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

THOMAS BUCK CHAPUT,	)	
	)	**No. 47459-2019**
Petitioner-Appellant,	)	
	)	**Twin Falls County Case No.**
v.	)	**CV42-19-3041**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Thomas Buck Chaput appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In November of 2018, Chaput pleaded guilty to grand theft in the underlying criminal case. (R., p.25.)[1] Pursuant to the parties' plea agreement, the state "agreed to not file three additional counts of Burglary" and agreed to "recommend a unified sentence of 10 years, with 5 years fixed followed by a 5 year indeterminate period." (R., p.25.)

Chaput had previously been convicted of "aggravated assault on a law enforcement officer" in a separate case. State v. Chaput, No. 46747, 2019 WL 8129561, at *1 (Idaho Ct. App. Dec. 17, 2019 (unpublished)). The grand theft charge, "among other conduct, resulted in probation violations" in the aggravated assault case, which Chaput admitted to. (R., p.25.)

The two cases were consolidated for sentencing. (R., p.26.) The district court sentenced Chaput as follows:

> On January 29, 2019, following a combined sentencing and disposition hearing a *Judgment of Conviction and Order of Commitment* was entered in the [grand theft] case. The sentence followed the plea agreement consisting of a unified sentence of 10 years, 5 years fixed followed by [a] 5 year indeterminate period to run concurrent with the sentence imposed in [the aggravated assault] case. In the [aggravated assault] case, the Court imposed the underlying sentence but modified it to a unified sentence of 10 years, with 5 years fixed followed by 5 year indeterminate period.

(Id. (emphasis in original).)

[1] Citations to the record refer to the page number of the electronic file.

Chaput filed a consolidated direct appeal from the judgments of conviction, claiming the "district court erred in failing to retain jurisdiction or in failing to further reduce his sentence in [the aggravated assault case] and abused its discretion by imposing an excessive sentence" in the grand theft case. Chaput, 2019 WL 8129561, at *1. The Court of Appeals, which reached the merits of Chaput's claim in the grand theft case (after finding the record "call[ed] into question whether Chaput's waiver" of his right to appeal "was voluntary, knowing, and intelligent"), affirmed the judgments of conviction and sentences. Id. at *2.

Chaput subsequently filed a pro se petition for post-conviction relief from the judgment of conviction in the grand theft case. (R., pp.5-9.) In it, Chaput alleged that trial counsel gave ineffective assistance of counsel by "never show[ing] me discovery until after I was sentenced"; by "threaten[ing] to quit on me"; and by "[telling] me what to do and say right before court (I felt pressured to)." (R., p.7.)[2] Chaput also filed a motion for the appointment of post-conviction counsel, and an affidavit in support of his petition, containing more allegations about trial counsel's purported deficient performance. (R., pp.10-16, 20-23.)

The district court issued a notice of intent to dismiss Chaput's petition. (R., pp.25-32.) In it, the court sua sponte took "judicial notice of the [register] of actions and content of the files" in the underlying criminal case and the aggravated assault case. (R., p.26.) The court construed and enumerated Chaput's claims as follows:

> [Chaput's] *Petition* alleg[es] ineffective assistance of counsel based on the following: 1) Counsel's failure to do what the Petitioner requested of him; 2) Counsel's failure to provide Petitioner with discovery until after sentencing; 3) Counsel pressured Petitioner regarding what to do and say in court; and 4) Counsel made misrepresentations to Petitioner regarding mental health court.

[2] Quotations from Chaput's pro se pleadings are reproduced with corrected capitalization.

(R., p.26 (emphasis in original).)

The district court found that the claims in the petition were subject to summary dismissal because Chaput had failed to allege any prejudice. (R., p.28.) Citing Strickland v. Washington, 466 U.S. 668 (1984), the court concluded Claims 1, 2, and 4 failed to "allege how the outcome of proceedings would have been different but for counsel's alleged deficient performance" (R., p.28 (boldface removed)), and failed to allege "any facts" indicating a probability of a different outcome (R., pp.28-29 (emphasis in original)). Turning to Claim 3, and counsel's alleged misrepresentations regarding Chaput's sentence, the court additionally found the allegation was "frivolous" in light of the record:

> The record does not support this bare assertion. The written plea agreement clearly stated the State's sentencing recommendation. Petitioner signed the plea agreement. At the hearing on the entry of plea, Petitioner acknowledged under oath that he had not been forced or threatened in any way to plead guilty or that he had not been made any promises in exchange for his plea of guilty other than what was set forth in the plea agreement. Petitioner also acknowledged that the plea agreement was not binding on the Court and that he could be sentenced up to the maximum penalty. Following these acknowledgments the Petitioner entered a plea of guilty.

(R., pp.28 (internal citations omitted).)

The court also pointed out that Chaput "had already admitted to the probation violations" in the aggravated assault case, and the "underlying sentence in that case consisted of [a] fixed period of 10 years—well in excess of the sentence recommended by the plea agreement." (R., p.29.) Thus, "[g]iven the concurrent nature of the sentence, whether the Court imposed a 2 year fixed period or a 5 year fixed period, the sentence would have no effect on the amount of time Petition would be required to serve." (Id.) As such, Claim 3 had "no merit." (Id.)

The court accordingly held that Chaput's "claims are frivolous and without merit" and issued its notice of intent to dismiss the petition. (R., pp.30-31.) For the same reasons, the court

concluded that "the appointment of counsel … would serve no useful purpose," and denied Chaput's motion for post-conviction counsel. (R., p.30.)

Chaput filed a response to the court's notice of intent to dismiss the petition. (R., pp.33-40.) In it, Chaput provided a series of unsworn, unverified statements that provided additional factual support for his claims. (See id.) However, the response never mentioned the district court's decision to take judicial notice of the records in the underlying case and aggravated assault case. (See id.) Chaput also attached several other documents to his response, including copies of letters he had sent to the court and the state bar, and a letter from his trial counsel denying the allegations in the petition. (R., pp.41-59.)

The district court entered an order dismissing the petition. (R., pp.60-61.) The court noted it had reviewed Chaput's response, which the court found just "rehashes the arguments raised in the *Petition* without providing any substantive information pertaining to the deficiencies identified in the *Notice of Intent to Dismiss*." (R., p.60 (emphasis in original).) Based on the reasons set forth in its notice of intent to dismiss, the district court summarily dismissed the petition. (R., pp.60-64.)

Chaput timely appealed from the district court's order and judgment summarily dismissing his petition. (R., pp.65-68.)

ISSUE

Chaput states the issue on appeal as:

> Whether the district court erred by summarily dismissing Mr. Chaput's petition for post-conviction relief without appointing an attorney.

(Appellant's brief, p.7.)

The state rephrases the issue as:

Has Chaput failed to show the district court erred by dismissing his petition for post-conviction relief and denying his motion for the appointment of counsel?

ARGUMENT

Chaput Has Failed To Show The District Court Erred By Dismissing His Petition For Post-Conviction Relief And Denying His Motion For The Appointment Of Counsel

A. Introduction

Chaput claims the district court abused its discretion, in two respects, when it summarily dismissed his petition for post-conviction relief. Chaput argues, for the first time on appeal, that the district court "abused its discretion by taking judicial notice of 'the entire record' from the underlying criminal cases." (Appellant's brief, p.10 (underlining and capitalization altered).) Chaput also purports that, because he "identified the possibility of a valid claim" in his pro se pleadings, the district court erred by denying his motion for post-conviction counsel. (Appellant's brief, p.12 (underlining and capitalization altered).)

Both of these claims fail. To begin with, Chaput's claim regarding judicial notice is unpreserved; below Chaput never objected to the district court's decision to take judicial notice of the records in the underlying cases. Alternatively, even if Chaput could raise this claim for the first time on appeal, he fails to show error, because the court ultimately identified the facts and documents it was relying on in crafting its decision. Finally, even assuming the district court erred by not specifically identifying the documents it was taking judicial notice of, Chaput fails to show any error was not harmless.

Chaput also fails to show the district court erred in denying his motion for post-conviction counsel. The district court correctly concluded that Chaput's claims of ineffective assistance were meritless. As such, the court properly denied Chaput's motion for counsel and summarily dismissed his petition.

B. Standard Of Review

Summary dismissal is appropriate where the petitioner's evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). On review of a summary dismissal of a post-conviction petition, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Id. at 523, 164 P.3d at 803.

"A decision to grant or deny a request for counsel in post-conviction cases is reviewed for an abuse of discretion." Shackelford v. State, 160 Idaho 317, 325, 372 P.3d 372, 380 (2016) (citing Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014)).

C. Chaput's Claim That The Court Erred By Taking Judicial Notice Of The Underlying Record Is Unpreserved; Alternatively, He Fails To Show Any Error Or That Such An Error Was Not Harmless

Chaput's first claim of error is that "the district court did not comply with the plain language of I.R.E. 201," which sets forth the requirements for judicial notice of adjudicative facts. (Appellant's brief, p.10.) Chaput complains that the court "took judicial notice generally of the entire record in the underlying criminal case, as well as the entire record of the [aggravated assault] case, without identifying the specific documents it was noticing or, more importantly, what specific adjudicative facts it was noticing." (Appellant's brief, p.10 (footnote omitted).)

But this claim, made for the first time on appeal, is not preserved. Parties are "held to the theory upon which the case was presented to the lower court" and "[i]ssues not raised below will not be considered by this court on appeal." State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (quoting Heckman Ranches, Inc. v. State, By & Through Dep't of Pub.

Lands, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979)). Consequently, the Idaho Supreme Court requires "'both the issue *and the party's position on the issue* [to] be raised before the trial court for it to be properly preserved for appeal.'" State v. Gonzales, 165 Idaho 667, 672, 450 P.3d 315, 320 (2019) (emphasis added, quoting State v. Gonzalez, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019)); State v. Wolfe, 165 Idaho 338, 445 P.3d 147, 151 (2019).

Below, the notice of intent to dismiss made it crystal clear the district court was taking "judicial notice of the [register] of actions and content of the files" in the underlying criminal case and the aggravated assault case. (R., p.26.) And Chaput had every opportunity to object, or otherwise claim this was an error, in his response to the court's order. He did not. (See R., pp.33-40.) Because Chaput did not preserve this issue below, he cannot raise it for the first time on appeal.

Chaput's opening brief identifies no exception to the preservation rules that apply here, nor does he otherwise argue how or why he should be permitted to make this never-before-seen claim on appeal. (See generally, Appellant's brief.) And while this Court has occasionally held that a court's ruling alone is sufficient to preserve an issue, regardless of whether the appellant raises it (see, e.g., State v. Jeske, 164 Idaho 862, 868, 436 P.3d 683, 689 (2019)), we know that exception does not apply here. The Idaho Supreme Court has already made clear that the *party* must raise judicial-notice issues to preserve them for appeal; the court's ruling, on its own, is not enough:

> The court did not comply with Idaho Rule of Evidence 201(c), which states, "A court may take judicial notice, whether requested or not. When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, *the court shall identify the specific documents or items that were so noticed*." (Emphasis added.) **Although the court did not identify the specific documents noticed, McKinney did not object to its failure to do so, and therefore any objection to the failure to do so is waived.**

McKinney v. State, 162 Idaho 286, 290, 396 P.3d 1168, 1172 (2017) (italics in original, boldface added). Thus, because Chaput failed to challenge to the district court's decision to take judicial notice below, he waived his objection and failed to preserve this issue.

Alternatively, even assuming Chaput's unpreserved claim could be heard on appeal, he fails to show the district court abused its discretion. I.R.E. 201 provides, in relevant part, that the court:

> (1) may take judicial notice on its own; …
>
> When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed.

I.R.E. 201(c). A district court "may take judicial notice at any stage of the proceeding." I.R.E. 201(d). Construing the rule's "specificity requirement," the Idaho Supreme Court has previously found error where a court takes judicial notice of an underlying case file "*in toto*, without specifying which documents and exhibits it was taking notice of." Taylor v. McNichols, 149 Idaho 826, 835-36, 243 P.3d 642, 651-52 (2010).

Admittedly, the district court here broadly took "judicial notice of the [register] of actions and content of the files" in the underlying criminal case and the aggravated assault case. (R., p.26.) The state agrees that, in many cases, this approach would contravene the rule. See Taylor, 149 Idaho at 831, 243 P.3d at 647. However, the court nevertheless acted properly here, as a matter of practical effect. That is because a court "may take judicial notice at *any* stage of the proceeding" (I.R.E. 201(d) (emphasis added), and, here, the court's ensuing statement of facts and analysis made it plain what documents and adjudicative facts it was relying on.

For example, the district court explained the terms of the plea agreement and noted that Chaput pleaded guilty to grand theft pursuant to that agreement. (R., p.25.) That information is

readily found in the record of the grand theft case—in the minutes of the entry of plea hearing and in the plea agreement itself. (46826 R., pp.30-31.) The court explained Chaput's aggravated assault conviction, the details of that sentence, and the fact that Chaput admitted to probation violations in that case. (R., p.25.) Those facts are equally plain in those underlying records. (43624 R., pp.351-53; 46747, p.109-11.) The court wrapped up its factual findings by discussing the sentence that was imposed in the consolidated cases (R., p.26)—an adjudicative fact that is plain in the records of both cases (not to mention unpublished Court of Appeals' opinions) (46747 R., p.111-12; 46826 R., pp.39-40); see Chaput, No. 46747, 2019 WL 8129561, at *1.

Turning to the court's legal analysis, the bulk of it simply pointed out that the record did *not* support Chaput's claims of prejudice. (R., pp.29-30.) By definition, this was a finding that had no corresponding adjudicative facts; one cannot prove a negative, much less specifically cite to it.

As for the portions of analysis that did rely on the record, it is once again plain what documents the court examined and what adjudicative facts it considered. The court reviewed the plea agreement and entry of plea transcript in the grand theft case, and the sentence in the aggravated assault case, and determined that: the "written plea agreement clearly stated the State's sentencing recommendation"; Chaput "signed the plea agreement"; Chaput "acknowledged under oath that he had not been forced or threatened in any way to plead guilty or that he had not been made any promises in exchange for his plea of guilty other than what was set forth in the plea agreement"; and that Chaput "acknowledged that the plea agreement was not binding on the Court and that he could be sentenced up to the maximum penalty." (R., pp.28 (internal citations omitted).) All of these findings are supported by the record. (46826 R., p.31; 46826 Tr., p.7, L.15 – p.9, L.5.)

In sum, this was not a complex civil case, with thousands of pages of underlying documents, where a point-by-point judicial notice disclaimer would have been required reading to sift through underlying facts and conduct a meaningful appellate review. This case turned on simple facts, plainly stated by the district court, that are easily found in the record, that this Court can comfortably review on appeal. As such, the lower court's approach to judicial notice was proper.

Chaput's own cited authority shows that, in practical terms, the court's approach was correct. In Taylor, the Idaho Supreme Court held the district court's decision to take notice was not susceptible to appellate review; the Court "could not" "consider the same materials that the district court judge erroneously considered from the Underlying Case" because "the district court *failed to identify the specific materials that it considered in reaching its ruling.*" Taylor, 149 Idaho at 836, 243 P.3d at 652, n.4 (emphasis added). This tracks with Chaput's conception of Rule 201: "what the rule is actually requiring the district court to do by identifying specific documents is to create a sufficient record of the adjudicative facts it was noticing, so as to foster proper review of that decision." (Appellant's brief, p.10.) If that is the standard, then the district court complied with it: the court identified the documents and adjudicative facts it considered to reach its ruling, even if it did not formalistically state that it was taking judicial notice of those documents. (See R., pp.25-29.)

Finally, even assuming the district court erred by taking judicial notice of the entire record of the underlying cases, Chaput fails to show such an error was not harmless, because he fails to show any error that affected his substantial rights. Taylor, 149 Idaho at 836, 243 P.3d at 652; I.R.C.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

Chaput argues that "the erroneous decision to take judicial notice affected" his "substantial rights because it directly affected the outcome of this case." (Appellant's brief, p.11.) His claim is that "the district court summarily dismissed Mr. Chaput's claim about trial counsel promising a particular sentence without appointing an attorney *solely* upon facts it derived from the underlying case files." (Id. (emphasis in original).) In other words, because the court dismissed Chaput's petition after relying on facts it judicially noticed, the court's decision to take judicial notice must have affected his substantial rights.

This argument fails because it mistakenly expands the scope of the purported error. To be precise, the claimed error here is not that the court took judicial notice period, or that the court took notice of some improper facts or documents. Chaput's narrow claim is that the court took judicial notice without identifying the underlying documents in the record. (Appellant's brief, p.10.) To see whether that error is harmless, we must ask whether the court's purported *failure to identify* the documents affected Chaput's substantial rights—not whether the court's decision to take judicial notice *itself* affected Chaput's substantial rights.

On that score, Chaput cannot show that the court's failure to identify the documents it was noticing had any effect on his substantial rights. There is no practical difference between the court's actual notice of intent to dismiss—which contained all of the facts and records the court considered—versus a slightly longer notice of intent with the missing magic words: "I hereby take judicial notice of the following…." We know exactly what adjudicative facts and documents the court considered by dint of the court's factual findings and analysis. (See R., pp.25-29.) And, critically, Chaput cannot show that the court's analysis would have been different with an itemized list of noticed documents—or that *because* the court did not itemize the documents it noticed, it analyzed this case any differently.

Chaput fails to show the district court's decision not to list the specific documents it was taking judicial notice of affected this case at all—much less that it affected his substantial rights. Even assuming this claim is preserved, and assuming Chaput has shown error, any error was harmless.

D. The District Court Correctly Denied Chaput's Motion For Appointment Of Counsel After Determining Chaput Failed To Show Any Possibility Of A Valid Claim

Post-conviction motions for appointment of counsel are "governed by I.C. § 19-4904, which provides that in proceedings under the UPCPA, a court-appointed attorney 'may be made available' to an applicant who is unable to pay the costs of representation." Shackelford, 160 Idaho at 325, 327 P.3d at 380 (quoting I.C. § 19-4904). "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." Id. (citing Murphy, 156 Idaho at 393, 327 P.3d at 369).

To show a valid claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-95 (1984). A reviewing court's "scrutiny of counsel's performance must be highly deferential"; therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. To meet the burden of showing prejudice where there is a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59

(1985).

Beyond that, petitioners who plead guilty, who therefore do not proceed to trial, do not have a "right to relief" where the claimed ineffectiveness stems from alleged failures to prepare for trial:

> Bjorklund also claims that his counsel was ineffective for failing to bring a motion to change venue and for failing to fully investigate the underlying criminal charges. The district court found that there was no right to relief related to these allegations because Bjorklund pled guilty to the crime. Even if true, these matters could have only affected the representation of Bjorklund had the matter gone to trial, which it did not. Hence, there was no right to relief.

Bjorklund v. State, 130 Idaho 373, 377, 941 P.2d 345, 349 (Ct. App. 1997).

"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." Shackelford, 160 Idaho at 325, 372 P.3d at 380 (quoting Melton v. State, 148 Idaho 339, 342, 223 P.3d 281, 284 (2009) (quotation marks omitted)). Nevertheless, courts are not "required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994)). To determine whether a petition has "raised the possibility of a valid claim," Idaho's appellate courts "consider 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 v. State, 148 Idaho 339, 342, 223 P.3d 281, 284 (2009).

The district court correctly considered the foregoing authority in ruling on Chaput's motion for the appointment of counsel. (R., pp.29-30.) Because the court determined that all of Chaput's claims of ineffective assistance of counsel were "frivolous and without merit," it concluded that "[t]he appointment of counsel in this case would serve no useful purpose." (R., p.30.) A review of record shows the district court was correct.

As for Claims 2 and 4, the district court concluded that Chaput failed to make a prima facie case of ineffective assistance of counsel, because, for both claims, he failed to show any prejudice. (R., p.28-29.) Claim 2 alleged that "counsel lied to [Chaput] in an effort to get him to waive the preliminary hearing"; however, even assuming arguendo this happened, Chaput failed "to allege any facts that would have provided a reasonable probability of a different outcome if [Chaput] had not waived the preliminary hearing." (R., p.28 (emphasis in original).) Likewise, Claim 4 alleged that "counsel lied to [Chaput] about not being able to apply to mental health court" (R., p.29); but even assuming this occurred, Chaput failed "to identify any potential prejudice … resulting from the alleged misrepresentation," insofar as "[t]he record supports that [Chaput] applied to mental health court and … his application was denied." (Id.; see also 46826 PSI, p.162 (affirming Chaput's mental health court application was denied).)

