the attachments as "Appendix" rather than "Exhibit."

to October 5, 2007." (R., p.8.) "In the alternative," Ho requested to withdraw his guilty plea "due to ineffective assistance of counsel for failing to follow through with the Motion to Dismiss pursuant to the Withheld Judgment, and for failing to adequately advise [him] of the severe immigration consequences of pleading guilty to the charge in CR-2012-2219." (R., p.8 (capitalization original).) Ho purported to support his petition with "the documentation and briefs submitted to th[e] court with [his] Motion to Withdraw his Guilty Plea, and Motion to Dismiss . . . currently pending before th[e] court," but those documents were not filed in the post-conviction case. (R., p.8 (capitalization original).)

The same day Ho filed his post-conviction petition, he also filed a "Motion for Expedited Hearing" on his petition. (R., pp.11-12.) The basis for Ho's motion was that he "ha[d] been in Immigration custody on account of the conviction at issue[[2]] since March 11, 2016, without the possibility of bond," and he was "set for an Immigration hearing to determine removability on July 14th, 2016." (R., p.11.) Ho further argued that "[w]ithout an order withdrawing [his] guilty plea, the government [would] most likely be able to establish removability in [his] case, and subject him to a removal order from the United States" "on account of a conviction that should never have happened." (R., pp.11-12.) The district court granted Ho's Motion for Expedited Hearing the same day, "finding good cause" to shorten the "statutory fourteen (14) day notice requirement for Motions" to "permit a hearing on [Ho's] Petition for Post Conviction Relief," and set a hearing

[2] Ho did not identify what the "conviction at issue" was.

for June 23, 2016 – just three days after Ho filed his petition.[3] (R., p.9 (capitalization original).)

At the expedited hearing, the district court stated it was "not a good situation" if Ho was deported while trying to litigate his petition, but it agreed to "give the State more time," although it would "short cut it." (Tr., p.9, Ls.14-24, p.14, Ls.6-13.) The court also offered to "sign an order that says this is what it looks like that [Ho could] use to take to Immigration and ask them not to deport him or not to make any hearing -- make any determinations regarding his removability" while the court "got to the bottom of this as quickly as possible." (Tr., p.15, Ls.10-15.) The court then advised post-conviction counsel[4] on what he could include in the order for the court's signature, and explained it "would never do this in any other case for any other reason other than to try to keep Mr. Ho from being deported" while "they got to the bottom of it." (Tr., p.15, L.16 – p.16, L.10; see also p.16, Ls.18-21 ("Like I say, I would never do this in any other case. It's kind of like getting a preliminary injunction . . .."), p.17, Ls.11-21.) The

[3] It is unclear on what basis the district court believed the "statutory fourteen (14) day notice requirement for Motions" (R., p.9) applies to a petition for post-conviction relief. As noted by the state on the expedited hearing date, post-conviction petitions are governed by the Uniform Post-Conviction Procedure Act ("UPCPA"), I.C. § 19-4901 et seq., which affords the state 30 days to respond to a petition by answer or motion, I.C. § 19-4906(a). (Tr., p.6, Ls.12-20.) It is also unclear what the purpose of the "expedited hearing" was as Ho did not file a motion for summary dismissal as authorized by I.C. § 19-4906(c). It appears the purpose of the hearing was to have the court agree that Ho was entitled to relief because the state had refused to "stipulate" to it. (R., p.12.)

[4] Ho was not present at the hearing. In fact, Ho never appeared before the district court in this case.

court, however, stated it did not "want to be accused of prejudging this case," despite its comments prejudging the case.[5] (Tr., p.16, Ls.15-16.)

The court then inquired whether there was "any discovery to do," although Ho never filed a motion for discovery. (Tr., p.18, L.6.) The prosecutor responded that he "intended to do some discovery" in terms of reviewing emails related to Ho's underlying criminal cases. (Tr., p.18, Ls.16-23.) The court then advised that "[s]omebody obviously needs to talk to" trial counsel, and commented that he doubted whether "Mr. Ho has anything to present on this, [but] maybe he does." (Tr., p.19, Ls.5-9.) The court gave "three weeks to complete discovery." (Tr., p.20, Ls.20-21.) The court also refused to give the state the opportunity to file a motion for summary dismissal, stating: "I'm not giving you time to file for a summary [dismissal] -- if you've got a provable defense or something, we'll take it up at hearing. We're going straight to hearing" because Ho "doesn't have time to give [the state] time to argue for a summary dismissal." (Tr., p.21, Ls.20-25.) The court set the petition for an evidentiary hearing for July 28, 2016. (Tr., p.24, Ls.15-16.)

---

[5] For example, the district court acknowledged that "maybe" there would be evidence the state could "dig up, that might change things," but expressed its opinion that "the chances of doing that are not good" because defense attorneys "fall on their sword" rather than letting "something bad befall" their clients. (Tr., p.10, Ls.15-23.) The court wished the state "[g]ood luck . . . getting evidence out of a lawyer to hang his client," even though it assured the state it was not "ruling on it" yet; the court was just commenting on "what appears to be the evidence so far," although no evidence had been presented in this case at that time. (Tr., p.10, L.13 – p.11, L.6.) Ironically, the court then subsequently proffered several explanations why counsel's failure to pursue the I.C. § 19-2604 motion may not have been deficient. (Tr., p.12, L.14 – p.13, L.3.)

Consistent with the court's direction at the expedited hearing, the court entered a "Minute Entry and Preliminary Order," which stated, in part:

> . . . [A]fter review of the facts and evidence presented to this point, this Court finds that there have been substantial questions raised by Petitioner's Petition for Post Conviction Relief, and these facts are likely to be established by the evidence. This Court further believes at this time that there is a substantial likelihood that the Petitioner will be granted Post Conviction relief, although the Court has not heard the state's evidence.
>
> This matter has been set for a final hearing on July 28, 2016, and this Court will move forward with all due haste to make a prompt and appropriate ruling in this case. This Court would respectfully request that the Immigration Court not make a ruling on removability as to this charge until final order [sic] is issued in this matter.

(R., pp.18-19.)

On July 12, 2016, an affidavit from trial counsel, Michael Kraynick, was filed with the court, as well as a separate document captioned "Evidence in Support of Post Conviction Relief," which reads: "COMES NOW, CUC PHUOC HO, by and through his attorney, NATHAN D. RIVERA, and hereby submits the following evidence in support of Petitioner's Petition for post conviction relief." (R., pp.20-25.) The latter document does not expressly refer to the affidavit, or any other "evidence," but the file stamp indicates both were filed at the same time on the same date. (R., pp.20, 24.)

On July 26, 2016, the state filed an Answer asserting several defenses, including the statute of limitations, the failure to raise a genuine issue of material fact, the failure to verify the petition as required by I.C. § 19-4902(a), and the fact that the petition improperly sought relief from two separate criminal cases. (R., pp.27-28.) The state also filed a separate written objection to Ho's unverified

petition "commingling separate criminal cases into a single petition for post conviction" relief, and a motion for summary dismissal. (R., pp.31-33, 34-35.) Ho filed an "objection" to the state's answer and motion for summary dismissal and moved "to strike and/or dismiss" both on the basis that the answer and motion were "time bared [sic]" because they were not filed within 30 days, and because the motion was not filed sufficiently in advance of the hearing date.[6] (R., pp.41-43.)

At the evidentiary hearing, the court noted that it had the court clerk "dig up the file in [Ho's] 2004 case," after which the court made several comments based on that file which it characterized as "matter[s] of law," not facts that it needed to find. (Tr., p.37, L.19 – p.38, L.16.) The court then discussed its research on the requirements of I.C. § 18-310, which governs the right to possess a firearm, which led the court to conclude: "you know what, there's no way, I can't help him, it's too late, too bad." (Tr., p.38, L.22 – p.40, L.8.) But then, the court explained, it continued its research and "looked at 18-3316," and determined that Ho might be able to get relief. (Tr., p.40, L.9 – p.41, L.14.) Then, before hearing any evidence, the court stated:

> . . . So, Mr. Kraynick, you bring the damn motion before the Court. He wouldn't have been prosecuted at all under 18-3316. That's all it took. It is impossible for me not to find ineffective assistance of counsel. I think it's impossible. You can argue that nine ways from

[6] Although the caption of Ho's objection is styled, "State of Idaho v. Cuc Phuoc Ho," and includes one of Ho's criminal case numbers, the clerk apparently nevertheless filed the document in Ho's post-conviction case. (R., pp.2, 41-43.) The court advised Ho of the error on the date of the evidentiary hearing, at which time the court changed the case number to the post-conviction case. (Tr., p.28, L.19 – p.29, L.4.)

> Sunday. He let that motion sit there five years. He never noticed it for hearing.
>
> I see his current affidavit where he says -- he says my understanding of the Court's procedure and process at that time was that you could file a motion and just say if the other side doesn't object, then, Judge, you can enter it, you can enter the order.
>
> And, frankly, I'm going to make this clear for the record. Mr. Kraynick was -- I don't want to say famous for doing that, but he did it frequently. Other counsel would do it and it -- it -- it -- I don't know where they got the idea. But Mr. Kraynick, and I hate to do this to him, but he was an abuser of that. He would do that, and I would tell him in cases you can't do that, you can't file a motion and say if the other side doesn't object. What does that mean? If they don't object in twenty minutes? In two days? In fifteen days? In six months? I'm not going to calendar this and come back to it and see if the other side objected. You can't put a burden on them to object. You have to set it for hearing. He didn't.
>
> And I just know that this happened in other cases and, like I say, he wasn't the only one that did it. It would happen, and I would have the clerks tell the attorneys you don't get an order until I get a hearing. I'm not -- it's not up to me to see if the prosecutors object to these things.

(Tr., p.41, L.15 – p.42, L.20.)

The court then invited post-conviction counsel to testify, cautioning him that after he was done testifying, he would ask him if he made his "statements to the Court under penalty of perjury."[7] (Tr., p.48, L.24 – p.49, L.4, p.51, Ls.1-4.) As post-conviction counsel "testified," the district court occasionally interjected, including indicating when it "remembered" events from Ho's 2004 case. (Tr., p.53, L.19 – p.54, L.5.) As part of his "testimony," post-conviction counsel

[7] After post-conviction counsel completed his "testimony," the court, in fact, asked him: "Everything you just told me is subject to penalty of perjury." (Tr., p.65, Ls.1-2.) Post-conviction counsel answered: "Absolutely, Your Honor."

argued that verification was not "an issue in this case," because post-conviction counsel was "not relying on any statements by Mr. Ho," and Ho would not have "anything to add" because he is uneducated and "ignorant of the legal system." (Tr., p.58, Ls.11-17.) Post-conviction counsel further argued: "So we're not relying on anything as far as verification other than the record, which is already in the Court's possession, which the Court indicated is pretty conclusive, and then the affidavit of Mr. Kraynick which further solidifies that." (Tr., p.58, L.23 – p.59, L.2.) The court agreed that "it," presumably referring to the "record" in its possession and the affidavit, which was not yet in evidence, "len[t] itself to one conclusion," unless the state could produce evidence to rebut all of the non-evidence Ho had yet to present to support the claims in his petition. (Tr., p.59, Ls.3-13, p.60, Ls.18-21.) The court also stated:

> So what I can rule is that -- what I recited or what I can rule -- and this is the time set for an evidentiary hearing. And I know you have objections on the non-verification part of this, that nothing is verified. But everything that I ran forward is just based on the record. Mr. Ho, frankly, doesn't need to verify what's in the court file. I can look in the court file and I can see the date and time Mr. Kraynick filed a motion and I can see that it wasn't set for hearing and I can see that he said I'm waiting for the judge to -- or, you know, Judge, if there's no objection, enter this. And I can see that nothing happened for five years and I can see that he got arrested on the new charge and I can read the code and say, you know, under 18-310 and 18-3316 subparagraph (3), final discharge and expungement, pardon or setting aside -- quote, setting aside the conviction or other comparable procedure are two different things. What I just read is different than a final discharge.
>
> So if Mr. Kraynick would have -- the conclusion that I can get to is if Mr. Kraynick would have filed that motion, there's a substantial chance that he would have been granted relief any time

---

(Tr., p.65, L.3.) The state declined the court's invitation to ask post-conviction counsel any questions. (Tr., p.65, L.6.)

> if Mr. Kraynick would have -- I don't want to say filed that motion, if he would have brought it on for hearing, there's a substantial chance that Mr. Ho would have gotten relief before he was charged with that offense under 18-3316.
>
> Those things, to me, are givens unless there's some – and I would ask [the state], do you have any evidence?

(Tr., p.65, L.13 – p.66, L.16.)

The state responded that it "did not have any additional information to add," but it would "use their evidence to support the State's position," which position was that the court could not make "rulings on speculation" based on "what might have happened back in 2007" when the motion was filed and "utilized that as evidence to support [the court's] basis for" finding "ineffective assistance." (Tr., p.67, Ls.6-22.) The court agreed, but commented that "the failure to get [the motion] in front of [the court] is absolutely inexcusable." (Tr., p.67, L.23 – p.68, L.1; see also p.68, Ls.14-17 ("I certainly agree, it's not appropriate to make decisions based on speculation, but I'm pretty certain that it's ineffective assistance to never bring that motion before the Court.").) The state then noted the portions from Mr. Kraynick's affidavit regarding the practice with respect to such motions, which the court "slam[med] the door shut" on because "Mr. Kraynick's idea of what might have been okay and what might have been the practice of the Court [were] dead wrong" because "[i]t violates the rules." (Tr., p.68, L.18 – p.69, L.19.) The court, however, acknowledged that the practice did occur, but it "infuriated" the court. (Tr., p.70, Ls.4-5; see also, p.70, Ls.19-21 ("That was never my practice to allow that. I resisted that at every opportunity I ever had to say, no, you can't do that.").) The court then told the

prosecutor he could “argue about what he might have thought was the practice,” but the court was “aggravated” by it. (Tr., p.70, Ls.10-12.) And, the court explained that its practice was instead to sign orders on motions without a hearing only if the motion included the language, “I have contacted counsel for the other side, they have received a copy of this motion, they have expressed to me they have no objection.” (Tr., p.70, L.22 – p.71, L.6.) It appears this practice was permissible to the court because “woe be on to any attorney that ever deceives” the court (Tr., p.71, Ls.6-7), but Mr. Kraynick’s understanding of the court’s “practice” was flawed because Mr. Kraynick’s motion did not include the court’s preferred language (Tr., p.70, Ls.14-21, p.71, L.8 – p.72, L.8).[8] Accordingly, the court concluded, Mr. Kraynick’s misunderstanding of the court’s practice was “ineffective assistance.” (Tr., p.72, L.12.)

The state also asserted that Ho was not entitled to relief because there is no right to counsel on a post-judgment motion, such as a motion pursuant to I.C. § 19-2604, and because Ho’s petition was untimely. (Tr., p.72, L.13 – p.74, L.22.) At the conclusion of the hearing, the state moved to admit the exhibits apparently prepared by post-conviction counsel that counsel had not admitted. (Tr., p.95, L.20 – p.96, L.1.) Those exhibits included Exhibit 1, the transcript of Ho’s change of plea hearing in the 2012 case; Exhibit 2, the transcript of the hearing on Ho’s motion to withdraw his guilty plea in the 2012 case, which

[8] It also appears the court was willing to grant other motions without a hearing, or without giving the opposing party the opportunity to respond, as evidenced by its order granting an “expedited hearing” in this case, which was neither noticed for hearing nor included language that opposing counsel was contacted and had no objection. (R., pp.9-12.)

hearing was held on June 2, 2016; and Exhibit 3, a "packet of evidence in support of post-conviction relief." (Tr., p.5 (exhibit list); see also Exhibits 1, 2, 3.) Although the parties agreed to admit Kraynick's affidavit as well, it was apparently not admitted based on the court's belief that it did not need to be admitted because it was "in the record in this case." (See Exhibit 3; Tr., p.97, Ls.3-9.)

Following the evidentiary hearing, the court issued its written "Findings and Conclusions on Petition for Post-Conviction Relief" and a "Judgment" granting the following relief:

> 1) Mr. Ho's plea of guilty entered on February 11, 2013 to the charge of Unlawful Possession of a Firearm pursuant to Idaho Code § 18-3316 in Blaine County case no. CR-2012-2219 is hereby SET ASIDE AND WITHDRAWN.
>
> 2) Mr. Ho's conviction and sentence in Blaine County Case no. CR-2012-2219, entered and filed on the 16th day of April, 2013, is hereby VACATED.

(R., p.60 (capitalization original).)

The state filed a timely notice of appeal from the district court's Judgment. (R., pp.62-64.)

ISSUE

Because the district court was concerned that Ho would get deported if his petition was not adjudicated "with all due haste," the court held an expedited evidentiary hearing on Ho's untimely, unverified petition for post-conviction relief, which petition was based on two separate criminal cases, and was unsupported by an affidavit alleging the factual basis of any of Ho's claims. At the conclusion of the evidentiary hearing, at which the only evidence admitted were documents related to Ho's underlying criminal cases and post-conviction counsel's testimony regarding the status of immigration proceedings and his understanding of immigration law, the court entered a written decision and judgment setting aside Ho's guilty plea and vacating the judgment in Ho's 2012 case after concluding that Ho received ineffective assistance in his 2004 case. Did the district court err in considering any of the claims in Ho's untimely, unverified post-conviction petition, which was improperly based on two separate cases? Alternatively, did the district court err in concluding counsel was ineffective in Ho's 2004 criminal case in relation to a post-judgment motion in which Ho was not entitled to counsel, and in granting relief in Ho's 2012 criminal case as a result of that finding?

ARGUMENT

The District Court Erred In Considering The Merits Of Any Of The Claims Raised In Ho's Untimely, Unverified Post-Conviction Petition That Improperly Alleged Error In Two Separate Underlying Criminal Cases; Alternatively, The Court Erred In Granting Ho Post-Conviction Relief

A. Introduction

In 2016, Ho filed a post-conviction petition alleging ineffective assistance of counsel in relation to his 2004 criminal case, in which he pled guilty to distribution of marijuana and possession of cocaine, and in relation to his 2012 criminal case, in which he pled guilty to unlawfully possessing a firearm. (R., pp.4-8.) In addition to alleging ineffective assistance of counsel in relation to two separate criminal cases, Ho's petition was untimely and unverified. (Id.) The district court rejected the state's request for dismissal of Ho's petition on these bases. (R., pp.54-57.) Application of the correct legal standards shows the district court erred in granting relief despite Ho's untimely defective petition.

B. Standard Of Review

This Court freely reviews the district court's application of the statute of limitation to a post-conviction petition. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (citing Freeman v. State, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992)). The interpretation of a statute is also a question of law subject to free review. State v. Lee, 153 Idaho 559, 561, 286 P.3d 537, 539 (2012).

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by

a preponderance of the evidence, the allegations on which his claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. The District Court Erred In Failing To Grant The State's Motion To Summarily Dismiss Ho's Untimely, Unverified Post-Conviction Petition

The district court erred in considering the merits of any of the claims in Ho's untimely, unverified petition in which Ho improperly sought relief in two separate criminal cases.

Idaho Code § 19-4902(a) provides, in relevant part:

> A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application may be filed at 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 a proceeding following an appeal, whichever is later. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.

Ho's post-conviction petition did not comport with any of these requirements. Ho's petition was not verified, nor did he swear to any of the "facts" alleged therein as being "true and correct." (R., pp.4-6.) Rather, the petition was signed by counsel and was unaccompanied by any affidavit from Ho with respect to the factual bases for his claims. (R., pp.4-6.) Despite the

verification requirement plainly stated in I.C. § 19-4902(a), the district court concluded "Ho did not need to verify his petition" because "the entire historical proceeding of this case is a matter of record." (R., p.54.) The district court relied on State v. Goodrich, 103 Idaho 430, 649 P.2d 389 (Ct. App. 1982), in support of this conclusion. (R., p.54.) The court's reliance on the Court of Appeals' opinion in Goodrich was improper because that opinion was vacated once the Idaho Supreme Court granted review. See State v. Goodrich, 104 Idaho 469, 660 P.2d 934 (1983). On review, the Supreme Court did not explicitly address whether Goodrich's unverified petition was a basis for dismissal. Although the Supreme Court found summary judgment in favor of Goodrich was proper because she "alleged" a genuine issue of material fact "requiring an evidentiary hearing to resolve," Goodrich, 104 Idaho at 472, 660 P.2d at 937, it did not hold, as the Court of Appeals did, that verification is not required if "[t]he application was based upon the record of court proceedings." Goodrich, 103 Idaho at 431, 649 P.2d at 390. Although a verified petition may not be a jurisdictional prerequisite, the failure to verify a petition or provide an affidavit of facts in support of the petition should preclude a finding that there is a genuine issue of material fact warranting an evidentiary hearing.

"A claim for post-conviction relief will be subject to summary dismissal pursuant to section 19-4906 of the Idaho Code (I.C.) if the applicant has not presented **evidence** making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." DeRushe v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (emphasis added)

(quoting Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). This is true "even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible **evidence**, or the applicant's conclusions of law." DeRushe, 146 Idaho at 603, 200 P.3d at 1152 (emphasis added) (quoting State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008)). The district court cannot "dig" through the underlying criminal record and create a genuine issue of material fact for the petitioner. See Kantor v. Kantor, 160 Idaho 810, ---, 379 P.3d 1080, 1093 (2016) ("the district court's duties do not include the responsibility to provide Sondra with a better contract than the one she bargained for"). Rather, the petitioner must present evidence in his petition "making a prima facie case as to each essential element" of his ineffective assistance of counsel claims. Ho failed to do so. Indeed, Ho offered no evidence when he filed his petition. Although Ho later filed Kraynick's affidavit, that affidavit was inadequate to support Ho's claims that Kraynick was ineffective in either Ho's 2004 case, or his 2012 case. Consequently, the court should have summarily dismissed Ho's petition on this basis.

The district court also should have rejected Ho's pursuit of relief in a single post-conviction proceeding on claims that were based on two separate underlying criminal cases. (R., pp.7-8.) The plain language of I.C. § 19-4902(a) contemplates one petition in relation to one criminal case. This is evident in the statute's reference to the singular, "conviction." This is also logically true given the one-year statute of limitation and the issues that could have been raised on

direct appeal, which will typically be different for each case. This is certainly true with respect to the two underlying criminal cases that were the basis of Ho's single post-conviction petition.

In Ho's 2004 case, the district court entered a withheld judgment on October 4, 2004. (Exhibit 3, Appendix D, p.6.) Ho did not file an appeal from his 2004 judgment of conviction. (See id. at p.7; see also R., p.5 ¶ 5.) As such, any post-conviction petition in relation to the judgment entered in that case was due on November 15, 2005 – one year and 42 days after judgment was entered. I.C. § 19-4902(a); I.A.R. 14(a). Ho's 2016 post-conviction petition was not timely from Ho's 2004 judgment of conviction.

Ho's 2016 post-conviction petition was also not timely from the court's orders on any of the post-judgment motions Ho filed in his 2004 case. Those motions included the "Motion to Set Aside Guilty Plea & to Enter Dismissal Pursuant to I.C. §19-2604" that Ho filed on May 25, 2012. (Exhibit 3, Appendix B.) The court entered an "Order Granting Motion to Dismiss Case and Restore Civil Rights" on June 14, 2012. (Exhibit 3, Appendix C.) Ho did not appeal that order; likely because the order granted his motion. (See Exhibit 3, Appendix D, p.7.) However, if Ho wished to claim counsel was ineffective in his pursuit of that motion, he should have filed his post-conviction petition no later than July 16, 2013 (one year and 42 days after the order was entered). Ho failed to do so. His 2016 petition was untimely as it relates to any alleged ineffective assistance of counsel in Ho's 2004 case. At a minimum, Ho's allegations relevant to his 2004 case should have been dismissed on this basis.

Ho's post-conviction petition was also untimely as it relates to Ho's 2012 case. Ho entered his guilty plea in that case on February 11, 2013, and the court entered judgment on April 16, 2013. (Exhibit 1; Exhibit 3, Appendix D, p.2; Exhibit 3, Appendix F.) Ho did not appeal. (See Exhibit 3, Appendix D, p.2; see also R., p.5 ¶ 5.) Any post-conviction petition alleging ineffective assistance in relation to that case was, therefore, due no later than May 28, 2014 – one year and 42 days after judgment was entered. Ho's 2016 post-conviction petition was not timely from the judgment of conviction entered in Ho's 2012 case.

Because Ho's post-conviction petition alleging he received ineffective assistance in his 2004 and 2012 cases was not timely filed, the district court should have dismissed the petition on this basis even if it was willing to overlook the pleading defects in the petition. The court, however, rejected the state's statute of limitation defense, stating:

> As to the claim that Mr. Ho's petition is time-barred, this Court can make the required finding pursuant to I.C. § 19-4901(b) that, on the basis of a substantial factual showing that is evident in the court record, the asserted basis for relief (ineffective assistance of counsel) raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Of course, we now have the benefit of hindsight, but hindsight reveals a manifest error of counsel that never caused harm until immigration authorities sought to deport Mr. Ho. Mr. Ho never knew of this error at the time he entered his plea, or during the time for an appeal of this case, although his counsel did. The intervention of immigration is a collateral consequence of Mr. Ho's plea, to be sure, but Mr. Ho would never have been subject to prosecution for the charge in the first place if counsel had completed the duty he undertook. Although the error occurred many years ago, the consequences have not been felt until recently. The statute requiring actions to be filed within a certain time limit should not be used to defeat a claim where the harmful effects of ineffective assistance of counsel are completely unknown and are not felt for many years.

(R., p.54 (emphasis original).)

The district court's "finding pursuant to I.C. § 19-4901(b)" is irrelevant to the post-conviction statute of limitation. Section 19-4901(b), I.C., governs claims that could have been raised on direct appeal, but which are "forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing . . . that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." This section does not serve to modify or toll the one-year statute of limitation set forth in I.C. § 19-4902.

"In Idaho, equitable tolling of the statute of limitation for filing a post-conviction petition has been recognized" in two circumstances: (1) "where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials"; and (2) "where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction." Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009) (citations omitted). Neither of these circumstances apply to Ho.

The Idaho Supreme Court has also stated that, in cases involving "important due process issues," equitable tolling of the post-conviction statute of limitation may be appropriate. Rhoades v. State, 148 Idaho 247, 251, 220 P.3d 1066, 1070 (2009) (citations omitted). However, even if tolling is permitted to allow consideration of an "important due process" claim, the claim "must still be

pursued in a timely fashion," meaning within a reasonable time from when the claim is discovered. Rhoades, 148 Idaho at 251, 220 P.3d at 1070 (citing Charboneau v. State, 144 Idaho 900, 174 P.3d 870 (2007)). Thus, for example, tolling may be warranted in a case involving an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963), until a reasonable time after the factual basis of the alleged misconduct is discovered. See Rhoades, 148 Idaho at 251, 220 P.3d at 1070. On the other hand, if the factual basis of a claim is known, or should have been known, within the limitation period, tolling is not appropriate. Id. at 253, 220 P.3d at 1072. Ineffective assistance of trial counsel is an example of a claim that "should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition." Id. (quotations and citations omitted). The date immigration authorities pursue deportation is irrelevant to whether Ho should have known deportation was a potential consequence of his actions. There is no authority to support the district court's "when the consequences are felt" exception to the post-conviction statute of limitation.

Finally, the district court also rejected the state's assertion that Ho's claim that counsel was ineffective for failing to request a hearing or ruling on the I.C. § 19-2604 motion filed on October 5, 2007, was not cognizable because Ho had no right to the effective assistance of counsel on a post-judgment motion. (R., pp.7, 54-55.) "Where there is no right to counsel, there can be no deprivation of effective assistance of counsel." Murphy v. State, 156 Idaho 389, 395, 327 P.3d 365, 371 (2014). This principle applies to post-judgment motions like Ho's I.C. §

19-2604 to set aside the judgment. See State v. Hartshorn, 149 Idaho 454, 458, 235 P.3d 404, 408 (Ct. App. 2010) (Because "a post-judgment hearing upon a motion to withdraw a guilty plea is not a critical stage for purposes of the Sixth Amendment," "Hartshorn has failed to show that he was deprived of his Sixth Amendment right to counsel at the post-judgment hearing on his motion to withdraw his guilty plea." The district court, however, rejected this legal principle in favor of a principle that has no application to an ineffective assistance of counsel claim. Specifically, the district court relied on Baccus v. Ameripride Services, 145 Idaho 346, 179 P.3d 309 (2008), and the statement therein that "a legal duty may arise if 'one voluntarily undertakes to perform an act, having no prior duty to do so,'" he or she must "perform the voluntarily-undertaken act in a non-negligent manner." (R., p.55 (quoting Baccus, 145 Idaho at 350, 179 P.3d at 313).) Baccus is a civil tort case that recites general negligence standards that have no relevance or bearing on an ineffective assistance of counsel claim raised under the Sixth Amendment. The district court's desire to grant Ho relief does not allow it to ignore the law that applies to the claims before it. See Kantor, 160 Idaho at ---, 379 P.3d at 1090 ("The district judge's actions in this case reflect the recognition of the bounds of judicial authority.").

The district court erred in refusing to dismiss Ho's untimely, unverified post-conviction petition that was unsupported by evidence making a prima facie case that Kraynick was ineffective in relation to Ho's 2004 case, or his 2012 case.

D. <u>Even If The Court Did Not Err In Failing To Summarily Dismiss Ho's Untimely, Unverified Petition, It Erred In Granting Any Relief On The Petition</u>

Even if this Court concludes that the district court did not err in failing to summarily dismiss Ho's untimely, unverified petition, the district court erred in granting any relief based on the evidence presented and the applicable law.

Ho presented three ineffective assistance of counsel claims in his petition: (1) ineffective assistance of counsel for "fail[ing] to fully inform [him] of the severe immigration consequences of pleading guilty to being a Felon in Possession of a Firearm," including "that he would lose his 30 year United States Residency, would be considered an aggravated felon in Immigration proceedings making him ineligible for bond, and that he would not be able to plead any form of relief as a result of the conviction and would be deported"; (2) ineffective assistance of counsel for "advis[ing]" him "to plead guilty to being a Felon in Possession of a Firearm, even though this charge should have been dropped when [his] previously felony conviction was dismissed"; and (3) ineffective assistance of counsel in the 2004 case for failing to schedule a hearing on the I.C. § 19-2604 motion filed on October 5, 2007. (R., p.7 (capitalization original).) Ho was not entitled to relief on any of these claims.

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. <u>Strickland v. Washington</u>, 466 U.S. 668, 687-88 (1984); <u>State v. Charboneau</u>, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). "[F]ailing to prove either prong individually or both will defeat a claim of ineffective assistance of

counsel." Icanovic v. State, 159 Idaho 524, 529, 363 P.3d 370, 375 (2015). 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, 244 (Ct. App. 1999). The United States Supreme Court has recently reiterated:

> Surmounting *Strickland*'s high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.

Harrington v. Richter, 131 S.Ct. 770, 788 (2011) (citations and quotations omitted).

1. The District Court Employed An Erroneous Prejudice Standard In Concluding Counsel Was Ineffective In Failing To Inform Ho Of The Consequences Of Pleading Guilty To Unlawful Possession Of A Firearm

According to Ho's petition, counsel was ineffective for failing to inform him of the immigration consequences associated with pleading guilty to unlawfully possessing a firearm, including the failure to tell Ho "that he would lose his 30 year United States Residency, would be considered an aggravated felon in

Immigration proceedings making him ineligible for bond, and that he would not be able to plead any form of relief as a result of the conviction and would be deported." (R., p.7.) Assuming Kraynick's affidavit is properly considered evidence despite the district court's failure to admit it at the evidentiary hearing, that affidavit indicates that counsel advised Ho he did not "believe that he would have any issues with pleading guilty to the charge because he was a refugee, did not have a passport, and Immigration did not make any contact with Mr. Ho after his 2004 conviction, which was much more serious, or when he was arrested on the gun charge." (R., pp.22-23.) Kraynick further averred that he "believed there must have been a special arrangement for refugees that might preclude his removal" and that since the immigration authorities did not "come after [Ho] on the 2004 conviction, and it ha[d] been well over 10 years," he "advised Mr. Ho that it was unlikely [that] immigration would take issue with the 2012 charge." (R., p.23.) The transcript of Ho's guilty plea in the 2012 case, which was admitted as evidence at the post-conviction evidentiary hearing, reflects that the court advised Ho: "By pleading guilty to this charge, it can affect your ability to remain in the United States. It might result in your deportation from the United States. And if you are deported from the United States, it might prevent or limit your re-entry into the United States." (Exhibit 1, p.16, Ls.18-22.) Ho stated that he understood. (Exhibit 1, p.16, Ls.23-25.) The court further advised Ho: "You understand those things are out of my control? I have no control over immigration issues." (Exhibit 1, p.17, Ls.3-7.)

Post-conviction counsel, however, "testified" at the evidentiary hearing that Kraynick's advice was wrong, although he did not testify that the court's advisements were incorrect. (See generally Tr., pp.51-65.) Post-conviction counsel's testimony was based on his "understanding of the code and the law." (Tr., p.65, Ls.8-11.) The district court found that counsel's performance was deficient in relation to his immigration advice because the "advice counsel gave was wrong." (R., p.57.) But, the court did not find prejudice as a result of that advice. The court instead concluded "it is difficult to say with any certainty that the outcome of the firearms case would have been different if Mr. Ho had been given correct advice, (because Mr. Ho might have had limited choices on how to proceed with the firearms case at the time of the plea)[.]" (R., p.57.) This "difficult[y]" is undoubtedly the result of the lack of any evidence that Ho would not have pled guilty but for the erroneous immigration advice. As noted, Ho did not allege such prejudice in his petition, nor did he testify at the post-conviction hearing. Such evidence was necessary for Ho to establish prejudice on this claim. Icanovic, 159 Idaho at 529, 363 P.3d at 370 (prejudice in relation to a claim that counsel was ineffective in relation to immigration consequences requires the defendant to show a "reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial") (citations, brackets, and quotations omitted). Because Ho failed to meet his burden of proof, the district was required to deny relief.

Undeterred by the lack of evidence to support a finding that Ho was prejudiced by Kraynick's immigration advice, the district court formulated its own

prejudice requirement – "that the wrong advice at the time of the plea prevented any inquiry by any other independent counsel into what had occurred in the 2004 case, and prevented any discovery of counsel's prior error in the 2004 case." (R., p.57.) This is not the law, and the district court erred in granting relief on this claim.

2. To The Extent The Court Granted Relief On Ho's Claim That Counsel Was Ineffective Because Counsel Correctly Advised Ho That The I.C. § 19-2604 Order In Ho's 2004 Case, Entered After Ho Committed The Crime Of Unlawful Possession, Was Not A Defense, The District Court Erred

Ho's second ineffective assistance of counsel claim was based on counsel's advice to plead guilty to the unlawful possession of a firearm after Ho's "prior felony conviction had been dismissed, and his civil rights had been restored." (R., p.7.) Similar to his claim based on counsel's immigration advice, Ho failed to allege, or present any evidence, that he would not have pled guilty but for counsel's advice. Further, Ho's contention that counsel's advice to plead guilty was deficient appears to be based on his belief that he was not guilty of the unlawful possession charge because he ultimately received I.C. § 19-2604 relief in his 2004 case. (R., p.7.) The district court's resolution of this claim appears to follow a similar logic. (R., p.57.) The logic is flawed because the factual basis of the unlawful possession charge predated the I.C. § 19-2604 relief Ho received in the 2004 case. Specifically, the Information in the 2012 case alleges that "on or about" May 17, 2012, Ho possessed two firearms, which he was prohibited from possessing as a result of his 2004 convictions. (Exhibit 3, Appendix E.) The court's "Order Granting Motion to Dismiss Case and Restore Civil Rights" in Ho's

2004 case was filed June 14, 2012. That order could not, and did not, retroactively render Ho's acts non-criminal. Indeed, the district court correctly acknowledged it had no authority to "go[ ] backwards into the 2004 case and enter[ ] an order *nunc pro tunc* . . . granting Ho's earlier motion to set aside his plea in [the 2004] case." (R., p.58 n.10.) To the extent the district court nevertheless granted relief on Ho's second claim by setting aside Ho's guilty plea, and vacating Ho's conviction and sentence in the 2012 case, the court erred.

3. Ho Was Not Entitled To Relief On His Claim That Counsel Was Ineffective For Failing To Schedule A Hearing On Ho's I.C. § 19-2604 Motion, Filed In Ho's 2004 Case In 2007, Because The Court Has Since Held A Hearing And Granted Ho's Motion

Ho's final post-conviction claim was that counsel was ineffective for failing to timely pursue a hearing on the I.C. § 19-2604 motion he first filed on October 5, 2007. (R., p.7.) According to Ho's unverified petition, he was prejudiced as a result because he "received a conviction of being Unlawfully in Possession of a Firearm." (R., p.7.) The district court agreed that counsel was deficient in this regard, and agreed with Ho's claim of prejudice. (R., pp.57-58.) The district court erred in granting any relief on this claim.

Again assuming Kraynick's affidavit may be considered as evidence, he alleged that he did not set the matter for hearing because it was his "recollection" that the court's practice "was that if a Withheld Judgment had been ordered, and the Defendant moved to have his case dismissed pursuant to the Withheld, and there were no objections, the Court would typically grant the motion and order

the dismissal without further action." (R., p.21.) The court found counsel was deficient in this regard based, in part, on its statements that such was not its practice – at least it was not the court's practice unless counsel included language in the motion indicating that the state did not object. (Tr., p.41, L.15 – p.42, L.20, p.70, L.14 – p.71, L.12.) Although it is less than clear that counsel's semi-misunderstanding of the court's practice would constitute deficient performance, failing to follow-up on the motion may be. Regardless, the relevant prejudice suffered by Ho has been cured because the court has since held a hearing on Ho's § 19-2604 request for relief, and has granted that relief. (Exhibit 3, Appendix C.)

Ho's prejudice in relation to his third claim is not, as the district found, that Ho was guilty of being a felon in possession in 2012. Indeed, there is no evidence that Kraynick ever told Ho his rights had been restored and he could, once again, possess a firearm when Ho committed that offense. To the contrary, Kraynick's affidavit alleged that he did not follow up on the motion he filed in 2007 because "he did not have much contact with Mr. Ho at that time, and [he] had other matters that [he] was focused on." (R., p.22.) The only other evidence on this point presented at the post-conviction hearing was the transcript from Ho's guilty plea to the unlawful possession charge, which reflects that Ho possessed the guns, not because Kraynick told him his rights had been restored, or because he believed his rights had been restored, but because "the cops" gave the guns back to him, and he was not going to "hurt anybody." (Exhibit 1, p.20, L.24 – p.21, L.24.)

The proper prejudice applicable to Ho's claim that counsel was ineffective for failing to schedule a hearing and pursue the I.C. § 19-2604 motion in 2007 when it was filed is the absence of a hearing. See Aragon, 114 Idaho at 761, 760 P.2d at 1177 (prejudice requires a defendant to show a reasonable probability that, but for counsel's deficient performance, the outcome of *the proceeding* would have been different). Because a hearing has been held on Ho's I.C. § 19-2604 motion, any relevant prejudice has been cured. Ho was not entitled to relief on this claim, or any other claim in his untimely, unverified post-conviction petition. The district court erred in concluding otherwise.

CONCLUSION

The state respectfully requests this Court reverse the district court's Findings and Conclusions on Petition for Post-Conviction Relief, and its Judgment granting Ho post-conviction relief.

DATED this 17th day of February 2017.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 17th day of February, 2017, served two true and correct copies of the foregoing BRIEF OF APPELLANT by placing the copies in the United States mail, postage prepaid, addressed to:

NATHAN D. RIVERA
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__/s/ Jessica M. Lorello________
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