7-31-2017

Parks v. State Respondent's Brief Dckt. 44291

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILAS BENJAMIN PARKS,	)	
	)	**No. 44291**
Petitioner-Appellant,	)	
	)	**Latah County Case No.**
v.	)	**CV-2011-0968**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

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STATEMENT OF THE CASE

Nature of the Case

Silas Benjamin Parks appeals from the district court's order denying his post-conviction petition following an evidentiary hearing.

Statement of Facts and Course of Proceedings

The state presented evidence of the following facts at the preliminary hearing, at the conclusion of which the magistrate court determined that the state established probable cause that Parks committed two counts of first-degree murder and one count of first-degree arson (R., Vol. V, pp.1043-1047):

On the morning of June 24, 2009, at approximately 7:45 a.m., an individual noticed smoke and fire coming from a duplex on Vandal Drive in Moscow. (R., Vol. IV, pp.835, 837-842.) She called 911 to report the fire at 7:48 a.m. (R., Vol. IV, pp.839-840.) Firefighters responded to the scene minutes later and recovered the badly burned body of Sarah Parks from a bedroom of the residence she shared with her husband, Silas Parks. (R., Vol. IV, pp.847-855, 864-868; see also R., Vol. II, pp.311-313 (coroner report).)

Silas Parks arrived at the scene of the fire by 8:15 a.m. (R., Vol. V, p.884.) He informed authorities that he had woken up at the residence at 6:45 a.m. and had checked on Sarah before driving to a nearby Anytime Fitness facility to work out at approximately 7:20 a.m. (R., Vol. V, pp.902-905, 1032-1034.) Parks also told a University of Idaho student who was near the scene of the fire that he had been trying to contact his wife via phone. (R., Vol. V, pp.878-879, 883-886.) The Anytime Fitness facility was approximately three-and-one-half minutes away from

the Parks' residence by car, and authorities were able to confirm that Parks swiped his membership card at the facility at 7:39 a.m. (R., Vol. V, pp.908, 916.) Authorities examined both of the Parks' cell phones and determined that Silas did not, as he told the University of Idaho student, call Sarah that morning. (R., Vol. V, pp.897-900.)

A Fire Marshal's Office investigation concluded that the fire started at or near the foot of the bed where Sarah Parks' body was found, and that the fire started within ten to fifteen minutes of being observed by the initial witness that morning. (R., Vol. V, pp.963, 1001-1003.) The investigation did not identify any evidence to support an accidental cause of the fire, and thus concluded that the fire was caused by the "interdiction of a flame to available and/or introduced fuels." (R., Vol. V, pp.990-1002.)

An autopsy performed by state forensic pathologist Dr. Jeffery Reynolds confirmed the identity of the deceased as Sarah Parks, and found that Parks was 19-20 weeks pregnant at the time of her death. (R., Vol. II, pp.314-319; R., Vol. V, pp.929-933.) Dr. Reynolds concluded that Parks died before her body was burned by the fire, and that the cause of death was "Probable Suffocation or Strangulation." (R., Vol. II, pp.314-319; R. Vol. V, pp.929-930.) No evidence of any other theoretical cause of death was discovered. (R., Vol. II, pp.314-319.)

The state charged Parks with two counts of first-degree murder and one count of first-degree arson. (R., Vol. I, pp.92-93.[1])

After a mediation, the parties entered into an I.C.R. 11 plea agreement. (R., Vol. I, pp.94-97; Tr., p.301, Ls.1-9.) Parks' counsel advised him to take the plea offer set forth by the state. (Tr., p.201, Ls.8-10.) Parks agreed to plead guilty to first-degree arson and to two amended charges of voluntary manslaughter. (R., Vol. I, pp.95-103.) The parties also agreed that Parks would remain at his parents' residence pending sentencing, that the sentences for the two voluntary manslaughter charges would run concurrently with each other, that Parks would waive his right to appeal, and that the parties would be free to recommend any lawful sentence. (R., Vol. I, p.95.) At the change of plea hearing, Parks provided a factual basis for the pleas by stating "that's what I did," when asked by the court why he was pleading guilty to first-degree arson and two counts of voluntary manslaughter. (R., Vol. II, p.291.) Parks further answered in the affirmative when asked by the court if he committed the acts as alleged in the amended charging information. (Id.) Parks' trial counsel also stipulated to the factual basis of the guilty pleas. (R., Vol. II, p.292.)

At the sentencing hearing, Parks recommended that the district court impose three concurrent 15-year sentences, each with five years fixed, for the three charges. (R., Vol. II, p.349.) The state recommended that the court impose concurrent fixed 15-year sentences for the two voluntary manslaughter charges,

[1] The district court took judicial notice of documents associated with the underlying criminal case. (R., Vol. IV, pp.795-800.) Many of these documents were also attached to various filings made in the post-conviction case. (See generally R.)

and a consecutive 25-year fixed sentence for first-degree arson, which would result in a cumulative 40-year fixed sentence. (R., Vol. II, p.353.) The district court imposed concurrent 15-year fixed sentences for the two voluntary manslaughter charges, and a consecutive 25-year sentence with five years fixed for first-degree arson. (R., Vol. I, pp.105-108, 111-114; R., Vol. II, pp.354-356.) This resulted in a cumulative 40-year sentence with 20 years fixed. The district court denied Parks' subsequent I.C.R. 35 motion for reduction of sentence. (R., Vol. I, p.166.) Parks did not attempt to appeal from the judgment of conviction.

In September 2011, Parks filed a *pro se* petition for post-conviction relief. (R., Vol. I, pp.20-25.) The district court appointed counsel to represent Parks on the petition. (R., Vol. I, pp.221-222.) Substitute counsel later made an appearance. (R., Vol. II, pp.237-239.) Through counsel, Parks filed an amended post-conviction petition and memorandum in support. (R., Vol. II, pp.250-259, 365-401.) Parks alleged: (1) trial counsel was ineffective for failing to retain a forensic pathologist to challenge the conclusions of the state autopsy report with regard to Sarah Parks' cause of death before advising Parks to accept the state's plea offer; (2) trial counsel was ineffective for failing to retain an expert to present evidence, at the sentencing hearing, regarding Parks' alleged lack of memory surrounding Sarah Parks' death; and (3) based upon these ineffective assistance of counsel claims, there existed material facts, not previously presented and heard, that required a vacating of the judgment of conviction in the interest of justice pursuant to I.C. § 19-4901(a)(4). (Id.)

Parks supported his first ineffective assistance of trial counsel claim with an affidavit and report prepared by Dr. Jonathan L. Arden of Arden Forensics, a consulting practice based in Virginia. (R., Vol. II, pp.261-266.) Dr. Arden reviewed the state's coroner and autopsy reports and concluded that, while it was "reasonable to consider some form of asphyxiation" as having caused Sarah Parks' death, Dr. Reynolds should have recorded the cause of death as "undetermined" in light of the "limitations imposed by the thermal destruction of the critical evidence" due to the fire, and because, Dr. Arden asserted, some of the methods relied upon by Dr. Reynolds were not reliable or did not adequately support his conclusions. (Id.) Parks also submitted an affidavit in which he alleged that, had he known that the state's autopsy results could be challenged in this manner, he would not have accepted the state's plea offer and would have insisted to proceeding to trial. (R., Vol. II, pp.276-278.)

The state moved for the summary dismissal of Parks' amended post-conviction petition. (R., Vol. III, pp.459-477.) The district court granted the motion with respect to Parks' claim that trial counsel was ineffective for failing to retain an expert to present evidence at the sentencing hearing regarding Parks' alleged lack of memory of Sarah Parks' death.[2] (R., Vol. III, pp.499-500.) The district court denied the motion with respect to Parks' claim that trial counsel was ineffective for failing to retain a forensic pathologist. (R., Vol. III, pp.497-488.) The district court did not expressly analyze or reach any conclusions regarding

[2] Parks does not challenge this conclusion on appeal.

Parks' I.C. § 19-4901(a)(4) newly discovered evidence claim. (See R., Vol. III, pp.494-501.)

An evidentiary hearing was conducted on Parks' remaining ineffective assistance of counsel claim. (Tr.) Parks, Parks' two trial attorneys, Dr. Arden, a federal ATF agent who investigated the fire, and a criminal defense attorney retained by the state as an expert witness testified at the hearing. (Id.)

At the conclusion of the hearing, and after both parties submitted written closing argument (R., Vol. VI, pp.1188-1251), the district court denied Parks' remaining ineffective assistance of counsel claim and dismissed Parks' post-conviction petition as a whole (R., Vol. VI, pp.1267-1276). The court concluded that Parks failed to demonstrate that his trial counsel provided deficient performance by advising Parks to accept the state's plea offer without first retaining a forensic pathologist to investigate the state autopsy conclusions. (Id.) The court did not reach the prejudice prong of Strickland.[3] (Id.) Parks timely appealed. (R., Vol. VI, pp.1279-1286.)

[3] Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

ISSUES

Parks states the issues on appeal as:

1. Does defense counsels' representation fall below constitutional standards mandating that the defendant's guilty pleas and plea bargain be set aside when (1) the cause of death in a first-degree murder prosecution is not obvious and is dependent upon scientific evaluation, (2) the accused person is unwilling or unable to explain the cause of death to his lawyers, (3) defense counsel fail to investigate the cause of death and allow the prosecution's forensic investigation to go unchallenged, (4) defense counsel advise the client to accept a plea bargain which results in the imposition of a 20- to 40- year prison sentence, (5) the District Court accepts that plea bargain without requiring the defendant to allocute to facts which support the guilty pleas, and (6) scientific evidence rebutting the prosecution's theory of the cause of death was readily available had an investigation by defense counsel occurred?

2. Do the newly presented material facts not previously presented and heard require vacatur of the convictions and/or sentences in the interest of justice pursuant to I.C. § 19-4901(a)(4)?

(Appellant's brief, p.22)

The state rephrases the issues on appeal as:

1. Has Parks failed to show that the district court erred by denying, following an evidentiary hearing, his post-conviction claim that his trial counsel was ineffective for failing to retain a forensic pathologist prior to advising Parks to plead guilty?

2. Has Parks failed to demonstrate that he is entitled to relief on his I.C. § 19-4901(a)(4) new evidence claim?

ARGUMENT

I.
Parks Has Failed To Show That The District Court Erred By Denying, Following An Evidentiary Hearing, His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Retain A Forensic Pathologist Prior To Advising Parks To Plead Guilty

A. Introduction

In his amended post-conviction petition, Parks alleged that his trial counsel was ineffective for failing to retain a forensic pathologist to challenge the state autopsy report's conclusions regarding Sarah Parks' cause of death. (R., Vol. II, pp.253-254, 373-394.) On appeal, Parks has failed to assign specific error to the district court's denial of this claim. (See Appellant's brief, pp.23-41.) Parks has therefore waived this issue for appeal. In any event, a review of the record reveals that the district court correctly concluded that Parks failed to demonstrate that his trial counsel provided deficient performance, and that Parks has also failed to demonstrate prejudice from any alleged deficiency. This Court should therefore affirm the district court's denial of this claim.

B. Standard Of Review

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. 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). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they

are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-277, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Parks Has Waived This Issue On Appeal Because He Has Failed To Assign Specific Error To The District Court

It is a well-settled tenet of appellate review that the "party alleging error has the burden of showing it in the record." Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014). It is equally well-settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for unspecified errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983); Liponis v. Bach, 149 Idaho 372, 374-375, 234 P.3d 696, 698-699 (2010) ("...to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived"). Moreover, "[a] party waives an issue on appeal if either authority or argument are lacking." State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)).

In this case, Parks has failed to assign any specific error to the district court with respect to its denial of his ineffective assistance of trial counsel claim. (See Appellant's brief, pp.22-41.) In fact, Parks has failed to allege any district

court error, specific or otherwise. Both the "Issues Presented on Appeal" and "Argument" sections of Parks' Appellant's brief assert only that Parks' trial counsel was ineffective, not that the district court erred in denying this claim. (Id.) Parks did not challenge any of the factual findings,[4] legal standards utilized, or legal analysis conducted by the district court. This Court should not conduct a blanket review of the district court's findings and legal analysis in the absence of such assigned error.

Because Parks has failed to assign any error, let alone specific error, to the district court, he has waived this claim for consideration on appeal. This Court should therefore decline to search the record for unspecified errors and instead affirm the determination of the district court.

D. Even If This Court Reaches The Merits Of This Claim, Parks Has Failed To Show That The District Court Erred

Even if this Court chooses to construe Parks' brief as contending that the district court erred, in a general sense, in denying his ineffective assistance of counsel claim, Parks has failed to show that the district court erred.

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman v. State, 144 Idaho

[4] Therefore, even to the extent that this Court considers the merits of Parks' appellate claims, it is bound by the factual findings of the district court as set forth in its order denying Parks' ineffective assistance of counsel claim. (See R., Vol. VI, pp.1267-1274.)

518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-688 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989).

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). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable …." Id. at 690.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691. However, "the duty to investigate does not force defense lawyers to scour the globe on the off chance

something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he or she did so for tactical reasons rather than through sheer neglect." Suits v. State, 143 Idaho 160, 164, 139 P.3d 762, 766 (Ct. App. 2006) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

With respect to a trial counsel's pretrial investigation, the Idaho Supreme Court has further explained:

> The obligation of defense counsel is to conduct a prompt and thorough pretrial investigation, which should include efforts to secure information in the possession of the prosecution and law enforcement authorities. However, the course of the investigation will naturally be shaped by a defendant's disclosure to his counsel, by his mental condition, by counsel's preliminary knowledge of the evidence against the defendant and by a variety of factors, many peculiar to each given case.

State v. Perez, 99 Idaho 181, 184, 579 P.2d 127, 130 (1978) (citation omitted).

To establish Strickland 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). With respect to Strickland prejudice stemming from claims that trial counsel performed an inadequate investigation prior to the entry of a defendant's guilty plea, the United States Supreme Court has explained:

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to

> plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill v. Lockhart, 474 U.S. 52, 59 (1985).

1. Parks Failed To Demonstrate Deficient Performance

As the district court concluded (R., Vol. VI, pp.1270-1272), Parks failed to demonstrate that his trial counsel[5] provided deficient performance by advising him to plead guilty before retaining a forensic pathologist to challenge the state's autopsy conclusions. Counsel's advice was entirely reasonable in light of the strong evidence of Parks' guilt, the admissions of guilt Park made to trial counsel, counsel's professional opinion regarding the likely outcome of a trial, and the state's willingness to amend Parks' two first-degree murder charges.

It was evident from the preliminary hearing that the state possessed strong evidence of Parks' guilt. The timing of when the fire was first observed (R., Vol. IV, pp.837-842) and when Parks arrived at the Anytime Fitness facility (R., Vol. V, p.916), combined with the fire investigation's conclusion regarding when the fire started (R., Vol. V, pp.1002-1003), created a tight timeline that fully supported the state's theory of the case that Parks killed his wife and then started a fire at or near the foot of the bed. The fire investigation's conclusions ruling out accidental causes of the fire (R., Vol. V, pp.990-1002), and the state autopsy

[5] Two public defenders, Ray Barker and Charles Kovis, represented Parks in the underlying criminal case. (Tr., p.292, Ls.9-11; p.328, Ls.6-16.) Both attorneys testified at the evidentiary hearing and were deposed by Parks in the course of the post-conviction proceeding. (R., Vol. III, pp.540-575; Tr., p.289, L.19 – p.373, L.14.) In this brief, the state discusses the representation of the two attorneys collectively.

report's conclusion that Sarah Parks died of "Probable Suffocation or Strangulation" and was already dead by the time the fire burned her body (R., Vol. II, pp.314-319), further supported the state's case. Additionally, neither the fire investigation nor autopsy identified any evidence supporting any other cause of death, or cause of fire, that would, if true, exonerate Parks. Indeed, attempting to theorize an innocent explanation for Sarah Parks' death and the subsequent fire strains credulity. Sarah Parks would have had to have died suddenly of some natural cause unsupported by the evidence almost immediately after Parks left the house, and then, almost immediately after she died, a non-accidental fire would have had to have been started by an unknown person at the foot of the same bed Sarah Parks died on (or, such a fire would have had to have been started by some accidental cause unsupported by the evidence).

Parks made several admissions of guilt to his trial attorneys which reasonably impacted the strategy they employed in resolving the case. Parks told trial counsel that he recalled putting his hands around Sarah's neck and starting the fire. (R., Vol. III, pp.543, 549-550, 623; Tr., p.303, Ls.2-19; p.318, L.13 – p.319, L.6.) Trial counsel interpreted these admissions from Parks as "reluctant" acknowledgments that he had committed the crimes as alleged. (R., Vol. III, pp.549-550; Tr., p.304, L.23 – p.305, L.5.) Trial counsel did not find credible Parks' assertions that he did not fully remember what happened the morning Sarah Parks died. (R., Vol. III, pp.570, 606; Tr., p.365, L.5 – p.366, L.11.) In light of the state's evidence of guilt, and these admissions, trial counsel reasonably began to focus on mitigation. (R., Vol. III, pp.598-599.)

Trial counsel further testified that in light of the circumstances of the case, convictions for first-degree arson and voluntary manslaughter (rather than first-degree murder) would be the "best possible outcome" following a jury trial. (R., Vol. III, pp.517-518, 527-528, 604-605; Tr., p.302, Ls.11-17; p.336, L.9 – p.338, L.14.) Trial counsel was, in fact, surprised by the state's plea offer and willingness to amend both first-degree murder charges. (Tr., p.343, Ls.5-22.) In light of this evaluation of the case, it was reasonable to advise Parks to accept the state's plea offer.

Indeed, the state's plea offer, which allowed Parks to recommend any lawful sentence to the district court, improved his sentencing prospects – particularly considering the evidence of Parks' guilt possessed by the state. In Idaho, the penalty for first-degree murder in a non-capital case is "a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service." I.C. § 18-4004. The maximum sentence in a non-capital first-degree murder case is fixed life. Id. The maximum sentence for voluntary manslaughter is 15 years, and there is no statutorily-mandated minimum sentence. I.C. § 18-4007(1).

Further, the state's plea offer was desirable to Parks because it permitted him to remain released on bond pending sentencing. (R., Vol. I, p.96.) During the mediation process prior to the entry of his guilty plea, Parks informed his trial

counsel that this pre-sentencing release was his "main concern." (R., Vol. III, p.526; Tr., p.343, L.23 – p.344, L.5.)

It is also clear from the record that trial counsel actively pursued a defense and/or mitigation, and that the advice given to Parks was strategic and not based upon some objective shortcoming such as inattentiveness or neglect. Trial counsel frequently communicated with Parks about the case, reviewed the evidence, and discussed the possibility of formally retaining a forensic pathologist. (R., Vol. III, pp.525-526; Tr., p.194, L.19 – p.196, L.25; p.292, L.9 – p.300, L.13.)

Trial counsel consulted two forensic pathologists about the case. (R., Vol. III, pp.525-526; Tr., p.330, L.17 – p.331, L.16.) Counsel declined to retain the first pathologist because he wasn't willing to testify at a trial, and then ultimately declined to retain the second pathologist because a plea agreement had been reached with the state. (R., Vol. III, pp.365, 525-526; Tr., p.330, L.17 – p.331, L.1.) Trial counsel also consulted an expert to review the state's fire investigation. (Tr., p.331, L.17 – p.331, L.8.) This expert concluded that while there could be no definitive certainty that the fire was "human-caused," there was no evidence supporting any other explanation. (Tr., p.331, L.17 – p.332, L.8.) Trial counsel also retained a private investigator to assist in the investigation. (Tr., p.294, L.11 – p.295, L.4.) At the change of plea hearing, Parks informed the court that he was happy with his trial counsel's assistance at that point. (R., Vol. II, pp.296-297.)

Trial counsel also considered and discussed the possibility of attempting to develop defense theories, including one based upon Sarah's asthma (R., Vol. III, p.528; Tr., p.336, L.9 – p.337, L.1), and one based upon a theoretical alternative perpetrator – before Parks specifically requested that counsel not pursue the latter option (Tr., p.334, L.14 – p.335, L.10).

The state presented an affidavit and expert testimony from defense attorney Paul Clark, who had, at the time, 45 years of experience in criminal law, including criminal defense. (R., Vol. IV, pp.750-755; Tr., p.276, p.3 – p.288, L.21.) Clark reviewed the relevant materials and concluded that Parks' trial counsel's decisions to accept the state's plea offer and forgo further investigation were reasonable based upon the strength of the state's evidence and other circumstances of the case. (R., Vol. IV, pp.752-753; Tr., p.283, L.13 – p.286, L.25.) Clark also agreed with trial counsel's assessment that Parks was likely to face conviction on both counts of first-degree murder if he proceeded to trial, even if trial counsel had obtained the conclusions of Dr. Arden at that point. (R., Vol. IV, p.752; Tr., p.287, Ls.9-25.)

Finally, the district court also properly concluded that Parks failed to demonstrate that his trial counsel provided deficient performance by failing to retain a forensic pathologist to present evidence at Parks' sentencing hearing regarding Sarah Parks' cause of death. (R., Vol. VI, p.1272.) As the court noted (id.), it would not have considered evidence presented at the sentencing hearing for the purpose of attempting to negate guilt. See, e.g., United States v. Hunt, 521 F.3d 636, 649 (6th Cir. 2008) ("it would be improper for the judge in

sentencing to rely on facts directly inconsistent with those found by the jury beyond a reasonable doubt").

In light of the strength of the state's case, the admissions of guilt Parks made to trial counsel, and the desirability of the state's plea offer, Parks has failed to show that the district court erred by concluding that trial counsel's performance was not deficient. Parks has therefore failed to show that the district court erred in denying this claim.

2. Parks Failed To Demonstrate Prejudice From Any Alleged Deficient Performance

While the district court did not reach the issue of Strickland prejudice, Parks has also failed to demonstrate that he was prejudiced by any alleged deficiency of his trial counsel. A review of the record reveals that the proposed expert testimony would have had only limited value to Parks' defense.

The state notes the inherent difficulty in weighing the strength of "new" defense expert conclusions, acquired long after a defendant pleads guilty, against the state's evidence of guilt which was never fully developed *because* the defendant chose to plead guilty and waive his right to require the state to prove its case and to present a defense to the charges.[6] (See R., Vol. II, pp.287-288.) Parks ended the state's investigation into the underlying crimes by pleading guilty. Parks then, only after receiving a sentence that exceeded his sentencing recommendation, sought new expert testimony to attack the state's evidence.

[6] The state further notes that each of the cases cited by Parks in the section of his Appellant's brief setting forth the law applicable to ineffective assistance of counsel challenges concerning investigations and expert witnesses involve cases where the defendant was convicted after a jury trial. (Appellant's brief, pp.33-37.)

Even acknowledging this difficulty and the incompleteness of the state's case, it is clear from the record that Parks has failed to demonstrate Strickland prejudice, even assuming that his trial counsel provided deficient performance. As discussed above, the state presented substantial evidence of Parks' guilt at the preliminary hearing, and the state's theory of the case was supported by witness testimony, the known time-line of events, the fire investigation conclusions, and the state's autopsy report.

Weighed against this evidence, the expert testimony now set forth by Parks would have been of limited value to his defense, even assuming trial counsel was able to retain this particular Virginia-based expert, or another expert who might have come to similar conclusions. Dr. Arden did not propose an alternative cause of death or even identify evidence supporting any other cause of death; he simply offered potential impeachment evidence to challenge the conclusions of the state autopsy performed by Dr. Reynolds. This is significant because the state was not required to prove any specific cause of death to satisfy the causation element of first-degree murder, only that Parks "engaged in conduct which caused the death of" Sarah Parks. (See I.C.J.I. 74.)

In fact, several of Dr. Arden's conclusions amounted to mere inconsequential critiques of the procedures utilized during Dr. Reynolds' autopsy of Sarah Parks. Neither Dr. Arden, nor Parks, has attempted to explain how these critiques demonstrate Strickland prejudice. For example, Dr. Arden criticized Dr. Reynolds for conducting the autopsy at a funeral home, for not weighing Sarah Parks' organs, and for failing to wait for the results of a toxicology

report (which ultimately came back negative), before reaching a conclusion regarding Parks' cause of death. (R., Vol. II, pp.263-266; Tr., p.106, L.7 – p.107, L.3.) It is unclear how any of these critiques, even if valid, ultimately impacted Dr. Reynolds' relevant conclusions or prejudiced Parks.

Further, Dr. Arden reached numerous conclusions which supported, or at least did not directly contradict or effectively challenge, the state's theory of the case and Dr. Reynolds' reported cause of death. Dr. Arden acknowledged that it was "reasonable to consider some form of asphyxiation considering the circumstances," and that Parks, in fact, "could have" died from strangulation or suffocation. (R., Vol. II, p.265; Tr., p.111, Ls.14-18; p.112, Ls.9-17.) Importantly, Dr. Arden also agreed with Dr. Reynolds' conclusion that Sarah Parks was dead before the fire burned her body. (Tr., p.108, Ls.13-25.)

Additionally, while Dr. Arden emphasized that "in order to figure out why people died," one must rely not only on the medical findings but also the context provided by "history and circumstances relating to the death" (Tr., p.77, L.18 – p.78, L.8; p.90, Ls.7-24), Dr. Arden did not himself review the crime scene investigation reports, police reports, witness statements, or fire investigation reports (Tr., p.101, L.22 – p.103, L.10).

Parks' trial counsel testified that in light of this limited usefulness of Dr. Arden's report, his advice to Parks to take the state's plea offer would not have changed even if he possessed the information at the time he advised Parks. (Tr., p.322, L.16 – p.323, L.4.) Therefore, it is likely that trial counsel's advice to Parks regarding the plea offer would have also remained unchanged.

Even had Dr. Arden testified at a trial, the jury would have had to weigh his conclusions against those of Dr. Reynolds, who is a well-qualified board-certified forensic pathologist. In his 30-year career, Dr. Reynolds has conducted over 3,000 autopsies and has never been disciplined by the Board of Medicine or any other licensing board. (Exhibits, pp.50, 61-63.[7]) Dr. Arden, relied upon by Parks, quit his job as a chief medical examiner in Washington D.C. while under investigation from the Inspector General's Office. (Tr., p.103, Ls.17-22.) Among the ultimate findings of the investigation was that Dr. Arden's histology laboratory was not properly vented, waste chemicals were not properly stored and disposed of, and that there was no standardized procedure for autopsies. (Tr., p.103, L.23 – p.104, L.8.)

Considering the limitations of Dr. Arden's testimony, as weighed against the substantial evidence of guilt presented by the state at the preliminary hearing, Parks has failed to demonstrate Strickland prejudice, even assuming that trial counsel was deficient as alleged. This Court should therefore affirm the district court's denial of this claim.

II.
Parks Has Failed To Demonstrate That He Is Entitled To Relief On His I.C. § 19-4901(a)(4) New Evidence Claim

A. Introduction

Parks, citing I.C. § 19-4901(a)(4), contends that he was entitled to post-conviction relief due to "newly presented material facts not previously presented

[7] Exhibits in the appellate record are contained within the electronic file, "EXHIBITS.pdf." Citations to page numbers of the "Exhibits" refer to the page numbers of this file.

and heard" which, Parks asserts, require a vacating of his convictions and/or sentence "in the interest of justice." (Appellant's brief, pp.41-45.) On appeal, Parks has failed to assign specific error to the district court's denial with respect to this claim. (See generally id.) Parks has therefore waived this issue for appeal. Further, Parks has failed to preserve this issue for appeal because his corresponding I.C. § 19-4901(a)(4) claim was bare and conclusory as presented to the district court, and because the expanded argument he now brings on appeal was not raised below. Finally, even if this Court reaches the merits of this claim, Parks has failed to demonstrate he is entitled to relief because the apparent "new evidence" of Dr. Arden's report is merely impeaching and would not have probably produced an acquittal.

B. Parks Has Waived This Issue On Appeal Because He Has Failed To Assign Specific Error To The District Court

As discussed above, it is a well-settled tenet of appellate review that the "party alleging error has the burden of showing it in the record." Akers, 156 Idaho 37, 320 P.3d 428. It is equally well-settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for unspecified errors. Hoisington, 104 Idaho at 159, 657 P.2d at 23. Moreover, "[a] party waives an issue on appeal if either authority or argument are lacking." Freitas, 157 Idaho at 267, 335 P.3d at 607 (citing Zichko, 129 Idaho at 263, 923 P.2d at 970).

In this case, Parks has failed to assign any specific error to the district court regarding his I.C. § 19-4901(a)(4) new evidence claim. (See Appellant's

brief, pp.41-45.) In fact, Parks has failed to allege any district court error at all. Both the "Issues Presented on Appeal" and "Argument" sections of Parks' Appellant's brief assert only that Parks is entitled to relief under I.C. § 19-4901(a)(4), not that the district court erred in denying the claim or by failing to rule on it. (Id.) This Court should not conduct a blanket review of the district court's findings and legal analysis in the absence of such assigned error.

Because Parks has failed to assign any error, let alone specific error, to the district court, he has waived this claim for consideration on appeal. This Court should therefore decline to search the record for unspecified errors and instead affirm the district court's order dismissing Parks' post-conviction petition.

C. In The Alternative, Parks Has Failed To Preserve This Claim In The Manner In Which He Now Raises It On Appeal

It is well-settled that Idaho's appellate courts "will not consider issues not raised in the court below." State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2011) (citing State v. Wheaton, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992)). Additionally, bare or conclusory post-conviction allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing and are subject to summary dismissal. Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985).

Idaho Code § 19-4901(a)(4) provides that a petitioner may seek post-conviction relief on the ground that "there exists evidence of material facts, not

previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

Where a criminal defendant is convicted after a trial, "[t]he request for a new trial in a post-conviction proceeding based on newly discovered evidence [pursuant to § 19-4901(a)(4)] is the same as a motion for new trial subsequent to a jury verdict." Whiteley v. State, 131 Idaho 323, 326, 955 P.2d 1102, 1105 (1998). In State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976), the Idaho Supreme Court articulated the four-part test a defendant must satisfy in order to be entitled to a new trial based upon newly discovered evidence. That test requires a defendant to show that the evidence offered in support of his motion for a new trial: (1) is newly discovered and was unknown to the defendant at the time of trial; (2) is material, not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Id. at 691, 551 P.2d at 978. The burden to show that each of these criteria is satisfied rests with the movant. State v. Dopp, 129 Idaho 597, 605, 930 P.2d 1039, 1047 (Ct. App. 1996).

In announcing this four-part test, the Court cited Professor Wright's text on Federal Practice and Procedure and specifically noted his comment, "after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial." Drapeau, 97 Idaho at 691, 551 P.2d at 978 (citation omitted). "Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and

conservation of scarce judicial resources." State v. Stevens, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008) (internal quotations and citations omitted) (quoting State v. Hayes, 144 Idaho 574, 577, 165 P.3d 288, 291 (Ct. App. 2007)).

The state has found no case where an Idaho Appellate Court has determined whether the Drapeau standard, or some other standard, applies to an I.C. § 19-4901(a)(4) post-conviction new evidence claim where the defendant pled guilty in the underlying criminal case, or whether such a defendant may even seek relief under that subsection. In this case, neither Parks, the state, nor the district court cited Drapeau or presented any analysis regarding the question of how, or if, Parks could demonstrate whether any newly discovered evidence in this case necessitated a vacating of his conviction or sentence "in the interest of justice."

Instead, in his memorandum in support of his amended post-conviction petition, Parks described the basis of his I.C. § 19-4901(a)(4) claim merely as follows:

> Although the above analysis [with respect to Parks' ineffective assistance of counsel claims] is sufficient to resolve this matter in favor of Mr. Parks on constitutional grounds rooted in the Sixth Amendment right to counsel, this reasoning set forth above applies with equal force in the context of Idaho Code § 19-4901(a)(4), and the entirety of the above analysis is incorporated herein.

(R., Vol. II, p.399.) Parks did not provide any additional analysis or argument with respect to this claim in his written closing argument following the evidentiary hearing. (R., Vol. VI, pp.1234-1235.)

Therefore, while the state presumes that Dr. Arden's report constitutes the "new evidence" Parks contends warrants a vacating of his judgment of conviction, Parks did not specifically identify such evidence to the district court or present argument explaining why such evidence entitled him to relief under I.C. § 19-4901(a)(4). Therefore, this claim, as presented to the district court, was bare and conclusory.

In its brief in support of its motion for summary dismissal, the state, like Parks, simply referred to its prior arguments regarding Parks' ineffective assistance of counsel claims in its response to Parks' I.C. § 19-4901(a)(4) new evidence claim. (R., Vol. III, p.475.) In a reply brief submitted in support of its motion for reconsideration of the district court's partial denial of its motion for summary dismissal, the state again only briefly addressed the I.C. § 19-4901(a)(4) claim, and stated that this claim "does not provide an independent basis for a post-conviction relief, but rather is a legal question to be considered only if the remaining issue [of Parks' ineffective assistance of counsel claims] is answered in the affirmative." (R., Vol. III, pp.583-584.) The state continued, "[i]f the [district] [c]ourt finds that Parks' trial counsel made a reasonable decision that made further investigation into the cause of Sarah Parks' death unnecessary, than the [I.C. § 19-4901(a)(4)] issue is moot." (R., Vol. III, p.584.) The state again only briefly referenced the I.C. § 19-4901(a)(4) claim in its closing argument following the evidentiary hearing. (R., Vol. VI, p.1249.)

The district court did not analyze or specifically rule on Parks' I.C. § 19-4901(a)(4) claim in either its order partially granting the state's motion for

summary dismissal or its final "Findings of Fact and Conclusions of Law" order entered following the evidentiary hearing. (See R., Vol. III, pp.494-501; R., Vol. VI, pp.1267-1274.) In its order partially granting the state's motion for summary dismissal, the district court stated that "the report authored by Dr. Arden presents evidence of a material fact not previously presented to the [c]ourt." (R., Vol. III, p.498.) However, the court did not further analyze or rule on the I.C. § 19-4901(a)(4) claim and instead made this statement only in the context of its analysis of Parks' first ineffective assistance of counsel claim. (See id.)

Thus, it is apparent from the record that Parks presented his I.C. § 19-4901(a)(4) new evidence claim only in a conclusory manner to the district court, and that the state and the court did not analyze the claim as a distinct ground for relief requiring its own analysis, but instead as a gateway through which Parks' ineffective assistance of counsel claims must pass before he was entitled to relief.

On appeal, Parks presents his I.C. § 19-4901(a)(4) new evidence claim in a somewhat expanded manner. (Appellant's brief, pp.41-45.) Specifically, Parks asserts that I.C. § 19-4901(a)(4) "is a broad grant of authority from the legislature [to] the judicial branch to ensure that justice is done in criminal proceedings in the State of Idaho." (Appellant's brief, p.43.) Parks additionally contends that he is entitled to I.C. § 19-4901(a)(4) relief in this case because of "the failure by the defense counsel to duly investigate, Dr. Arden's findings and conclusions demonstrating a bona fide defense, the unusual pressures placed on Mr. Parks by counsel, and the District Court's failure to require a factual admission from

Mr. Parks at the change of plea hearing (at the joint request of the prosecution and the defense attorneys)." (Id.) Parks thus appears to interpret I.C. § 19-4901(a)(4) as a catch-all provision granting the judicial branch broad authority to grant discretionary relief.

Parks failed to preserve this proposed interpretation of I.C. § 19-4901(a)(4) for appellate review because he did not present it to the district court. By presenting his I.C. § 19-4901(a)(4) new evidence claim to the district court in a conclusory manner, Parks deprived the court of the opportunity to consider the claim in the manner in which he now presents it on appeal. This Court should therefore decline to consider this claim.

D. Even If This Court Considers The Merits Of Parks' I.C. § 19-4901(a)(4) Claim, Parks Has Failed To Show He Is Entitled To Relief

Finally, in the alternative, if this Court chooses to reach the merits of Parks' I.C. § 19-4901(a)(4) new evidence claim, Parks has failed to demonstrate he is entitled to relief. First, the state disputes Parks' contention that I.C. § 19-4901(a)(4) constitutes a "broad grant of authority" that a court may wield in the flexible manner advocated for by Parks on appeal. Parks has cited no authority standing for the proposition that a I.C. § 19-4901(a)(4) new evidence claim is subject to a standard any less restrictive than the Drapeau standard, and therefore, has waived this claim on appeal. See Zichko, 129 Idaho at 263, 923 P.2d at 970 (a party waives an issue on appeal if either authority or argument is lacking).

Instead, as the state noted above, it is well established that a post-conviction petitioner who was found guilty after a jury trial in his underlying criminal proceeding must satisfy the four-prong Drapeau standard to demonstrate that he is entitled to relief under I.C. § 19-4901(a)(4). See, e.g, Whiteley, 131 Idaho at 326, 955 P.2d at 1105; Rodgers v. State, 129 Idaho 720, 723, 932 P.2d 348, 351 (1996); Cootz v. State, 129 Idaho 360, 365-367, 924 P.2d 622, 627-629 (Ct. App. 1996); Grube v. State, 134 Idaho 24, 30-31, 995 P.2d 794, 800-801 (2000). There is no reason why a post-conviction petitioner who pled guilty in his underlying criminal proceeding, and who therefore waived his right to require the state to prove his guilt and to put on a defense, should be entitled to some more-forgiving standard than Drapeau.

However, even assuming, without conceding, that the Drapeau standard applies under these circumstances, Parks clearly could not satisfy this standard because Dr. Arden's report provided, at best, impeachment evidence, and because the report would not probably produce an acquittal.

The Idaho Court of Appeals has described the difference between impeachment evidence and substantive evidence as follows:

> Unlike substantive evidence which is offered for the purpose of persuading the trier of fact as to the truth of a proposition on which the determination of the tribunal is to be asked, impeachment is that which is designed to discredit a witness, i.e. to reduce the effectiveness of his testimony by bringing forth the evidence which explains why the jury should not put faith in him or his testimony.

State v. Marsh, 141 Idaho 862, 868-869, 119 P.3d 637, 643-644 (Ct. App. 2004). Evidence may be both substantive and impeaching. Id.

In this case, Dr. Arden's conclusions provided only, at best, impeachment evidence because he did not affirmatively set forth any alternative cause of death or cause of the fire. Instead, had these conclusions been utilized at a theoretical jury trial, they would have been offered only to attempt to discredit the conclusions of Dr. Reynolds.

Finally, the Dr. Arden report, even if it had been presented at a theoretical jury trial, would not probably have resulted in an acquittal. For this proposition, the state relies on its arguments, presented above, regarding the strength of the state's case and the limited defense value of Dr. Arden's conclusions.

Parks waived his I.C. § 19-4901(a)(4) new evidence claim because he failed to assign specific error to the district court, and because he failed to preserve the claim in the manner he now presents it on appeal. In any event, even if this Court reaches the merits of this claim, Parks cannot demonstrate that Dr. Arden's report satisfied the Drapeau standard. This Court should therefore decline to find that Parks is entitled to relief on this claim.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Parks' petition for post-conviction relief.

DATED this 31st day of July, 2017.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 31st day of July, 2017, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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MWO/dd