In other words, for both Claims 2 and 4, Chaput failed to allege a prima facie case of Strickland prejudice. On appeal, Chaput does not appear to challenge the court's conclusion that Claims 2 and 4 were meritless, or argue that counsel should have been appointed based on these claims. (See generally Appellant's brief.) As such, Claims 2 and 4 did not even raise the possibility of a valid claim, and Chaput fails to show the court erred in denying his motion for counsel.

As for Claim 1, where Chaput "allege[d] generally that counsel failed to provide him with the State's discovery responses until after sentencing," the court found that Chaput failed "to allege any facts revealed in the discovery that would result in a reasonable probability of affecting the outcome of the proceedings," and therefore failed "to identify any potential prejudice … resulting from the alleged untimely disclosure." (R., p.28 (emphasis in original).) Claim 3—where Chaput alleged "that counsel misrepresented to [Chaput] that if he signed the plea agreement he would be sentenced to a rider or at the most would receive a sentence of 2 years fixed with time served"—was rejected because the court found it "frivolous." (R., p.28.) This was correct, because plea agreement and the transcript of the entry of plea both demonstrated that Chaput understood the state's sentencing recommendation, agreed to it, "had not been forced or threatened in any way to plead guilty," and understood that the court could sentence Chaput up to the maximum penalty. (R., p.28; 46826 R., p.31; 46826 Tr., p.7, L.15 – p.9, L.5.) Claims 1 and 3 accordingly did not even raise the possibility of a valid claim, and so the court correctly denied Chaput's motion for counsel.

On appeal Chaput fails to show any error. Chaput appears to argue that Claims 1 and 3, taken together, show at least a possibility of ineffective assistance. Chaput alleges that but for the purported lack of access to discovery, and the purported misadvice about his sentence, he *would have* insisted on a trial:

> Mr. Chaput's allegations still establish *the possibility* that he would have rejected the plea offer—that he would not have acceded to trial counsel's promise of a particular sentence, and would have taken his case to trial—if he had timely seen the discovery.

(Appellant's brief, p.17 (emphasis in original).) Thus, Chaput contends, Claims 1 and 3 "are the types of claims a reasonable person with means would hire an attorney to investigate, which

means they raise *the possibility* of a valid claim," and the district court therefore "abused its discretion by summarily dismissing his petition without appointing post-conviction counsel." (Appellant's brief, p.18 (emphasis in original).)

This argument fails for several reasons. First, Chaput has failed to demonstrate that either Claims 1 or 3, analyzed on their own, establish the possibility of a valid claim of ineffective assistance of counsel. Claim 1, regarding the failure to share discovery, is essentially a claim of trial-stage error. But because Chaput pleaded guilty, he had "no right to relief" for this purported error. Bjorklund, 130 Idaho 373, 377, 941 P.2d 345, 349.

And while a claim of attorney misadvice about a potential sentence, such as Claim 3, could theoretically show deficient performance, a petitioner cannot show prejudice where the *court* correctly informs him of the sentence potentially in store for him. Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007) ("Even if Womack's counsel's performance were somehow deemed ineffective, Womack was not prejudiced by his counsel's prediction because the plea agreement and the state district court's plea canvass alerted Womack to the potential consequences of his guilty plea."); Gonzalez v. United States, 33 F.3d 1047, 1051-52 (9th Cir. 1994). Here, the district court ultimately told Chaput what the maximum potential sentence was, that the court was "not bound by the plea agreement," and that the "only person that can promise you what sentence you'll receive is the judge"—all of which Chaput affirmed he understood. (46826 Tr., p.7, L.22 – p.9, L.5.) So even assuming Chaput's counsel misadvised him about the sentence he would or could receive, the district court cured any error—and prevented any prejudice—by properly alerting Chaput to the consequences of his plea.

Even if Claims 1 and 3 could be cobbled together to show the possibility of a valid claim of ineffective assistance, such a claim would still fail. Because Chaput pleaded guilty, it is his

burden to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lockhart, 474 U.S. at 59. To this point, Chaput's argument on appeal is conclusory: he simply assumes that, but for the purported lack of discovery and misadvice about the plea, he "would have taken his case to trial." (Appellant's brief, p.17.)

But Chaput's affidavit in support of his petition never actually says that he *would have* insisted on a trial, but for counsel's alleged deficient performance. (See R., pp.10-11.) While Chaput's response to the court's notice certainly indicated he would have "fought this case," but for counsel's purported deficient performance (R., p.37), that response was unsworn and unverified (see R., pp.33-40). Because "unsworn representations, even by an officer of the court, do not constitute 'substantial evidence,'" there was no substantial evidence in the record to demonstrate that Chaput *would have* insisted on going to trial, but for any of counsel's purported errors. See State v. Cunningham, 161 Idaho 698, 702, 390 P.3d 424, 428 (2017). Post-conviction petitions for relief must be verified and must contain either "[a]ffidavits, records or other evidence supporting its allegations," or a statement explaining the lack of evidence. I.C. § 19-4903; Pentico v. State, 159 Idaho 350, 354, 360 P.3d 359, 363 (Ct. App. 2015). Chaput's unverified, unsworn statements in his response were therefore insufficient to provide any substantial evidence showing even a prima facie claim of Strickland.

Finally, even assuming there was some admissible evidence that Chaput would have insisted on a trial, but for the discovery issues or trial counsel's purported misadvice about the sentence, the court correctly rejected this argument as frivolous. The record demonstrably disproves that Chaput was unaware of the terms of the plea agreement, was threatened to enter into it, or otherwise misunderstood that only the sentencing court could "promise [him] what

sentence you'll receive." (46826 Tr., p.7, L.15 – p.9, L.5.) And while the post-conviction court was required to accept Chaput's unrebutted allegations as true and to construe all inferences in his favor, Charboneau v. State, 140 Idaho 789, 793-94, 102 P.3d 1108, 1112-13 (2004), it was not required to accept Chaput's post-hoc arguments that contradicted all the evidence in the record.

Indeed, there is no requirement "to conduct an evidentiary hearing to determine which" of a petitioner's "contrary statements is more credible." Campos v. State, 165 Idaho 90, 94, 438 P.3d 787, 791 (Ct. App. 2019). Courts routinely rely on petitioners' "solemn declarations made in open court" at the entry of plea, which, ex ante, "carry a strong presumption of verity." United States v. Rivera-Ramirez, 715 F.2d 453, 458 (9th Cir. 1983). Likewise, courts are entitled to "reject[petitioners'] after-the-fact statements to the contrary." Id. This is precisely why the Idaho Court of Appeals rejected Campos's contention "that the district court is required to conduct an evidentiary hearing when, as here, the statements he makes in post-conviction are contrary to the statements he made incident to the guilty plea." 165 Idaho at 94, 438 P.3d at 791. Instead, the Campos Court concluded that "this is exactly the situation where the appellate courts have held that the post-conviction claims are belied by the record and subject to summary dismissal." Id.

Thus, the district court here was entitled to rely on Chaput's prior sworn testimony, instead of any post-hoc, self-serving declarations that contradicted them. And while it is generally true that additional *evidence* might tip the scales "in support of the post-conviction claim," warranting further proceedings (see id., n.1), Chaput has identified no such evidence in the record here.

Chaput therefore fails to show that the district court abused its discretion by determining his claims of ineffective assistance were "frivolous and without merit." (R., p.30.) And because Chaput's claims were frivolous and meritless there was necessarily no possibility of a valid claim. The district court therefore properly denied Chaput's motion for appointment of counsel, and properly dismissed his petition.

CONCLUSION

The state respectfully requests this Court affirm the district court's order denying Chaput's motion for the appointment of counsel, and summarily dismissing his petition for post-conviction relief.

DATED this 4th day of August, 2020.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of August, 2020, 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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/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd