7-26-2012

State v. Dunlap Respondent's Supplemental Brief 1 Dckt. 32773

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. TIMOTHY A. DUNLAP, Defendant-Appellant.	NO. 32773-2006
TIMOTHY A. DUNLAP, Plaintiff-Respondent, vs. STATE OF IDAHO, Respondent.	NO. 37270-2009

SUPPLEMENTAL BRIEF OF RESPONDENT

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

HONORABLE DON L. HARDING
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR RESPONDENT

SHANNON N. ROMERO
State Appellate
Public Defender's Office
3050 N. Lake Harbor Ln–Ste. 100
Boise, ID 83703

ATTORNEY FOR PETITIONER-APPELLANT

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The state submits this Supplemental Brief of Respondent to address the issue of the scope of I.C. § 19-2827 – Idaho's mandatory review statute in capital cases – and whether it overrides the fundamental appellate rule regarding preservation of error before the trial court in capital cases, which, as contended by Defendant-Appellant Timothy A. Dunlap ("Dunlap"), would permit death sentenced defendants to raise any issue for the first time on appeal irrespective of whether the alleged error was preserved before the district court or the defendant met his burden of establishing fundamental error under State v. Perry, 150 Idaho 209, 227-28, 245 P.3d 961 (2010).

ISSUE

Should this Court apply the fundamental error doctrine announced in Perry to claims raised for the first time on appeal stemming from capital sentencing hearings?

ARGUMENT

A. Introduction

In his opening brief, Dunlap raised a plethora of issues for the first time on appeal that were not preserved before the district court. The state responded by noting the issues being raised for the first time on appeal and that Dunlap had failed to meet his burden of establishing fundamental error as required by this Court's recent pronouncement in Perry, 150 Idaho at 227-28, particularly the third prong requiring harmless error. In his reply, Dunlap initially contended the state waived any argument regarding the interaction between I.C. § 19-2827 and Perry. (Brief, pp.3-4.) Dunlap then contended, "pursuant to

Section 19-2827, this Court must review errors arising from Mr. Dunlap's capital sentencing proceeding and *Perry* simply does not apply." (Brief, p.7.)

Dunlap has overstated the scope of review associated with I.C. § 19-2827. Because this is the first capital case involving jury sentencing and the first after modification of the fundamental error doctrine in Perry, this Court should clarify the scope of I.C. § 19-2827 and its interaction with the doctrine in capital cases.

B. Legislative History Of I.C. § 19-2827 And Mandatory Review

In 1972, the Supreme Court concluded the death penalty violated the Eighth Amendment because state statutes permitted arbitrary and unguided imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). Idaho responded to Furman by requiring imposition of the death penalty in all first-degree murder cases. 1973 Idaho Sess. Laws, ch.276, § 2, p.589. However, in Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court concluded mandatory death penalty sentencing schemes are unconstitutional because defendants must be evaluated individually to determine whether the death penalty is an appropriate punishment for a particular crime.

As a result of Furman and Woodson, Idaho enacted a capital sentencing scheme requiring inquiry into statutory aggravating factors before the death penalty may be imposed and weighing of the mitigation against aggravating factors. 1977 Idaho Sess. Laws, ch.154, § 2, pp.390-93. As part of Idaho's new capital sentencing scheme, the Legislature also enacted I.C. § 19-2827, which, in relevant part, read as follows:

> (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Idaho. . . .
>
> (b) The supreme court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * *

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

1977 Idaho Sess. Laws, ch.154, § 5, pp.393-94.

In 1994, the Legislature eliminated proportionality review by amending I.C. § 19-2827(c)(3) and (e) to read as follows:

(c)(3) Whether the sentence of death is excessive ~~or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant~~.

*****

(e) ~~The court shall include in its decision a reference to those similar cases which it took into consideration.~~ In addition to its authority

regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

1994 Idaho Sess. Laws, ch.127, § 1, p.286.

The final amendment to I.C. § 19-2827 occurred in 2006, after the Supreme Court issued Ring v. Arizona, 536 U.S. 584 (2002), which mandates juries find the requisite statutory aggravating factors and not judges, unless the jury has been waived. The relevant changes to I.C. § 19-2827 were to subsections (c) and (e), and reads as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor~~,~~; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code.~~, and~~

~~(1) Whether the sentence of death is excessive.~~

* * * *

(e)(2) Set the sentence aside and remand the case for resentencing by a jury or, if waived, the trial judge~~. based on the record and argument of counsel.~~

2006 Idaho Sess. Laws, ch.155, § 1, p.470.

C. Judicial Interpretation Of I.C. § 19-2827

In State v. Osborn, 102 Idaho 405, 410-11, 631 P.2d 187 (1981), this Court first addressed the parameters of I.C. § 19-2827. Because the defendant pled guilty, the Court

addressed only alleged sentencing errors stemming from imposition of the death penalty; no guilt phase claims were reviewed. Specifically, the Court addressed the question of whether the district court erred by relying upon the preliminary hearing transcript at the sentencing hearing even though neither party objected and each utilized the transcript at the sentencing hearing. Id. Concluding it was not bound by "the general rule that precludes review of matters not objected to below," the Court decided:

> This general rule applicable to appellate review of error is not necessarily controlling where we are statutorily required to undertake appellate review irrespective of the defendant's contentions, if any. Death is clearly a different kind of punishment from any other that may be imposed, and I.C. § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below.

Id. at 410-11. The Court then noted, "Other jurisdictions similarly do not allow technical appellate rules to preclude a comprehensive review of those cases where a sentence of death has been imposed (citing cases)," but then explained, "[w]e have previously recognized as much in this state by holding that fundamental error, even absent objection at trial will be reviewed on appeal. (citing cases)." Id. at 411. Therefore, it appears this Court relied in some fashion upon the fundamental error doctrine in justifying review under I.C. § 19-2827. However, as recognized in State v. Perry, 150 Idaho 209, 219, 245 P.3d 961 (2010), "Multiple statements of law pertaining to the fundamental error doctrine have caused confusion." As a result, this Court clarified the fundamental error doctrine, id. at 226, which is markedly different than what was considered in Osborn.

In State v. Sivak, 105 Idaho 900, 903, 674 P.2d 396 (1983), this Court appeared to expand Osborn by reviewing a sentencing claim – whether the Idaho Constitution required jury sentencing in capital cases – that was "not alleged by appellant here." While recognizing the Court "normally [] would not consider arguments not raised by the parties, capital cases present an exception to that rule in that we are required by law to conduct an independent review of cases where the death penalty has been imposed." Id.[1] Similar to Osborn, at the end of its opinion this Court concluded I.C. § 19-2827 "requires us to conduct a review of the record to determine if this particular death sentence resulted from any arbitrary factors, such as passion or prejudice." Id. 105 Idaho at 908.

In State v. Gibson, 106 Idaho 54, 63, 675 P.2d 33 (1983), this Court concluded I.C. § 19-2827 required "an independent review of this cause and [to] examine the total proceedings in the trial court to ensure that the sentence of death was imposed without resort to passion or prejudice or any other arbitrary factor, that the evidence supports the trial court's findings of aggravating circumstances, and that the sentence of death is not excessive or disproportionate." However, the Court reviewed only the sentencing procedures and concluded there was no error. Id. *See also* State v. Paradis, 106 Idaho 117, 126, 676 P.2d 31 (1983) (same); State v. Fetterly, 109 Idaho 766, 772, 710 P.2d 1202 (1985) ("We believe that the findings of the trial court, in considering the death penalty under I.C. § 19–2515, reflect a rational dispassionate evaluation of the factual circumstances of the case and demonstrate a thorough consideration of all of the relevant evidence produced at the sentencing hearing.").

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[1] In State v. Creech, 105 Idaho 362, 376-77, 670 P.2d 463 (1983) (Huntley, J., dissenting), the dissent raised this same issue. Despite I.C. § 19-2827 and Sivak, 105 Idaho at 908, the majority did not address the issue.

In State v. Aragon, 107 Idaho 358, 367, 690 P.2d 293 (1984), this Court again noted its "duty to conduct an independent review of the case to ensure that the [death] penalty was imposed without resort to passion or prejudice and that the imposition of such penalty is not excessive or disproportionate." Although the Court noted this review was to ensure "the penalty" was imposed in accordance with I.C. § 19-2827, the Court also concluded, "there is nothing in the record to indicate a resort to passion or prejudice. Instead, we find virtually an error-free trial conducted by a trial judge intent on giving the defendant every opportunity possible to obtain a fair trial. The jury was adequately instructed on the law applicable to this case, and the evidence presented at trial supports the first degree murder verdict returned by the jury." Id.

In State v. Scroggins, 110 Idaho 380, 385-86, 716 P.2d 1152 (1985), it appears this Court expressly relied upon I.C. § 19-2827 to address a jury instruction error where there was no objection at trial. After concluding the error would be addressed, this Court also concluded it was harmless. Id. In State v. Leavitt, 116 Idaho 285, 289, 755 P.2d 299 (1989), the Court implied I.C. § 19-2827 permitted review of trial errors by stating, "Since the instant case involves a conviction of first degree murder and the imposition of the death penalty, we have carefully reviewed the record for any indication of prejudicial error occurring at trial, regardless of whether or not error has been specifically asserted by the defendant." However, this comment was dicta made in an introductory statement. Only trial issues specifically raised by Leavitt were discussed; no trial issue was considered *sua sponte* by the Court. Discussing the one issue allegedly not raised by Leavitt – sufficiency of the evidence under I.C. § 19-2515(d) – the court stated, "Finally, we turn to the propriety of the imposition of the death sentence." Id. at 606. The court

did not *sua sponte* review a trial issue. Even in Leavitt the Court explained that claims defaulted at trial are ordinarily not considered on appeal. Id.

The state is unaware of any other case mentioning, let alone considering review of a trial claim based upon I.C. § 19-2827. In State v. Creech, 109 Idaho 592, 598-600, 710 P.2d 502 (Idaho 1985) (Bistline, J., dissenting), State v. Beam, 109 Idaho 616, 631-33, 710 P.2d 526 (1985) (Bistline J., dissenting), and State v. Stuart, 110 Idaho 163, 184, 715 P.2d 833 (Idaho 1985) (Bistline, J., dissenting), based upon Osborn and Leavitt, the dissent criticized the majority for not completing a more expansive review on appeal.

The Court returned to applying I.C. § 19-2827 to sentencing review in State v. Lankford, 113 Idaho 688, 702, 747 P.2d 710 (1987) (footnote omitted), explaining:

> [T]here is nothing in the record that indicates that the sentence of death was due to the influence of passion, prejudice or any other arbitrary factors. To the contrary, we find the trial was conducted in an error-free manner by a district court judge who sought every opportunity to provide Lankford with a fair trial. The jury instructions clearly informed the jury of the applicable law and the evidence presented at trial supports the jury's finding of two counts of first degree murder. The district court, after studying the presentence report and conducting an involved sentencing hearing in which the defendant produced witnesses and information favorable to his cause, made findings both in mitigation and in aggravation. In addition, the Court found numerous statutory aggravating circumstances as delineated under I.C. § 19–2515(g). After laying the findings in mitigation and aggravation, the district court set forth extensive rationale for why the death penalty was imposed. This Court can find no error in the procedure followed by the district court in making its findings.

On several occasions this Court has reviewed sentencing claims under the guise of I.C. § 19-2827. *See, e.g.,* State v. Pizzuto, 119 Idaho 742, 760-61, 810 P.2d 680 (1991) (reviewing constitutionality of victim impact statement even though there was no objection at the sentencing hearing); State v. Hoffman, 123 Idaho 638, 647, 851 P.2d 934 (1993); State v. Dunlap, 125 Idaho 530, 537-38, 837 P.2d 784 (1993). Even in the single

case where the defendant waived his appeal except as to I.C. § 19-2827, this Court in examining subsection (1) reviewed only the trial court's findings as to the death penalty, explaining, "As to the first element of our inquiry, we believe the findings of the trial court, in considering the death penalty under I.C. § 19-2515, reflect a rational and dispassionate evaluation of the factual circumstances of the case and demonstrate a thorough consideration of all the relevant evidence produced at the sentencing hearing." State v. Wells, 124 Idaho 836, 837, 864 P.2d 1123 (1993).

D. This Court Refused To Review Defaulted Or Waived Claims In Capital Cases

In State v. Lovelace, 140 Idaho 53, 287, 90 P.3d 278 (2003), the defendant raised a competency issue for the first time on appeal, contending he was denied due process because the magistrate failed to suspend proceedings once she found cause to conduct a competency inquiry prior to the preliminary hearing. Reciting "[t]he longstanding rule of this Court [] that we will not consider issues that are presented for the first time on appeal," the Court reviewed the claim under the fundamental error doctrine, not I.C. § 19-2827. Id. at 63. Likewise, the Court reviewed under the fundamental error doctrine the defendant's contention that the inquiry made by the district court regarding waiver of counsel was insufficient. Id. at 64.

"Prosecutorial misconduct" was reviewed for fundamental error in State v. Hairston, 133 Idaho 496, 507-08, 988 P.2d 1170 (1999). Specifically, the defendant challenged the state's obtaining of a discovery deadline without notification, "hiding" evidence that was represented would be used only for impeachment, and improper closing arguments. In fact, the defendant's attorney expressly explained during post-conviction proceedings that he did not object to the prosecutor's statements because he

believed the statements would be reviewed under the fundamental error doctrine. Id. at 513. In State v. Porter, 130 Idaho 772, 785, 948 P.2d 127 (1997), the defendant contended for the first time on appeal that the district court erred by allowing the state to call his investigator as a witness during its case-in-chief. Because the issue was not preserved before the trial court, it was reviewed under the fundamental error doctrine. Id. "Prosecutorial misconduct" stemming from the late disclosure of an expert report, questioning of a witness, and comments during closing argument were also reviewed under the fundamental error doctrine. Id. at 785-86.

In State v. Fields, 127 Idaho 904, 911, 908 P.2d 1211 (1995), the defendant contended for the first time on appeal that the eye-witness identifications were tainted by media publication of the defendant's photograph. This Court rejected the claim, concluding, "Because this evidence was not objected to at trial, and the admission of this evidence does not rise to the level of fundamental error, this issue will not be addressed by this Court on appeal." Id. The prosecutor's closing argument was reviewed for fundamental error in Pizzuto, 119 Idaho at 752, even though the Court reviewed the victim impact statements under I.C. § 19-2827, Pizzuto, 119 Idaho at 760-61. In State v. Lankford, 113 Idaho 688, 693-94, 747 P.2d 710 (1987), this Court reviewed alleged errors during the jury selection process and the presence of uniformed officers in the courtroom for fundamental error.

This Court has also recognized that even sentencing claims can be waived if the defendant fails to comply with I.A.R. 35(a)(6). In State v. Creech, 132 Idaho 1, 19-21, 966 P.2d 1 (1998) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 955 (1996); I.A.R. 35(a)(6)), this Court repeatedly refused to address the merits of sentencing claims

because of the defendant's failure to cite legal authority and argument to support those claims, and concluded the claims were waived. In Porter, 130 Idaho at 795, this Court refused to address whether I.C. § 18-4003 was vague, overbroad, and ambiguous because the defendant "provided no argument or authority in his brief to support his contentions and simply requested leave to address the issues in oral argument." *See also* Hairston, 133 Idaho at 511 (addressing only claims of ineffective assistance of counsel for which argument and citations were provided); Pizzuto v. State, 146 Idaho 720, 725, 202 P.3d 642 (2008) (declining to address an equal protection argument regarding disqualification of judge); *contra* State v. Wood, 132 Idaho 88, 94, 967 P.2d 702 (1998).

E. Idaho Code § 19-2827 Does Not Eliminate The Need To Preserve Error Or The Fundamental Error Doctrine

While Dunlap's position that error need not be preserved before the trial court and I.C. § 19-2827 eliminates the fundamental error doctrine in capital cases gains some initial traction from this Court's early interpretation of the statute, that position is vitiated based upon a plain reading of the statute, this Court's subsequent cases applying fundamental error in capital cases, and basic policy considerations surrounding the need to require preservation of error even in capital cases.

This Court has recently reaffirmed the following fundamental rules of statutory construction:

> "The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must

> be given effect, and the Court need not consider rules of statutory construction."

State v. Schulz, 151 Idaho 863, 867, 264 P.3d 970 (2011) (quoting Farber v. Idaho State Ins. Fund, 147 Idaho 307, 310, 208 P.3d 289 (2009)).

There is simply nothing within the confines of I.C. § 19-2827, particularly subsection (c)(1), that mandate the expansive interpretation utilized in Osborn, 102 Idaho at 410-11. Subsection (c)(1) merely states, "With regard to the sentence the court shall determine (1) [w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." It has never stated the sentence of death shall be reviewed for any error even when that error has not been preserved before the trial court. Nor do the words "passion, prejudice, or any other arbitrary factor" connote a death sentence will be reviewed for error even when not preserved before the trial court. Rather, the plain meaning of "passion" is "the state or capacity of being acted on by external agents or forces." Webster's Ninth New Collegiate Dictionary, 860 (1989). "Prejudice" means "injury or damage resulting from some judgment or action of another in disregard of one's rights." Id. at 928. "Arbitrary" means "depending on individual discretion (as of a judge) and not fixed by law," "not restrained or limited in the exercise of power; ruling by absolute authority." Id. at 99.

These definitions do not support the broad review Dunlap contends should be employed under I.C. § 19-2827, and they certainly do not support the notion that the fundamental principle of preserving alleged error before the trial court is not required in capital cases, particularly in light of the definition of fundamental error now being utilized by this Court as a result of Perry, 150 Idaho at 227-28. In fact, in Porter, this Court utilized those words to determine whether the defendant met his burden of

establishing prosecutorial misconduct, not whether review was being completed pursuant to I.C. § 19-2827. 130 Idaho at 785 (quoting State v. Babb, 125 Idaho 934, 942, 877 P.2d 905 (1994) ("Prosecutorial misconduct rises to the level of fundamental error when it is 'calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt by factors outside the evidence.'")).

In Jones v. United States, 527 U.S. 373, 388 (1999) (quoting 18 U.S.C. § 3595(c)(2)(A)), in an attempt to circumvent the failure to object to the jury instructions, the defendant relied upon the Federal Death Penalty Act, which requires an appellate court to remand where it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Rejecting Dunlap's argument the Court explained, "The statute does not explicitly announce an exception to plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme. Statutory language must be read in context and a phrase gathers meaning from the words around it." Id. (internal quotes and citations omitted). Likewise, Georgia utilizes the "plain error" doctrine in determining whether a death sentence is imposed under the influence of passion, prejudice, or any other arbitrary factor. Collier v. State, 707 S.E.2d 102, 108 (Ga. 2011); Sharp v. State, 692 S.E.2d 325, 329 (Ga. 2010). In State v. Cole, 71 S.W.2d 163, 170 (Mo. 2002), the Missouri Supreme Court explained that improper comments by a prosecutor in a capital case are reviewed "only for manifest injustice under the plain error rule."

Utilization of the plain or fundamental error doctrine is particularly appropriate since this Court clarified its parameters in Perry, 150 Idaho at 226 (footnote omitted):

> [A]fter careful and considered analysis, we hold that in cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings. If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings. Placing the burden of demonstrating harm on the defendant will encourage the making of timely objections that could result in the error being prevented or the harm being alleviated.

Because the policy considerations are the same, this standard is just as appropriate in capital cases as non-capital cases. As explained by this Court:

> Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial. This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the trial court the opportunity to consider and resolve them. Ordinarily, the trial court is in the best position to determine the relevant facts and to adjudicate the dispute. In the case of an actual or invited procedural error, the trial court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. Furthermore, requiring a contemporaneous objection prevents the litigant from sandbagging the court, i.e., remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. However, every defendant has a Fourteenth Amendment right to due process and [i]t is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process. Accordingly, when an error has not been properly preserved for appeal through objection at trial, the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal.
>
> The U.S. Supreme Court has never held that the U.S. Constitution requires state courts to provide appellate review for instances of unobjected to violations of constitutionally protected rights. Nevertheless we choose to consider the U.S. Supreme Court's application of the statutorily-derived plain error review and how it compares with Idaho's traditional fundamental error review.

Id. at 224 (internal brackets, quotes, and citations omitted).

Defense attorneys are involved in the same type of "sandbagging" in capital cases. As demonstrated in Hairston, 133 Idaho at 513, counsel strategically chose not to object to alleged error so it could be raised for the first time on appeal, potentially requiring a new trial long after post-conviction proceedings and the unitary appeal were completed, wasting valuable time and resources when the error could have easily been corrected at the trial. These types of antics cannot be countenanced by this Court even in capital cases, which are already provided "heightened scrutiny" or "super due process" under the steady beat that "death is different."

Moreover, such review of death sentences would require this Court to review the guilt-phase in capital cases under the same standard because "[e]vidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." I.C. § 19-2515(6). Outside of Scroggins, 110 Idaho at 385-86, the state is unaware of this Court relying upon I.C. § 19-2827 to address guilt-phase issues that were not preserved below.

Similarly, Dunlap's broad interpretation of I.C. § 19-2827 is inconsistent with I.C. § 19-2719(4), which permits review under the Uniform Post-Conviction Procedure Act ("UPCPA"). Obviously, if all error, particularly sentencing error, is reviewed as contended by Dunlap, there is no need to raise ineffective assistance of counsel claims because there would be no showing of prejudice under the two-prong requirements of Strickland v. Washington, 466 U.S. 668, 687 (1984). Rather, as recognized in Hairston, 133 Idaho at 513, this Court would simply make a determination of whether the alleged error violated the Constitution, and if there was no constitutional violation, there could be no prejudice as required under Strickland. Nevertheless, not only have capital defendants utilized the UPCPA for ineffective assistance of counsel claims, but in 1984 the

Legislature expressly enacted I.C. § 19-2719(6), which provides for a remedy by way of the UPCPA. 1984 Idaho Sess. Laws, ch.159, § 7, pp.386-390. There was simply no reason for the legislature to enact I.C. § 19-2719(6) if it subscribed to the broad interpretation of I.C. § 19-2827 advocated by Dunlap.

Finally, as a result of this Court's early interpretation of I.C. § 19-2827, the Ninth Circuit has virtually eliminated principles of comity and federalism when reviewing Idaho's capital sentences. In Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), the Ninth Circuit addressed the question of whether Beam fairly presented a claim to this Court based upon one of Idaho's aggravating factors. Relying upon I.C. § 19-2527, the Ninth Circuit concluded, "the [Idaho Supreme Court] 'either explicitly or implicitly' concluded that the sentencing judge's application of the 'continuing threat' aggravating factor did not violate the Eighth Amendment." Beam, 3 F.3d at 1307. As a result, capital sentencing errors are being reviewed for the first time in federal habeas without the benefit of this Court having a fair opportunity review those claims. *See e.g.* Hoffman v. Arave, 973 F.Supp. 1152, 1158-64 (D. Idaho 1997). Based upon the Idaho Legislature and this Court's strong concerns regarding principles of comity and federalism, *see* State v. Bitt, 118 Idaho 584, 587, 798 P.2d 43 (1990); Idaho Power Co. v. Idaho Pub. Utilities Comm., 102 Idaho 744, 755, 639 P.2d 442 (1981), it is unfathomable this Court would not have an opportunity to correct alleged errors in capital cases prior to them being raised for the first time in federal habeas.

For all intents and purposes, capital sentencing before a jury is virtually identical to a trial, particularly a resentencing before a new jury. While there are some nuances that distinguish the resentencing, such as the application of Idaho's Rules of Evidence,

the state is required to prove beyond a reasonable doubt at least one statutory aggravating factor, which is then weighed by the jury against the collective mitigation. Based upon the arguments above, capital defendants should not be permitted the windfall that comes from permitting defense counsel to "sandbag" at a resentencing and be permitted to raise issues for the first time on appeal, particularly considering the "heightened scrutiny" that is mandated in all capital cases. Rather, this Court should utilize the fundamental error doctrine announced in Perry, in all cases, including capital sentencing appeals, which provides sufficient scrutiny to alleviate any concern regarding capital defendants' ability to seek relief from alleged constitutional violations.

CONCLUSION

The state respectfully requests that this Court clarify the parameters of I.C. § 19-2827, utilize the fundamental error doctrine as adopted by this Court in Perry, and affirm Dunlap's death sentence and the district court's Memorandum Decision and Order denying post-conviction relief. Alternatively, should this Court conclude I.C. § 19-2827 mandates the review in Osborn, and if this Court finds sentencing error, the state requests that Dunlap's death sentence and the district court's Memorandum Decision and Order denying post-conviction relief be affirmed under the harmless error doctrine.

DATED this 18th day of June, 2012.

L. LaMONT ANDERSON
Deputy Attorney General and
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of June, 2012, served a true and correct copy of the foregoing document by causing a file stamped copy addressed to:

SHANNON N. ROMERO
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit