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# IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|---|---|---|
| TIMOTHY ALAN DUNLAP, | ) | |
| Petitioner-Appellant, | ) | |
| | ) | NO. 41105-2013 |
| vs. | ) | |
| | ) | Caribou County |
| | ) | Case No. 2011-108 |
| STATE OF IDAHO, | ) | |
| Respondent. | ) | |

**BRIEF OF RESPONDENT**

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

**HONORABLE MITCHELL W. BROWN**
**District Judge**

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## STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant, Timothy A. Dunlap, who has been sentenced to death for the first-degree murder of Tonya Crane, appeals from the district court's Final Judgment granting the state's Motion for Summary Dismissal and dismissing the claims in his Amended Petition for Writ of Habeas Corpus, which is a successive petition stemming from his resentencing and the consolidated appeal therefrom.

Statement Of Facts And Course Of The Underlying Criminal Proceedings

The facts leading to Dunlap's conviction for first-degree murder and sentence of death for Tonya's murder are summarized in Dunlap v. State (Dunlap III), 141 Idaho 50, 55 106 P.3d 376 (2005) (footnote omitted), as follows:

> On October 16, 1991, Dunlap entered and robbed the Security State Bank in Soda Springs, Idaho. Dunlap entered the bank, stood within a few feet of bank teller Tonya Crane, and ordered her to give him all of her money. Without hesitation, Tonya Crane did so. Dunlap immediately and calmly pulled the trigger of his sawed-off shotgun, which was less than two feet from Tonya Crane's chest, literally blowing her out of her shoes. Police officers responded immediately. When the officers arrived at the bank, Tonya Crane had no pulse. When taken to the hospital she was pronounced dead on arrival.
>
> Dunlap fled the scene, but subsequently surrendered to police. After being given his *Miranda* rights, Dunlap confessed to the murder and to a murder that occurred ten days before in Ohio. The following day, Dunlap again confessed and explained how he planned and completed both murders. Dunlap was charged with first-degree murder and robbery.
>
> Within days of his arrest, Dunlap arranged to be interviewed by Marilyn Young, Associate Editor of the Albany New Tribune in Indiana. During the interviews Dunlap explained to Young how he murdered his girlfriend [Belinda Belanos] in Ohio with a crossbow and then traveled west where he subsequently planned to rob the Soda Springs' bank. Dunlap described the bank robbery and Tonya Crane's murder to the editor.

Dunlap was charged with Tonya's first-degree murder, robbery, and two sentencing enhancements for use of a firearm during the murder and robbery. State v. Dunlap (Dunlap I), 125 Idaho 530, 531, 873 P.2d 784 (1993). Pursuant to a plea agreement, Dunlap pled guilty to Tonya's first-degree murder and use of a firearm in the commission of the murder, and the remaining charges were dismissed. Id. The district court subsequently sentenced Dunlap to death. Id. at 532. This Court affirmed Dunlap's conviction and death sentence. Id. at 539.

Statement Of Facts And Course Of Proceedings Regarding Dunlap's Pre-Resentencing Petitions For Post-Conviction Relief

Dunlap filed a Petition for Post-Conviction Relief that was dismissed because it was untimely. Dunlap v. State (Dunlap II), 131 Idaho 576, 576-77, 961 P.2d 1179 (1998). Because Dunlap did not know and could not reasonably have known that a timely post-conviction petition was not filed before the appointment of new counsel, this Court reversed and remanded for further proceedings. Id. at 577.

On remand, the state conceded error occurred during Dunlap's sentencing, requiring he be resentenced. Dunlap III, 141 Idaho at 56. Based upon the state's concession, the district court ordered a new sentencing hearing, but denied Dunlap's guilt-phase post-conviction claims after an evidentiary hearing. Id. This Court affirmed the district court's decision granting a new sentencing hearing and denying post-conviction relief as to guilt. Id. at 66.

Dunlap subsequently filed a *pro se* successive post-conviction petition raising claims this Court refused to address in Dunlap III because they were raised for the first time on appeal. Dunlap v. State (Dunlap IV), 146 Idaho 197, 200, 192 P.3d 1021 (2008).

The district court summarily dismissed the claims because they were known or reasonably could have been known when Dunlap filed the first post-conviction petition, and, alternatively, for failing to raise any genuine issues of material fact. Id. at 198, 200. This Court affirmed, concluding the claims were untimely and that Dunlap failed to establish "any genuine issue of material fact as to whether the claims were not known or could not have been known at the time his first petition was filed." Id. at 201.

Statement Of Facts And Course Of Proceedings Regarding Resentencing And Post-Conviction Petition

Represented by new counsel David Parmenter and James Archibald, Dunlap's resentencing commenced in February 2006, and concluded with the jury finding three statutory aggravating factors and that the collective mitigation was not sufficiently compelling to make imposition of the death penalty unjust. State v. Dunlap (Dunlap V), 155 Idaho 345, 313 P.3d 1, 14 (2013).[1] The district court sentenced Dunlap to death. Id.

Through the State Appellate Public Defender ("SAPD"), Dunlap filed his initial post-conviction petition. (#37270, R., pp.1-41.)[2] The Final Amended Petition for Post-Conviction Relief contained thirty-seven claims with multiple sub-claims. (Id., pp.751-1093.) The state filed an answer (id., pp.1190-1342) and Motion for Summary Dismissal (id., pp.1545-47), which the district court granted (id., pp.1940-2012).

Dunlap filed timely notices of appeal, challenging his new death sentence and the denial of post-conviction relief; the appeals were consolidated pursuant to I.C. § 19-

[1] Dunlap's resentencing before a jury was mandated by Ring v. Arizona, 536 U.S. 584 (2002), which requires a jury to determine whether the state has proven the statutory aggravating factors, and I.C. § 19-2515(5), which was enacted as a result of Ring.

[2] Because of the multiple records and transcripts involved in this appeal, the state will refer to the records and transcripts by their respective supreme court numbers.

2719(6). Dunlap V, 313 P.3d at 14. Dunlap's 114-page opening brief was lodged with this Court on February 25, 2011, and filed March 22, 2011. (#41105, R., pp.936-1049, 1360.) On August 27, 2013, this Court affirmed Dunlap's death sentence, but concluded the district court erred by summarily dismissing two claims – ineffective assistance of counsel regarding the investigation and presentation of mitigation evidence and rebuttal of the state's evidence in aggravation, and alleged violations of Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1962) – and remanded both claims for an evidentiary hearing; the summary dismissal of Dunlap's remaining post-conviction claims was affirmed. Dunlap V, 313 P.3d at 48.

Statement Of Facts And Course Of Proceedings In Dunlap's Successive Post-Resentencing Post-Conviction Case

With the assistance of new counsel, Dunlap filed his successive post-resentencing Petition for Post-Conviction Relief on April 7, 2011, raising nineteen claims containing both substantive and ineffective assistance of appellate counsel claims regarding jury instructions (Claims 1-6), voir dire (Claim 7), another Brady claim (Claim 8), disparity of resources (Claims 9, 10), the charging of statutory aggravators and the factual basis supporting those aggravators (Claims 11, 12), trial counsels' opening and closing statements (Claim 13), statutory challenges (Claim 14), written jury findings (Claim 15), Idaho's method of execution (Claim 16), Dunlap's competency at the time he pled guilty (Claim 17), victim impact statements (Claim 18), and denial of Dunlap's discovery request during the prior post-conviction proceeding (Claim 19). (#41105, R., pp.10-51.) The state filed an answer (id., pp.1066-83) and Motion for Summary Dismissal asserting Dunlap's "substantive" claims should be summarily dismissed because he failed to

establish they were not known or could not reasonably have been known when he filed his first post-resentencing petition, were untimely, or otherwise fit within the narrow exception of I.C. § 19-2719 (id., pp.1299-1304). As to his ineffective assistance of appellate counsel claims, the state asserted Dunlap failed to overcome the presumption that the claims were not raised on appeal because of tactical decisions made by the SAPD, and that each claim otherwise failed on its merits. (Id., pp.1304-57). In his response, Dunlap conceded his "substantive claims may be barred in state court under § 19-2719" but contended page limitations imposed by this Court during his consolidated resentencing appeal "constitute an external impediment to raising the claims and a due process violation under the federal Constitution" (id., pp.1387, 1389-90); he also withdrew Claims 16 and 17 (id., pp.1447-48).

Over the state's objection (id., pp.1535-49), Dunlap was permitted to amend his petition (id., pp.2177-78) recasting Claim 7 as ineffective assistance of trial counsel during voir dire and impaneling a biased jury. (Id., pp.1557-96.) On May 8, 2013, the district court granted the state's Motion for Summary Dismissal, concluding Dunlap's substantive claims could have been raised in his initial resentencing post-conviction petition. (Id., pp.2259-62.)[3] While finding Dunlap's ineffective assistance of appellate counsel claims were timely, the district court reasoned he failed to establish either deficient performance of appellate counsel or prejudice. (Id., pp.2267-2336.) Dunlap filed his Notice of Appeal June 10, 2013. (Id., pp.2340-43.) Final Judgment was filed June 24, 2013 (id., p.2352.)

---

[3] The district court's decision was signed May 8, 2013, but there is no filing stamp indicating when it was actually filed.

## ISSUES

Dunlap has phrased the issues on appeal as follows:

> A. Whether each underlying substantive claim that is the subject of each ineffective assistance on appeal claim may be considered on the merits? [sic]
>
> B. Whether Dunlap was denied federal constitutional rights when appellate counsel omitted violations of the Fourteenth Amendment Due Process Clause and Sixth Amendment rights to an impartial jury and effective assistance of counsel, that (1) the resentencing court erroneously applied *Witherspoon v. Illinois* and improperly excluded a juror for cause; (2) the resentencing court failed to exclude numerous jurors who were substantially impaired under *Morgan v. Illinois*; and (3) trial counsel was ineffective, under *Strickland v. Washington*, in conducting voir dire resulting in a biased jury composed of substantially impaired jurors and an improper exclusion for cause of a qualified juror? [sic]
>
> C. Whether the preliminary jury instructions unconstitutionally restricted voir dire? [sic]
>
> D. Whether the propensity instruction given to the jury was vague and ambiguous under the Eighth Amendment and also resulted in a violation of The Due Process Clause? [sic]
>
> E. Whether the weighing instruction and verdict form lessened the State's burden of proof in violation of federal Ex-Post Facto and Due Process protections? [sic]

(Brief, p.3.)

The state wishes to rephrase the issues on appeal as follows:

1. Has Dunlap waived his substantive claims because they were known or reasonably could have been known during his first resentencing post-conviction proceedings and subsequent appeal?

2. Has Dunlap failed to raise a genuine issue of material fact regarding his voir dire ineffective assistance of appellate counsel claims, thereby requiring their summary dismissal?

3. Has Dunlap failed to raise a genuine issue of material fact regarding his three jury instruction ineffective assistance of appellate counsel sub-claims, thereby requiring their summary dismissal?

# ARGUMENT

I.
Dunlap's Substantive Claims Were Known At The Time He Filed His First Resentencing Post-Conviction Petition

A. Introduction

Dunlap contends, "In asserting claims of ineffective assistance of appellate counsel for not raising various issues, Dunlap also raised an underlying substantive issue for each appellate IAC claim." (Brief, p.6.) While Dunlap concedes his underlying substantive issues "could have been raised in the direct appeal, and that any failure to raise them therein may operate to waive the claims under § 19-2719(5)," he contends the "only basis or excuse" he has for not previously raising them on appeal is that the SAPD "was limited on appeal by the page limits imposed by this Court," and that this Court's page limit for his resentencing consolidated appeal violated due process. (Id.)

Dunlap has properly conceded his substantive claims were known or reasonably could have been known during his first resentencing post-conviction proceedings and appeal. Moreover, this Court's page limit for Dunlap's resentencing brief on appeal does not fall within the exception of I.C. § 19-2719(5). To the extent Dunlap is raising a new due process claim associated with the Court's page limit, such a claim was never raised in Dunlap's successive amended petition and fails to meet the dictates of I.C. § 19-2719.

B. Standard Of Review

Whether a successive petition for post-conviction relief was properly dismissed pursuant to I.C. § 19–2719 is a question of law, which this Court reviews de novo. Fields v. State, 154 Idaho 347, 349, 298 P.3d 241 (2013) (quotes and citation omitted).

C. Because Dunlap Has Failed To Comply With The Dictates Of I.C. § 19-2719, The Substantive Claims In His Successive Petition Must Be Summarily Dismissed

1. The Legal Parameters Of I.C § 19-2719

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Capital post-conviction proceedings, like non-capital post-conviction proceedings which are governed by the Uniform Post-Conviction Procedure Act ("UPCPA"), are civil in nature and governed by the Idaho Rules of Civil Procedure. Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 58 (1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and "supersedes the UPCPA to the extent that their provisions conflict." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999); Pizzuto, 127 Idaho at 470.

Specifically, I.C. § 19-2719 provides a capital defendant one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition which must be filed within forty-two days after entry of judgment. State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991). The **only exception** is provided in I.C. § 19-2719(5), which permits a successive petition "in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute." Id., 120 Idaho at 807.

Additionally, claims which were not known or which could not have reasonably been known within forty-two days of judgment "must be asserted within a reasonable time after they are known or reasonably could have been known." Paz v. State, 123 Idaho 758, 760, 852 P.2d 1355 (1993); McKinney, 133 Idaho at 701. In ascertaining what constitutes a "reasonable time," the Idaho Supreme Court explained:

> [A] reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.

Pizzuto v. State, 146 Idaho 720, 727, 202 P.3d 642 (2008).

Even if the petitioner can meet these mandates, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

> An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

I.C. § 19-2719(5)(a).

A capital defendant who brings a successive petition for post-conviction relief has a "heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute." Pizzuto, 127 Idaho at 471. That burden includes establishing when the claim was known or reasonably could have been known. Stuart v. State, 149 Idaho 35, 41-42, 232 P.3d 813 (2010). If a capital petitioner fails to comply with the requirements of I.C. § 19-2719, the issues are "deemed to have [been] waived" and "[t]he courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief." I.C. § 19-2719(5); McKinney, 133 Idaho at 700. Likewise, failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive post-conviction petition. Fields v. State, 135 Idaho 286, 289-90, 17 P.3d 230 (2000).

2. Dunlap's Substantive Successive Post-Conviction Claims Are Governed By I.C. § 19-2719 And Must Be Summarily Dismissed

Each of Dunlap's substantive claims are waived under I.C. § 19-2719 because they were known or reasonably could have been known during his initial resentencing post-conviction proceedings. His only "excuse" for "raising them in the successive petition in this case is that appellate counsel was limited on appeal by the page limits imposed by this Court." (Brief, p.6.) However, the **only** exception to I.C. § 19-2719(5) is for "those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute." Rhoades, 120 Idaho at 807. There is no exception based upon page limitations in a petition, appellate brief, or any other pleading. Based upon Dunlap's failure to establish a viable exception to I.C. § 19-2719(5), his substantive claims are waived and were properly dismissed by the district court.

Dunlap's attempt to raise a new due process claim based upon the page limitation also fails. First, Dunlap never raised such a claim in his amended petition. Rather, the claim was first raised as a "general argument common to all claims" in his Response to Motion for Summary Dismissal. (#41105, R., p.1389.) However, I.C. § 19-4903 requires the petition "specifically set forth the grounds upon which the application is based." As explained in Cowger v. State, 132 Idaho 681, 687, 978 P.2d 241 (Ct. App. 1999), "an applicant must file an amended application when he or she desires to raise additional issues in a post-conviction petition." Dunlap failed to follow this pleading requirement even when it was brought to his attention in the state's Reply Brief in Support of Respondent's Motion for Summary Dismissal (#41105, R., p.1498) and he was permitted

to amend his petition. He should not be permitted to raise a substantive due process claim on appeal when it was not properly pled in his amended petition.

Second, the claim is untimely. While it could not have been raised during the initial post-conviction proceedings, it could have been raised no later than 42 days after this Court entered its Order on March 22, 2011. (#41105, R., p.1360.) "[A] reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim." Pizzuto, 146 Idaho at 727. Dunlap has failed to argue there are "extraordinary circumstances that prevented him . . . from filing the claim within that time period." Id. Although, Dunlap filed his successive petition on April 7, 2011, it did not contain a claim based upon the page limitation. Therefore, any constitutional claim regarding the page limitation is waived.

Finally, even if considered on the merits, the claim fails. Not only has Dunlap failed to provide any authority establishing a page limitation violates due process, State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking."), several courts have expressly rejected such claims. *See* Twin City Fire Ins. Co. v. Adkins, 400 F.3d 293, 301 (6th Cir. 2000) ("Being limited to a 20–page reply brief falls far short of the kind of due process violation that will permit a court to declare the judgment of another court void ab initio."); Weeks v. Angelone, 176 F.3d 249, 271 (4th Cir. 1999) ("The fifty-page limit merely limited the manner in which Weeks could present his arguments; it did not wholly prevent him from presenting them."); Watts v. Thompson, 116 F.3d 220, 224 (7th Cir. 1997) ("Enforcing page limits and other restrictions on litigants is rather ordinary practice. This court has a page limit which is rather strictly, and cheerfully, enforced.").

Because Dunlap has failed to establish his substantive claims fit within the narrow exception of I.C. § 19-2719, they have been waived and the district court properly dismissed each since it had "no power to consider any such claims for relief as have been so waived or grant any such relief." I.C. § 19-2719(5); McKinney, 133 Idaho at 700.

## II.
## Dunlap's Ineffective Assistance Of Appellate Counsel Claims Fail Because Of His Failure To Raise A Genuine Issue Of Material Fact Regarding Deficient Performance And Prejudice

### A. Introduction

Dunlap challenges the district court's dismissal of four of his ineffective assistance of appellate counsel claims, contending the issues he now raises with the assistance of new counsel are stronger than the claims raised with the assistance of the SAPD during his resentencing consolidated appeal. (Brief, pp.7-53.) Specifically, Dunlap challenges the dismissal of various sub-claims involving voir dire. (Brief, pp.7-43.) Dunlap next raises claims regarding three jury instructions. (Brief, pp.43-53.) Dunlap's claims fail because he has not established the SAPD's tactical decisions regarding claims in the consolidated appeal were objectively unreasonable, and because his new claims would not have prevailed on appeal, he has failed to establish prejudice.

### B. Standard Of Review

In Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108 (2004) (quotes and citation omitted), this Court reaffirmed the standard of review in post-conviction cases in which summary dismissal was granted:

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief

> if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding.

C. Standards Of Law Regarding Ineffective Assistance Of Appellate Counsel

The unwavering standard for ineffective assistance of counsel claims remains the test articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires Dunlap establish both deficient performance and prejudice. The first element "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. In making this determination, there is a strong presumption that counsel's performance fell within the "wide range of professional assistance." Id. at 689. Dunlap has the burden of showing counsel's performance "fell below an objective standard of reasonableness." Id. at 688. The effectiveness of counsel's performance must be evaluated from his perspective at the time of the alleged error, not with twenty-twenty hindsight. Id. at 689. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." Harrington v. Richter, 131 S.Ct. 770, 788 (2011) (internal quotations and citation omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Richter, 131 S.Ct. at 788 (internal quotations and citation omitted).

The second element requires Dunlap to show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This requires Dunlap to demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id. at 694, which "requires a substantial, not just conceivable, likelihood of a different result," Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011) (internal quotations and citation omitted). A reviewing court "must consider the totality of the evidence before the judge or jury," Strickland, 466 U.S. at 695, and in regards to sentencing must reweigh that evidence "against the totality of available mitigating evidence," Pinholster, 131 S.Ct. at 1408 (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

The Strickland standard applies to appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). To prevail on a claim of ineffective assistance of appellate counsel, Dunlap must show his counsels' representation on appeal was deficient and that the deficiency was prejudicial. Strickland, 466 U.S. at 687. The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, Dunlap would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000). While there is a constitutional right to effective appellate counsel, there is no obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-52, (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. Addressing the Strickland test, the Ninth Circuit has explained:

> These two prongs partially overlap when evaluating the performance of appellate counsel. In many instances appellate counsel will fail to raise an

> issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason – because she declined to raise a weak issue.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1984) (internal quotations and citations omitted). Based upon these standards, while it is still possible to raise ineffective assistance of appellate counsel claims, "it is difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288.

These same general standards are utilized in Idaho to address ineffective assistance of appellate counsel claims. *See* Daniels v. State, 156 Idaho 327, ---, 325 P.3d 668, 671-73 (Ct. App. 2014); Stevens v. State, 2013 WL 6423426, *9-11 (Ct. App. 2013); Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40 (Ct. App. 2007). As explained in Suits v. State, 143 Idaho 160, 164, 139 P.3d 762 (Ct. App. 2006) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)), "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." Strategic and tactical choices are "virtually unchallengeable" if made after thorough investigation of the law and facts. Strickland, 466 U.S. at 690-91. "Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." Harrington, 131 S.Ct. at 789 (quotations and citation omitted). Counsel is permitted to formulate a strategy that was reasonable at the time and "balance limited resources in accord with effective trial tactics and strategies." Id. As explained in United States v. Cook, 45 F.3d 388, 395 (10th Cir. 1995), the issue not raised must be a "dead bang winner" that was "obvious from the trial record." *See also* Mintun, 144 Idaho at 45 (quoting Smith, 528 U.S. at 288 ("[O]nly

when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

D. Counsels' Voir Dire And The Alleged Impartiality Of The Jury

1. Introduction

Dunlap contends the SAPD was ineffective on appeal for failing to raise trial counsels' alleged ineffectiveness during voir dire, which resulted in trial counsels' failure to object to Katherine McMinton being excused for cause, failing to object to eleven of the twelve jurors seated to hear Dunlap's resentencing which Dunlap contends violated due process under Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny, and a general challenge to trial counsels' voir dire. (Brief, pp.7-53.) The majority of Dunlap's argument focuses upon the underlying merits of his claim and barely addresses whether the SAPD's performance was deficient. Because Dunlap has failed to overcome the presumption the SAPD winnowed out each of these sub-claims and failed to establish they would have changed the outcome of his appeal, each sub-claim fails.

2. General Facts Regarding Jury Selection At The Resentencing

At his resentencing, the district court denied Dunlap's motion for individual voir dire, but reconsidered and permitted the parties five minutes of individual voir dire. Dunlap V, 3313 P.3d at 20. Each venireman also completed a "comprehensive" questionnaire and general voir dire was permitted. Id. After voir dire, Parmenter believed the jury constituted "a fairly open-minded bunch." (#41105, R., p.389.)

In his Final Amended Petition for Post-Conviction Relief, Dunlap contended his trial attorneys were ineffective by failing to (1) retain a jury consultant, (2) object to the

jury questionnaire, (3) move for adequate voir dire procedures, (4) object to some of the prosecutor's statements in general voir dire, (5) oppose the motion to excuse McMinton for cause, (6) argue for excusing Craig Mansfield and Blair Mickelson for cause, (7) question the panel regarding "blood atonement," and (8) conduct an adequate individual voir dire that allegedly would have resulted in Chandis Lindsey, Corey Kunz, Kim Lindstrom, Matt Gronning, Kristine Robinson, Craig Crandall, James Young, Michelle Alver, Michael Nally, Hagen Beckstead, Eric Christensen, Lonnie Taggert, Cathy Canaday, Chad Neibaur, and Forest Hansen being excused for cause. (#32273, R., pp.787-823.) The district court rejected Dunlap's ineffective assistance of counsel claims, concluding trial counsels' voir dire decisions were tactical. (Id., pp.1951-54.) In his consolidated appeal, Dunlap contended the district court erred by limiting individual voir dire to five minutes and failing to excuse Mansfield and Mickelson for cause. (#41105, R., pp.953-58.) This Court reasoned Dunlap failed to establish the district court abused its discretion or committed reversible error. Dunlap V, 313 P.3d at 19-20, 36-37.

In his successive Amended Petition, Dunlap contended trial counsel failed to rehabilitate McMinton and that her exclusion violated Witherspoon. (#41105, R., p.1573.) Dunlap further contended trial counsel failed to properly voir dire eleven of the twelve jurors seated who allegedly were willing to automatically vote for the death penalty in violation of Morgan v. Illinois, 504 U.S. 719 (1992). (Id., p.1574.) The district court rejected Dunlap's voir dire claims. (Id., pp.2287-2309.)

3. Standards Of Law Regarding *Witherspoon* And Its Progeny

In Witherspoon, 391 U.S. at 512, the Supreme Court examined a state statute that permitted the exclusion of jurors in death penalty cases who possessed only

"conscientious scruples against capital punishment." After recognizing "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror," id. at 519, the Court held, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," id. at 522 (footnote omitted).

In Adams v. Texas, 448 U.S. 38, 42 (1980), the Court examined whether a Witherspoon issue arose by asking veniremen about their ability to take an oath that included the phrase, "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Focusing upon the word, "affect," the Court explained:

> Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to unwillingness or an inability on the part of the jurors to follow the court's instruction and obey their oaths, regardless of their feelings about the death penalty.

Id. at 49-50. The Court affirmed "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror." Id. at 45.

In Wainwright v. Witt, 469 U.S. 412, 418 (1985), after explaining "*Witherspoon* is best understood in the context of its facts," the Supreme Court recognized that "more

recent opinions of this Court demonstrate no ritualistic adherence to a requirement that a prospective juror make it 'unmistakably clear . . . that [she] would automatically vote against the imposition of capital punishment,'' id. at 849. Reviewing Witherspoon and Adams, the Court took the "opportunity to clarify" Witherspoon, and reaffirm Adams "as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright at 852 (footnote omitted). The Court further explained, "this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity'" "because determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism." Id. The Court recognized "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." Id. at 424-25. These principles have been applied by the Idaho Supreme Court in State v. Enno, 119 Idaho 392, 397-99, 807 P.2d 610 (1991), which recognized Wainwright "clarified" Witherspoon.

In Morgan, 504 U.S. at 726, the Supreme Court examined the reverse of Witherspoon; that is, "whether the defendant is entitled to challenge for cause and have removed on the ground of bias, a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law." Relying upon Ross v. Oklahoma, 487 U.S. 81, 85 (1988), the Court answered affirmatively, concluding, "based upon the requirement of impartiality embodied in the Due Process

Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views." Morgan, 504 U.S. at 729.

4. The Exclusion Of McMinton For Cause

In her questionnaire, McMinton appeared ambivalent regarding the death penalty. (#41105, R., pp.2150-76.) For example, she had no opinion regarding her support of the death penalty, whether executions are needed to protect the public, whether it would be hard for her to vote to kill someone, whether televised executions would reduce crime, the wisdom of the death penalty, and leaving to God matters of life and death. (Id., pp.2163-65.) Nevertheless, when asked, "How do you feel about the death penalty," she responded, "When they are guilty of taking a life then they should be willing to give a life," and that she supported the death penalty. (Id., p.2166) (capitalization altered).

Obviously concerned about McMinton's response that "they should be willing to give a life," Dunlap's counsel explored the area:

Q. What do you mean by that?

A. Well, you are going to play, you have got to pay.

Q. That is similar to an eye for an eye, and a tooth for a tooth?

A. Yeah. . . .

(Id., p.1809.) McMinton then changed the subject, resulting in the following colloquy:

> A. Yeah. I have a question, though, if I could really fast. In the big room, did you say he had mental problems?
>
> Q. That is going to be something that we are going to talk about.
>
> A. Well, on that fact I **don't think** I could give you a verdict of death. There is just **no way**. I know about mental illness and there is just **no way**.

Q. How do you know about mental illness?

A. I have a stepsister.

Q. What has she been diagnosed with?

A. Paranoid schizophrenia.

Q. If you hear evidence about Tim Dunlap having a mental illness, is that going to change your opinion on an eye for an eye?

A. Yes.

Q. That is something that the Judge is going to tell you about, aggravating circumstances of the crime, mitigating circumstances of the crime, and you understand that sometimes there are explanations?

A. Yes, I do.
Q. It doesn't get him out of being guilty.

A. Correct.

Q. It just means what do we do with him. Do we give him the death penalty or do we let him stay in prison for the rest of his life. Is that what you are saying?

A. That is what I am saying.

Q. So when you answered this about an eye for an eye, you weren't thinking about mental illness?

A. Correct.

(Id., pp.1809-10) (emphasis added).

The prosecutor also questioned McMinton regarding her feelings surrounding mental illness and her ability to vote for the death penalty:

Q. You talked a little bit about – it sounds like you have some pretty strong opinions on mental illness, and what that evidence might mean: is that fair to say?

A. Yeah.

Q. If the facts and evidence in this case indicated that the death penalty was appropriate, and that being that the aggravating factors of this crime were not outweighed by any mitigation, would you refuse to give the death penalty just based on evidence that he might have had some mental problems?

A. That is a hard one to answer. I am not sure.

Q. I guess my question is, would you give more weight to the fact that there may be mental illness than you would the other evidence?

A. On my past experience with my stepsister, I would have to say yeah.

Q. So if there is evidence of **any sort** of mental problems, you could not give the death penalty?

A. **I could not.**

(Id., pp.1811-12) (emphasis added). The district court then granted the state's motion to disqualify McMinton for cause, concluding, "I do think that her present state of mind that if there is [sic] any mental problems she couldn't give the death sentence, I think that disqualifies her as a juror"; Dunlap's counsel did not object. (Id., p.1812.)

Apparently, Dunlap contends the SAPD should have raised this claim in his consolidated appeal since it was allegedly stronger than the issue raised regarding voir dire because that issue was allegedly "foreclosed by *Ross v. Oklahoma*" (Brief, p.22), and McMinton's answers indicated "she could follow the law with regard to sentencing determinations," was willing "to give death in some circumstances," and that she was merely willing to give mental health evidence "weight, great weight or even the ultimate weight in her decision making" (Brief, pp.19-20).

Initially, Dunlap has failed to establish deficient performance. The SAPD raised a similar claim in the Final Amended Petition for Post-Conviction Relief. (#41105, R., pp.802-03.) Moreover, the SAPD raised a claim regarding the disqualification of two

other jurors for cause in the consolidated appeal. (Id., pp.956-58.) Based upon the claims raised during post-conviction proceedings and the appeal, the SAPD was obviously aware of the claim regarding McMinton, recognized it would be futile to challenge the district court's denial of the claim, and made a tactical decision to raise other claims that may have a greater chance of success on appeal.

Dunlap attempts to refute this presumption by contending the claim raised on appeal by the SAPD "was foreclosed by *Ross v. Oklahoma*," making the instant claim "clearly a stronger issue." (Brief, p.22.) The state recognizes that in Mintun, 144 Idaho at 661, the Idaho Court of Appeals opined, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." However, this broad statement overstates the standards associated with ineffective assistance of appellate counsel claims. As explained in Dunlap V, 313 P.3d at 40 (quotes and citation omitted), "When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review." The SAPD having raised the issue during the initial post-sentencing post-conviction proceedings and raising a similar issue on appeal demonstrates there was not "inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review." Rather, the SAPD made a tactical decision to raise other claims on appeal.

Moreover, even the court of appeals has recognized more is required than merely finding weaker claims were raised on appeal. In Daniels, 325 P.3d at 672, the petitioner

contended appellate counsel was ineffective because the district court's denial of a suppression motion was a stronger appellate issue than the sentencing issue that was raised. Initially, the court of appeals opined the denial of the suppression motion was not "'clearly stronger' than the challenge to his sentence." Id. The court then recognized that while the standard of review for sentencing claims "makes it difficult to succeed on such a challenge, Idaho appellate courts have, on several occasions, granted sentencing relief." Id. at 673. The court further explained, "Moreover, we will not second-guess appellate counsel's strategic decision to pursue Daniels' excessive sentence challenge rather than to pursue an unsuccessful challenge to the suppression motion." Id.

Merely because a weaker claim may have been raised on appeal, an argument the state does not concede, does not mean appellate counsel was ineffective. Such a test would result in a "weak" claim being filed in virtually every appeal just to leave open the possibility of an ineffective assistance of appellate counsel claim in the future. Moreover, such a test ignores the fact that "[c]ounsel [are] permitted to develop a strategy that was reasonable at the time and may balance limited resources," Dunlap V, 313 P.3d at 40, and counsel have "no constitutional obligation to raise every nonfrivolous issue requested by an appellant," Daniels, 325 P.3d at 671 (citing Jones, 463 U.S. at 751).

Additionally, because Dunlap's ineffective assistance of appellate counsel claim involves an ineffective assistance of trial counsel claim, the appellate counsel claim is wrapped in a double presumption, which is exceptionally difficult to penetrate. Bryan v. State, 794 N.E.2d 1135, 1142 (Ind. App. 2003). "This is no mere quibble. Appellate lawyers must make difficult judgment calls in narrowing a broad range of possible claims to a select few that are thought to have the best chance of success. In this winnowing

process, possibly valid claims may be eliminated due to page limits, time limits on oral argument, or the strategic judgment that the perceived strongest contentions not be diluted." Woods v. State, 701 N.E.2d 1208, 1221 (Ind. 1998). Because Dunlap failed to rebut the presumptions associated with this claim, it was properly dismissed.

Dunlap has also failed to establish Strickland prejudice. Not only was McMinton properly excused for cause under Wainwright and Enno, she was properly excused under Witherspoon. Her statement, "there is just no way" (#41105, R., p.1810) establishes her unequivocal decision that, if any mental health evidence was presented, she could not impose the death penalty. Indeed, when asked by the prosecutor, "if there is evidence of **any sort** of mental problems" could she vote for the death penalty, McMinton replied, "**I could not**." (Id., p.1812) (emphasis added). Moreover, the manner in which the issue was raised supports the district court's decision; it was McMinton that raised the issue by interrupting Dunlap's attorney and changing the subject from questioning regarding her feelings about the death penalty to mental illness, which she knew about because her sister had been diagnosed with paranoid schizophrenia. (Id., pp.1809-10.) Indeed, despite her opinion about the death penalty, when asked whether it would change her opinion "on an eye for an eye," McMinton responded, "Yes." (Id., p.1810.) This was clearly more than a juror who was willing to give great consideration to mitigation evidence, but was a juror who unequivocally stated she would not impose the death penalty because she "[knew] about mental illness and there is just no way." (Id., p.1810.)

Based upon such unequivocal responses and the time limits imposed by the district court, exactly how trial counsel was supposed to "rehabilitate" McMinton remains a mystery. While she expressed a willingness to follow the law (id., p.1811), her

response was certainly not as definitive as her responses regarding mental illness and not being willing to vote for the death penalty. Irrespective, the standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" Wainwright, 469 U.S. at 424; *see also* Enno, 119 Idaho at 398. More importantly, the district court was in the position to examine McMinton's demeanor and credibility, which "are peculiarly within a trial judge's province." Wainwright at 428. This is particularly important in this case because of the manner in which the issue was raised by McMinton and the close ties she had with mental illness because of her sister's diagnosis. As recognized by the Supreme Court, "'the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.'" Id. at 428 n.9 (quoting Reynolds v. United States, 98 U.S. 145, 156-57 (1989)).

The SAPD was not required to tackle the voir dire issues with a shotgun approach on appeal as initially advocated in Dunlap's first post-conviction case and now advocated in his successive post-conviction proceedings. Rather the SAPD chose a strategy surgically attacking the voir dire process by limiting the claims on appeal. More importantly, because this claim would not have changed the outcome of Dunlap's appeal, it also fails under Strickland's prejudice prong.

5. Counsels' Decision To Not Object To The Exclusion Of Eleven Jurors

The remainder of Dunlap's challenge to the SAPD's performance on appeal surrounds trial counsels' decisions to not object to eleven of the twelve jurors on his jury. (Brief, pp.24-43.) As to whether the SAPD's performance was deficient, the only

argument Dunlap raises is that the claims raised by the SAPD regarding voir dire were "clearly weaker." (Brief, p.25.) However, as previously discussed, merely because an allegedly weaker claim is raised on appeal does not mean the SAPD's performance was deficient. Dunlap has failed to establish the SAPD's failure to raise these sub-claims was the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review. Rather, the claims were winnowed out and the SAPD presumptively made tactical decisions to raise other claims on appeal.

Additionally, it must be remembered the claims Dunlap is raising involves the SAPD's failure to raise an ineffective assistance of trial counsel claim for alleged inadequacies during voir dire and failing to move for removal of jurors for cause. In other words, not only must Dunlap establish the SAPD's decision was objectively unreasonable, he must also establish that trial counsels' decisions to not move for exclusion of the jurors was objectively unreasonable. For example, in her questionnaire, Canady agreed "that the burden of proof should be greater than beyond a reasonable doubt, such as proof beyond any possible doubt or proof to an absolute certainty," and then explained, "I feel you should be sure through the evidence that he or she did the crime without doubt." (#41105, R., p.2074.) Trial counsel would have wanted to retain a juror who expressed an exceptionally strong desire to have the state prove the elements required for imposition of the death penalty. Canaday also explained that as a result of watching television and movies, she had "become more desincitized [sic] over the years." (Id., p.2078.) Considering the brutality with which Dunlap murdered Tonya, this was a plus for the defense. Canaday also agreed that "[i]nnocent people have been executed." (Id., p.2080.) Answering the question regarding statements that most accurately

represented how she felt about the death penalty, Canady chose the middle ground, agreeing, "I generally favor the death penalty, but I would base a decision to impose it on the facts and the law in the case." (Id., p.2084.) Based upon these answers, it was reasonable for trial counsel to not object to Canady sitting on Dunlap's jury. Moreover, because there was no basis for excusing Canady for cause, it was also reasonable for trial counsel to not seek her recusal, and for the SAPD to winnow the claim on appeal.

Dunlap has also failed to establish prejudice, and his arguments demonstrate a fundamental misunderstanding of Morgan by asserting an overly-broad basis for exclusion. As confirmed by the Ninth Circuit, "A defendant has a constitutional due process right to remove for cause a juror who will **automatically vote** for the death penalty." United States v. Mitchell, 502 F.3d 931, 954 (9th Cir. 2007) (citing Morgan, *supra*) (emphasis added). In Mitchell, although the juror responded to a question "indicat[ing] that she thought the only punishment for certain kinds of 'horrific crimes should be death,' she later qualified that response by indicating, 'well, death or imprisonment.' Thereafter she said in a number of ways that she could keep an open mind." 502 F.3d at 955. The Ninth Circuit was clearly examining the entirety of the juror's responses and not focusing exclusively upon her response to a single question.

Similarly, in Treesh v. Bagley, 612 F.3d 424, 438 (6th Cir. 2010) (quoting Morgan, 504 U.S. at 729), the Sixth Circuit recognized cause could be established only if the juror "'will automatically vote for the death penalty in every case'" because such jurors "'will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require.'" Although a juror initially stated she thought anyone guilty of murder should not be "up and walking around," her other responses

indicated "she did not believe that everyone who purposely murdered should be sentenced to death." Id. As a result of the totality of the juror's statements, the court concluded, "These statements suggest that [the juror] would not 'automatically vote for the death penalty in every case,' and demonstrate that she could take into consideration mitigating factors." Id. at 438-39.

Moreover, a juror's equivocal answers regarding imposition of the death penalty do not establish a vote for "automatic" imposition of the death penalty. In Bowling v. Parker, 344 F.3d 487, 520 (6th Cir. 2003), the court discussed some of the jurors' answers which were equivocal, and concluded, "Though we recognize this is a close question, ultimately Livingston is not an 'automatic death penalty' juror within the meaning of *Morgan*. Livingston did initially state that he would automatically give the death penalty to those who met the aggravating factor, but later he expressly said that he would consider mitigating evidence." *See also* Bartee v. Quarterman, 574 F.Supp.2d 624, 667 (W.D. Tex. 2008) ("Ms. Jones' ambiguous and vacillating answers regarding her personal opinion on the applicability of the death penalty did not establish she was unwilling or unable to consider all relevant mitigating evidence in answering the capital sentencing special issues."). As explained in Patton v. Young, 467 U.S. 1025, 1038-39 (1984), when jurors' answers are ambiguous and contradictory, "it is [the] judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading [questions]." This determination "is essentially one of credibility, and therefore largely one of demeanor." Id. at 1039.

Relying primarily upon her questionnaire, Dunlap contends Canaday "is the most obvious[ ] ADP juror who sat on [his] jury."[4] (Brief, pp.25-27.) However, while Canaday's questionnaire indicated she believed in the death penalty, which was reaffirmed during voir dire when she stated, "I believe in the death penalty," when asked, "[h]ow do you feel about being the one that has to make that decision," she responded, "That is a [sic] difficult because I have not had to live that out, you know, my beliefs before. So that is not the easiest you know." (#41105, R., p.1791.) Moreover, irrespective of her "personal feelings about the death penalty," Canaday recognized she had "to be fair too, and I believe I can when I [think] it through." (Id., p.1792.) Additionally, when asked about her consideration of mitigation evidence, Canaday explained "it won't be the easiest case. This is my first case," but agreed she "could give [Dunlap] due benefit by listening to the evidence" and explaining, "I believe so, yes, because, like I said, I felt a lot the last two days trying to figure it out." (Id., p.1795.)

Canaday's responses do not establish she would automatically impose the death penalty. Jurors are not excluded based upon their "beliefs" regarding the death penalty. As explained in Witherspoon, 391 U.S. at 519, "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Just like "general objections" to the death penalty cannot exclude a venireman from jury service, general statements of support for the death penalty cannot exclude a venireman from jury service. Witherspoon, 391 U.S. at 522 n.21 ("veniremen cannot be excluded for cause on the ground that they hold such views"). As further explained by the Supreme Court, "The

[4] Dunlap uses the abbreviation "ADP" to refer to jurors he believes would automatically impose the death penalty or be unable to give effect to mitigating evidence. (Brief, p.24.)

most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote [for or] against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding." Id.

Canaday and the other jurors fall within this category; they were all willing to consider imposition of the death penalty **and** fixed life without the possibility of parole. Not a single juror expressed the view that they would "automatically vote for the death penalty in every case" or otherwise "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require[d]." Morgan, 504 U.S. at 728. Dunlap has failed in his quest to establish the SAPD's performance was deficient for failing to raise these new claims because he has failed to pierce the presumption that the decision not to raise these claims was tactical and that the SAPD winnowed out these ineffective assistance of trial counsel claims. Dunlap has also failed to establish prejudice because none of the claims are "dead-bang" winners on appeal. *See* Cook, 45 F.3d at 395. Even under Mintun, 144 Idaho at 66, Dunlap has failed to establish the Morgan claims "are clearly stronger than those presented."

Focusing upon snippets from Crandall's questionnaire, Dunlap next challenges the SAPD's tactical decision to not appeal trial counsels' alleged ineffectiveness to move to excuse Crandall for cause. (Brief, pp.28-29.) While Dunlap focuses upon some of Crandall's answers, he ignores others. Crandall **disagreed** with the statements, "Murder is murder, and understanding motives and circumstances is not important," "I do not believe criminals can be rehabilitated," "[a] person would not be brought to trial unless the person was guilty," [i]t doesn't matter what kind of childhood a murderer had," and

[c]ourts are too concerned with the rights of criminals." (#41105, R., pp.1939-40.) He also **agreed** with the statement, "It is possible for even the worst criminal to turn his or her life around." (Id., p.1940.) Even his support for the death penalty was not "strong"; he merely agreed when asked whether he supported the use of the death penalty. (Id.) Admittedly, in the questionnaire Crandall stated, "if a person commits a crime that is punishable by the death penalty – so be it." (Id., p.1942.) When asked during voir dire to explain his answer he initially stated, "I would just think that if the crime fits the punishment, then that is how it ought to be," and when asked how he would determine "whether the crime fits the punishment," explained, "I suppose that is what we are doing here. We are going to have to determine that." (Id., pp.1762-63.) This response does not indicate Crandall would automatically impose the death penalty in every case; quite the contrary, he recognized he would have to hear all the evidence and base his decision upon the evidence presented in court. Crandall also agreed that "life imprisonment without the possibility of parole" "is always a reasonable option for a jury," and that any juror could hold out for life imprisonment as opposed to the death penalty. (Id., pp.1763-64.) Trial counsel was not deficient in passing Crandall for cause and the SAPD was not deficient for winnowing out this claim and tactically deciding to raise other issues on appeal. Because Crandall was not a juror who would automatically vote for the death penalty, Dunlap's Morgan claim fails resulting in his failure to establish prejudice as an ineffective assistance of resentencing claim and, therefore, an appellate counsel claim.

Focusing upon answers to only two questions from the questionnaire, Dunlap next contends Taggart was "*Morgan* impaired." (Brief, p.29.) Taggart's answers to other questions indicate he would be a good defense juror. For example, he disagreed that

“[m]urder is murder, and understanding motives and circumstances is not important,” that “[p]eople who kill should be punished no matter what the circumstances are,” and that criminals cannot be rehabilitated. (#41105, R., pp.2135-37.) He also agreed “[p]sychologists can tell you lot about a person,” “[w]e should always try to see the best in people,” and that he would be “uncomfortable about having to decide about executing someone.” (Id., p.2137.) More importantly, he explained the death penalty is warranted only “in some cases.” (Id., p.2138.) “Some” is not an “automatic vote for the death penalty in every case,” as required under Morgan, 504 U.S. at 728. Taggart also believed he was the type of person that could conduct the weighing process in a death penalty case. (Id., p.1805.) Indeed, even though he was a school trustee, Taggart was not concerned he would be voted out of office if he voted for life in prison without parole. (Id., pp.1806-07.) When asked about his questionnaire response regarding death penalty appeals, Taggart explained, “It should have been carried out **or** sentenced to life in prison.” (Id., p.1807) (emphasis added). He further agreed he had not made up his mind whether Dunlap “should get the death penalty or life in prison without parole” and that “there might be a situation that would be unjust to give the death penalty.” (Id.) Taggart’s collective answers establish Dunlap’s claim fails.

Dunlap contends Kunz was “predisposed on the propensity aggravating circumstance and was an ADP juror.” (Brief, p.30.) As detailed above, this is not the test that requires recusal for cause under Morgan. Kunz described an “unpleasant experience involving law enforcement” stemming from his arrest for disturbing the peace (#41105, R., p.2020), a factor that favored the defense. He disagreed that “[m]urder is murder, and understanding motives and circumstances is not important,” that criminals cannot be

rehabilitated, that "[p]sychiatrists and psychologists rarely provide any real help to people with problems," "[n]o one convicted of murder should ever be allowed out of prison," and "[i]t doesn't matter what kind of childhood a murderer had." (Id., pp.2023-24.) He agreed "[i]t is possible for even the worst criminal to turn his or life around" and "[i]t would be hard for me to vote to kill someone," and strongly agreed "criminals should be rehabilitated whenever possible" and was "uncomfortable about having to decide about executing someone." (Id., p.2025.) While Kunz believed there "are circumstances under which the death penalty could be an appropriate penalty," he recognized it "[m]ust be decide[d] on a case-by-case basis." (Id., pp.2026-27.) When asked about his ability to "go into this situation with an open mind and do the weighing that is required," Kunz discussed the thought process he had already undertaken and "how difficult it might be to come to that kind of decision," explaining, "I think the only way that I could come to that decision would be to look at all of the evidence and listen to the instructions accordingly that explains what the law is, and the only way I could live with it is to look at all of that stuff and weigh it in my own mind and come to a decision for myself, what needs to be done." (Id., pp.1778-79.) Kunz recognized the necessity of considering mitigation, including how Dunlap was raised, and agreed he would need to be instructed by the district court prior to deliberating. (Id., pp.1780-81.) This is not a juror who would automatically vote for the death penalty irrespective of the facts or the instructions of law, but is a juror who was willing to examine all of the evidence before determining whether the death penalty should be imposed.

Dunlap next challenges Gronning. (Brief, pp.31-32.) In his questionnaire, Gronning responded to a question regarding how he felt about the death penalty, stating,

"In some cases it is fair and warranted." (#41105, R., p.1886.) When questioned during voir dire regarding his response, Gronning explained, "Well, basically I think you take it case by case. In my opinion, you know, if someone has thought it out, planned it, and they execute it the way they had it planned, I think it is different than something of a spur-of-the-moment type thing. That is kind of what I mean by that." (Id., p.1748.) Dunlap contends, "Gronning's answer is another case of a juror believing that the circumstances where death is not appropriate are limited to instances of a lesser degree of murder, a non-deliberate, non-premeditated murder that would not even be eligible for the death penalty." (Brief, p.31.) Dunlap is mistaken because Gronning never stated he would limit his decision to impose a fixed life sentence to cases involving less than first-degree murder, but stated it must be considered "case by case." Dunlap's argument is particularly disingenuous since the jury had not even been instructed regarding what constitutes mitigation and how it must be weighed against the individual aggravating factors.[5] While Gronning was never questioned regarding his view of mitigation, he agreed to follow the jury instructions even if he disagreed with the law as instructed by the district court (#41105, R., p.1883), and said he would base his decision on the facts and law in the case (id., p.1888). When asked if he had already decided whether Dunlap "should get life imprisonment without parole, or the death penalty," Gronning responded,

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[5] Dunlap makes a similar argument with regard to several other jurors and their answer to the question, "It doesn't matter what kind of childhood a murderer had." (Brief, pp.32-35.) Without the jury having been instructed on what constitutes mitigation, Dunlap's claim that the jurors' answer to this single question disqualifies them under Morgan, is preposterous, demonstrating why trial counsel declined to move for the jurors' disqualification and the SAPD chose not to raise the issue on appeal. The same analysis applies to Dunlap's argument regarding some jurors' answer to the question, "Someone already convicted of a murder is likely to kill someone else." (Brief, p.35.) This question alone, without being instructed on the definition of mitigation, does not establish a juror will automatically vote for the death penalty or not consider mitigation evidence.

"No," and explained there are cases where the death penalty would not be appropriate. (Id., pp.1748-49.) After disclosing that he knew the son of Richard Hunsaker, Gronning agreed he would not feel "any pressure at all to vote one way or another for either the death penalty or the [sic] life imprisonment without parole," and did not have any bias for or against either side." (Id., pp.1751-52.) Because Dunlap has failed to establish Gronning was a juror that would automatically vote for the death penalty in every case, trial counsel was not ineffective by declining to seek the exclusion Gronning for cause and the SAPD was not ineffective for failing to raise this dubious claim on appeal.

Dunlap also challenges Nally. (Brief, p.33.) While many of Nally's answers indicated support for the death penalty, other answers indicated his willingness to consider the evidence presented and that he was not an automatic vote for the death penalty. For example, while Nally "generally favor[ed] the death penalty," he agreed to "base a decision to impose it on the facts and law in the case." (#41105, R., p.2056.) He also agreed, "It is better for society to let some guilty people go free than to risk convicting an innocent man," "[p]sychologists can tell you a lot about a person," "[i]t is possible for even the worst criminal to turn his or her life around," "criminals should be rehabilitated whenever possible," "[w]e should always try to see the best in people," and he was "uncomfortable about having to decide about executing someone." (Id., pp.2052-53.) When questioned whether he had "any reservations" about being able to vote for the death penalty based upon the evidence and the law, he responded, "No, sir," and when asked, "are you willing to vote against it if the evidence doesn't show that," he responded, "I think I am fairly objective, sir, yes, in mind." (Id., pp.1783-84.) Nally further agreed he could "give both the State and the defense a fair shake in this case."

(Id.) The weighing process was also discussed and Nally agreed that was something he could "do fairly and justly," and he agreed "that given the proper mitigating evidence that life imprisonment without the possibility of parole is always a reasonable alternative for a juror." (Id., pp.1787-88.) Based upon the colloquy with Nally, Dunlap has failed to establish the SAPD was ineffective on appeal because trial counsel was not ineffective by declining to move for his exclusion for cause. Indeed, his agreeing that life imprisonment without the possibility of parole is "always a reasonable alternative" made him a good defense juror. Dunlap's arguments to the contrary overstate the holding of Morgan.

Dunlap's argument regarding Beckstead is premised upon a single question from the questionnaire regarding the childhood of a murderer (Brief, pp.33-34) that the state has addressed above. The answer to that question does not make him "Morgan impaired," let alone establish a viable ineffective assistance of appellate counsel claim. In fact, when he was questioned regarding his feelings about the death penalty, Beckstead responded, "I am okay with the death penalty, but I think it needs to be [used] pretty cautiously. I mean, it is kind of an important decision." (#41105, R., p.1798.) This statement alone establishes Beckstead was not a juror who would automatically impose the death penalty in every case or ignore mitigation evidence. However, Beckstead continued by agreeing that, "if the law and the facts do not require [the death penalty, he] could vote the other way." (Id., p.199.)

The same is true with respect to Lindsay, Robinson, Christensen, and Lindstrom who Dunlap next challenges (Brief, pp.34-35); each responded in a similar fashion to the same "childhood question" or the alleged "propensity question." The answers to those two questions do not make them "Morgan impaired," let alone establish a viable

ineffective assistance of appellate counsel claim. Lindsay was questioned regarding the "right circumstances" for imposing the death penalty and responded, "you would just have to weigh out all of the evidence. If the crime fights [sic] for that penalty, that is what you should hand down, after weighing out all of the evidence." (#41105, R., p.1737.) Lindsay was comfortable "listening to the mitigating and the aggravating evidence and kind of weighing it all out in [her] mind" as well as the state having the burden of proof beyond a reasonable doubt. (Id.) Moreover, she disagreed with the premise that "[l]ife in prison without the possibility of parole is not a harsh enough penalty for murder" (id., p.1829) and explained the death penalty "is appropriate in some cases. It is not appropriate for all cases. You must decide on a case by case basis" (Id., p.1831). This is not a juror who would automatically vote for the death penalty irrespective of the facts or the trial court's instructions.

In her questionnaire, Robinson stated, "I support the death penalty. I feel those who commit terrible murders and are a threat to society should be put to death." (Id., p.1914.) During voir dire, she agreed that was still her opinion, but when asked how she would determine "what a terrible murder is," she responded, "Well, see, I don't know what the State uses as their – I assume the Judge would provide us with some guidelines, and I don't know what those guidelines are." (Id., pp.1757-58.) In determining what constitutes a "threat to society," Robinson agreed "that probably depends on the evidence and what comes out." (Id., p.1758.) Discussing the "weighing process," Robinson acknowledged she could "go through that weighing process and do it fairly and justly" and "that given the proper mitigation, that life imprisonment is always a reasonable option in this kind of case." (Id., p.1758.) Trial counsel were not ineffective because no

Morgan violation occurred as a result of Robinson being seated on the jury and the SAPD was not ineffective in failing to raise such a claim on appeal.

Christensen also agreed he would listen to testimony from psychologists and psychiatrists "with an open mind." (Id., p.1772.) When asked what he thought about Dunlap "get[ting] the death penalty," Christensen responded:

> I think, you know, we have been asked if we are chosen to look at the circumstances and go above what our personal things are and provide what the law instructs you to do and keep that out of it. That is very important cause [sic] that is what our society is based on, to be able to take ourselves out of it. Yeah, it is easy to have blases [sic] sometimes but I think we need to be honest with ourselves in the purpose because I think it is a very serious question.

(Id., p.1772.) On his questionnaire, Christiansen also explained the death penalty "has a place but you need to use it with caution and only when warranted." (Id., p.1998.) (capitalization altered). Based upon the response to the questionnaire and the entirety of the voir dire, Christensen was not a juror who was remotely inclined to impose the death penalty in every case or ignore relevant mitigation evidence. It is little wonder the SAPD chose not to raise an ineffective assistance of trial counsel claim based upon Morgan.

Dunlap's arguments regarding Lindstrom are also without merit. The only argument he makes involves the alleged "propensity question" (Brief, p.35), which the state has addressed. Moreover, Lindstrom's questionnaire and voir dire establish he was not an automatic vote for the death penalty nor would he ignore relevant mitigation. Lindstrom disagreed that "[m]urder is murder, and understanding motives and circumstances is not important," "[n]o one convicted of murder should ever be allowed out of prison," and strongly agreed that "criminals should be rehabilitated whenever possible." (#41105, R., pp.1856-68.) Additionally, Lindstrom had served on a jury tried

by Archibald just the summer before and Archibald may have felt a connection with Lindstrom as a result of that trial. (Id., pp.1740-42.) When questioned regarding her questionnaire statement that she "feel[s] if a person has no remorse or doesn't show any sign of being able to be rehabilitated, the death penalty is justified" (id., p.1859), Lindstrom explained, "I guess it depends on probably what lead [sic] up to killing someone in the first place, and are they glad they did it. Do they not care that they took a life. I guess even their own views on whether they would rather spend time [sic] the rest of their life in prison or have the death penalty themselves. I mean, a lots [sic] of factors go into that, plus the law. You know, what are the legal issues as far as recommendations for either one" (id., p.1744). When asked, "So in your mind, being guilty of murder does not automatically mean the death penalty," Lindstrom replied, "Well, there are moral issues and then there are legal issues that go along with it too." (Id.) Lindstrom's responses do not establish she was a juror willing to automatically vote for the death penalty, but wanted to hear the facts and apply those facts to the law as given by the district court. Dunlap's claim regarding Lindstrom was properly dismissed.

6. Dunlap's General Challenge To Trial Counsels' Voir Dire

In what is a repetitive, perplexing, and confusing argument, Dunlap makes a general challenge to trial counsels' voir dire (Brief, pp.36-43), challenging the questions asked, counsels' failure to move for exclusion of the jurors discussed in the previous section, and their failure to "rehabilitate [ ] McMinton and oppose the State's motion to exclude her for cause" (id., p.37). While the state will attempt to address Dunlap's general challenge to counsels' voir dire, the arguments regarding McMinton's exclusion and the eleven jurors who were not excused has been addressed in the two prior sections.

"The choice of questions to ask prospective jurors during voir dire is largely a matter of trial tactics. Such strategic or tactical decisions made by trial counsel will not be second-guessed on post-conviction relief, unless those decisions are made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." Milton v. State, 126 Idaho 638, 641, 888 P.2d 812 (Ct. App. 1995); *see also* State v. Porter, 130 Idaho 772, 793, 948 P.2d 127 (1997) (counsel's decision that challenges were unnecessary will not be questioned on appeal).

Based particularly upon the district court's rulings limiting voir dire, the alleged deficiencies by trial counsel were nothing more than trial tactics. As explained by Parmenter, "It's a little hard in five minutes to delve into every issue. So typically you kind of have to highlight the areas where -- that you thought it might be most effective and decide whether that is the kind of jury that you want or not." (#41105, R., p.394.) Archibald agreed, "voir dire changes from trial to trial for respective jurors or for respective attorneys" (id., p.600) and "knowing that you had the five-minute time limit, we would pick our couple of top issues . . . we tried to use our five minutes very, very frugally. Very efficiently" (id., p.601). Dunlap also ignores the importance of a prospective juror's "body language," "one of the factors that you consider," and was considered by counsel. (Id., p.607.) Dunlap has also failed to establish additional voir dire would have resulted in any additional jurors' recusal for cause because, as explained by Parmenter, he "can't tell you what results that would have created." (Id., p.429.)

While Dunlap concedes "the resentencing court's [allegedly] unreasonable temporal limitation is certainly responsible in part for the truncated individual questioning," he contends the court's "limits cannot excuse trial counsel's [sic] failure to

explore issues presented in the jury questionnaire responses of jurors who ultimately were seated on [his] jury," complaining about questions regarding "irrelevant matters." (Brief, p.38.) However, Dunlap's claims regarding "irrelevant matters" are both conclusory, State v. Payne, 146 Idaho 548, 560-61, 199 P.3d 123 (2008), and generally not supported with any facts or citation to the record and, therefore, must be disregarded by this Court. Zichko, 129 Idaho at 263. Irrespective, considering the fact that Dunlap's mental health "was the primary focus of the defense at sentencing," Dunlap V, 313 P.3d at 45-46, his complaint regarding voir dire questions regarding Canaday's background in psychology and whether she would consider such evidence rings hollow and illustrates the overzealous nature of Dunlap's current claims. The old proverb, "one man's junk is another man's treasure," rings particularly true regarding the questioning of prospective jurors when trial lawyers, in very short periods of time, attempt to develop a relationship with individuals that will decide their clients' fates.

Dunlap's reliance upon Knese v. State, 85 S.W.3d 628, 632-33 (Mo 2002) (en banc), is sorely misplaced. The court's finding of deficient performance was based on counsel's complete failure to read the two jurors' questionnaires prior to voir dire, which resulted in failing to learn of Morgan issues that should have been raised during voir dire. In other words, it was based upon "inadequate preparation," something "capable of objective review," Dunlap V, 313 P.3d at 40, which does not exist in Dunlap's case.

Dunlap's reliance upon Anderson v. State, 196 S.W.3d 28, 40-41 (Mo 2006), is also misplaced. The Missouri Supreme Court's decision that trial counsel's failure to excuse a juror was ineffective was based upon statements made during voir dire that the juror was unwilling to follow the law when he stated his requirement that the defendant

present evidence establishing he should not be given the death penalty. Id. at 40. The court explained, "No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty **and also stated** that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state." Id. at 41 (emphasis added). Moreover, the court explained part of its decision was also based upon the fact that Anderson's attorneys both testified they failed to excuse the juror because of an "oversight" resulting from "a note-taking error." Anderson is clearly inapposite because none of Dunlap's jurors indicated a refusal to follow the law nor is there any evidence establishing his attorneys inadvertently left a juror on that should have been excused. In fact, Parmenter discussed his thoughts regarding the jury and testified he thought they "were working with, you know, a fairly open-minded bunch." (#41105, R., p.389.)

Because Dunlap has failed to establish trial counsel were ineffective, his appellate counsel claim fails, not only because it is not "obvious from the record" the claim would succeed on appeal, but the SAPD made tactical decisions to raise more viable claims than the voir dire claims Dunlap presented in his successive petition and now on appeal.

E. SAPD's Failure To Appeal Jury Instructions

1. Introduction

In Dunlap's consolidated appeal, the SAPD raised four claims regarding jury instructions (#41105, R., pp.958-966), which this Court rejected under the capital fundamental error doctrine. Dunlap V, 313 P.3d at 20-21. Dunlap now contends the SAPD was ineffective on appeal for failing to challenge three additional jury instructions. (Brief, pp.43-53.) However, like the four claims raised in the consolidated appeal, the

SAPD was not ineffective on appeal regarding the three new sub-claims because there was no objection below and they would have failed on appeal under Idaho's capital fundamental error doctrine. Because Dunlap has failed to overcome the presumption the SAPD winnowed out each of these sub-claims and failed to establish they would have changed the outcome of his appeal, each fails.

2. Fundamental Error And Standards Of Law Regarding Jury Instructions

Fundamental error as defined in State v. Perry, 150 P.3d 209, 245 P.3d 961, 980 (2010), has been applied when the defendant fails to object to jury instructions. State v. Grove, 151 Idaho 483, 493, 259 P.3d 629 (Ct. App. 2011). Likewise, the fundamental error doctrine has been applied in capital cases, Dunlap V, 313 P.3d at 210-21, which requires Dunlap to establish the existence of an error that was not harmless, id. at 19.

An erroneous instruction rises to the level of a constitutional violation only where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Jones v. United States, 527 U.S. 373, 390 (1999) (internal quotes and citation omitted). An instruction that reduces the state's burden of proof, for example, violates the right to a jury trial, because such an error would "vitiate[] all the jury's factual findings." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). Likewise, removing from the jury a decision on elements of the crime can implicate the constitutional right to a jury. Morissette v. United States, 342 U.S. 246, 275 (1952). However, instructions must be reviewed "as a whole, not individually, to determine whether the jury was properly and adequately instructed." State v. Shackelford, 150 Idaho 355, 247 P.3d 582, 373-74 (2010). "In evaluating the instructions, we do not engage in a technical parsing of [the] language of the instructions, but instead approach

the instructions in the same way that the jury would – with a commonsense understanding of the instructions in the light of all that has taken place at the trial." Johnson v. Texas, 509 U.S. 350, 367 (1993) (quotes and citation omitted).

3. Failing To Appeal Preliminary Instruction P-3

Dunlap contends Preliminary Instruction P-3, ¶ 16, violated his right to due process because it "overly emphasized the need to exclude jurors who were inclined toward rendering a life verdict unless they could follow the law as given in the instructions" while it "ignored the same requirement that jurors who are inclined to render a death verdict had to follow the law as given," which, "in combination with the limited time for voir dire to explore individual views on the death penalty, led to the seating of jurors who were substantially impaired in their ability to follow the instructions." (Brief, p.43.) Because this Court has already affirmed the district court's limitations on voir dire, Dunlap V, 313 P.3d at 19-20, and because Dunlap's claim is expressly tied to that limitation, his claim fails. However, even in isolation, the claim regarding this instruction fails.[6]

After the district court completed its questioning of the veniremen (#41105, R., 1613-72), the court instructed the jury as follows:

> Because your verdict could lead to imposition of the death penalty, your attitude toward the death penalty is a proper subject of inquiry by the Court and the attorney[s]. The fact that you may have reservations about or conscientious or religious objections to capital punishment, does not automatically disqualify you as a juror in a capital case. Of primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a juror and follow the law I give to you. If you are willing to render a verdict that speaks the truth as you find it to

[6] To the extent Dunlap's claim is premised upon Witherspoon and its progeny, in the previous section the state has addressed why there are no such violations.

> exist, even though such verdict may lead to the imposition of the death penalty, you are qualified to serve as a juror in this case. If[,] however, you possess such strong opinions regarding capital punishment, no matter what the opinions may be, that you would be prevented or substantially impaired in the performance of your duties as a juror, you are not qualified to serve as a juror.
>
> It is up to each of you, using the standard described[,] to search your conscience to determine whether you are in a position to follow the law as I give it to you and render a verdict as the evidence warrants. Only by your candor can either the accused or the State of Idaho be assured of having this extremely serious case resolved by a fair and impartial juror.
>
> You will be asked questions by the Court and counsel in private regarding the death penalty and other issues.

(Id., pp.1672-73.)

Dunlap's claim regarding this "instruction" misses the mark. The district court expressly stated the "primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a juror and follow the law I give to you." (Id., p.1672.) The court further explained, "If, however, you possess such strong opinions regarding capital punishment, **no matter what those opinions may be**, that you would be prevented from or substantially impaired in the performance of your duties as a juror, you are not qualified to serve as a juror." (Id., pp.1672-73) (emphasis added). The court was not inquiring or even focusing upon the need to exclude veniremen "inclined toward rendering a life verdict unless they could follow the law" (Brief, p.43), but was concerned with any "strong opinions regarding capital punishment" that would result in a venireman being "prevented from or substantially impaired in the performance of [their] duties as a juror."

Moreover, Dunlap completely ignores the written questionnaire completed by each venireman that asked multiple questions about their respective views regarding the death penalty (*e.g.*, #41105, R., pp.1814-41), including the following:

> Under Idaho law, the jury has to decide whether to impose the death penalty. Persons convicted of First Degree Murder *cannot* automatically be given the death penalty. Before the jury could impose the death penalty, there will be a hearing on the appropriate penalty, and the jury would have to find that the death penalty was appropriate under the guidelines set by Idaho law. Evidence will be presented regarding the appropriate penalty.

(Id., p.18) (emphasis in original). The veniremen were also asked, "Do you feel that your views on the death penalty would prevent or substantially impair your ability to view the facts impartially" and to explain "why." (Id.)

Even if Preliminary Instruction P-3, ¶ 16 did not adequately address the issue Dunlap is raising, when bolstered by the questionnaire and the questions of the respective attorneys during individual voir dire, he has failed to establish a Witherspoon or Morgan violation that should have been raised on appeal. Rather, he has "parsed" the language of the instruction and failed to view the instructions as a whole as required to establish instructional error, which not only demolishes the merits of his claim, but makes it virtually impossible for him to establish the error was not harmless. More importantly, he has failed to overcome the presumption that the SAPD made a tactical decision to not raise this issue for the first time on appeal. Dunlap implicitly concedes he raised a voir dire claim on appeal before the Idaho Supreme Court, but then contends, "Attacking Preliminary Instruction P-3 would have strengthened appellate counsel's claim regarding the inadequacies of individual voir dire." (Brief, p.46.) However, he fails to explain how such an attack would have strengthened the voir dire claim actually raised on appeal.

Dunlap's argument is nothing more than second-guessing the SAPD's arguments on appeal, which is not permitted under any kind of ineffective assistance of counsel claim, let alone ineffective assistance of appellate counsel. Merely because Dunlap's current successive post-conviction attorneys would have raised a different voir dire claim or argued the claim that was raised differently, does not establish the SAPD was ineffective on appeal. Dunlap has completely failed to establish prejudice.

4. Failing To Appeal The Propensity Instruction

Despite conceding this Court has previously approved the narrowing language for the propensity aggravator, Dunlap contends he "raises this issue to preserve it for review" and that the SAPD was ineffective for not raising it on direct appeal because the phrase, "less than the normal amount of provocation," is allegedly "undefined, ambiguous and confusing." (Brief, pp.46-47.) Not only has Dunlap failed to establish the SAPD's performance was deficient, he has failed to establish prejudice.

The propensity aggravator reads, "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." I.C. § 19-2515(9)(h). Not only was this statutory aggravating factor given to the jury (#32773, Supp. R., p.13), but the district court also gave the approved narrowing instruction regarding the aggravator, which reads as follows:

> The phrase "exhibited a propensity to commit murder which will probably constitute a continuing threat to society" means conduct showing that the defendant is more likely than not to be a continuing threat to society. The state is required to prove the existence of this propensity beyond a reasonable doubt. Such finding cannot be based solely upon the fact that you found the defendant guilty of murder. In order for a person to have a propensity to commit murder, the person must be a willing,

> predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. Propensity requires a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

(Id., p.17.)

This language was derived from this Court narrowing the class of people eligible for the death penalty in State v. Creech, 105 Idaho 362, 380-81, 670 P.2d 463 (1983), as follows:

> We would construe "propensity" to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, susceptibility, and even an affinity toward committing the act of murder.

In State v. Pizzuto, 119 Idaho 742, 711, 810 P.2d 680 (1991), this Court recognized similar language was upheld by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), and concluded there was "no reason to reconsider our opinions." Moreover, the United States District Court of Idaho has reasoned the narrowing language from Creech "is sufficiently narrow to channel the sentencer's discretion to focus on the future dangerousness of the offender based on objective facts." Creech v. Hardison, 2010 WL 1338126, *21 (D. Idaho 2010).

Because this Court provided the narrowing language for Instruction 11, which is a pattern jury instruction in Idaho (ICJI #1715) and instructions approved by the Idaho Supreme Court are "presumptively correct," McKay v. State, 148 Idaho 567, 571 n.2, 225 P.3d 700 (2010), and because the instruction has been approved by a federal district

court, not only has Dunlap failed to establish the SAPD ignored an issue that should have been raised on appeal because it was a "dead bang winner" that was "obvious from the trial record," Cook, 45 F.3d at 395, this claim was a "dead bang loser" with no possibility of success on appeal before this Court. Merely because Dunlap now wishes to "preserve" the claim for review before some other court, does not mean the SAPD's performance was deficient. Indeed, "[a] criminal defendant does not have the right to have this Court review an opinion of the Court of Appeals," Pierce v. State, 142 Idaho 32, 34, 121 P.3d 963 (2005), let alone the right to preserve an issue for some other unknown court.

Interestingly, when Sivak v. Hardison, 2008 WL 782877, *25 (D. Idaho 2008), was appealed to the Ninth Circuit, the issue of whether the limiting language of the propensity aggravator is unconstitutionally vague was not raised on appeal even though Sivak was represented by the same attorneys representing Dunlap in the instant case. *See* Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011). Presumably, Dunlap's current attorneys made a tactical decision in Sivak to winnow out the claim on appeal because it had virtually no possibility of success. The SAPD should be afforded that same discretion, particularly since Dunlap is parsing a single clause from the instruction and failing to recognize the instruction must be read as a whole. *See* Johnson, 509 U.S. at 367 ("In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would - with a commonsense understanding of the instructions in the light of all that has taken place at the trial."); State v. Aragon, 107 Idaho 358, 363, 690 P.2d 293 (1984) ("Jury instructions must be read in their entirety, as a whole, not in their isolated parts.").

Moreover, even if the instruction was erroneous, there was no prejudice because the jury found two other statutory aggravating factors and weighed the collective mitigation against the statutory aggravating factors individually. (R., #32773, pp.686-88.) Therefore, this Court would not need to address Instruction 11, and even if it was addressed, the death penalty would have been affirmed. *See* State v. Wood, 132 Idaho 88, 105-06, 967 P.2d 702 (1998); Hoffman v. Arave, 236 F.3d 523, 541-42 (9th Cir. 2001) (declining to address the constitutionality of the "heinous, atrocious and cruel" aggravating factor because, under I.C. §19-2515, the trial court correctly weighed the collective mitigation against another statutory aggravating factor).[7]

Dunlap has failed to overcome the presumption that failing to raise this issue on appeal was strategic or otherwise establish deficient performance or prejudice.

5. Failing To Appeal Instruction 14 And The Verdict Form

Dunlap contends the SAPD was ineffective on appeal by failing to raise another claim regarding Instruction 14 and the verdict form, asserting they "improperly instructed the jury on the sentencing law, I.C. § 19-2515, that applied at the time of the re-resentencing proceeding, rather than the law that applied at the time of the crime and entry of [his] guilty plea," which allegedly "violated the Ex Post Facto and Due Process Clauses of the state and federal constitutions." (Brief, p.49.) This claim fails because

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[7] The state recognizes this Court subsequently determined the jury was not properly instructed regarding the specific intent aggravator. Dunlap V, 313 P.3d at 20-21. However, the SAPD had no way of knowing when winnowing out claims that this Court would find instructional error regarding the specific intent aggravator. Therefore, the SAPD's performance was not deficient. Irrespective, because there are still two statutory aggravators, any alleged error was harmless. Id. at 21. Moreover, there was no prejudice because Dunlap has failed to establish the results of his direct appeal with respect to this issue would have changed since it fails on its merits.

Dunlap has failed to overcome the presumption that the SAPD appropriately winnowed out this claim because it fails on the merits.

In his first resentencing post-conviction case, Dunlap raised a claim of ineffective assistance of counsel based upon resentencing counsels' "failing to request or argue that the court apply the version of I.C. § 19-2515 in effect at the time of Mr. Dunlap's offense and entry of guilty plea as it related to the finding and weighing of aggravating and mitigating circumstances." (#37270, R., p.923.) While the claim was not couched in terms of Instruction 14 and the verdict form, both were referenced (id.) and it was similar to the claim Dunlap raised in his successive Amended Petition for Post-Conviction Relief (*compare* #41105, R., pp.1566-68). Moreover, the SAPD actually raised a claim based upon Instruction 14 in Dunlap's consolidated direct appeal (id., pp.962-63), which this Court summarily rejected, Dunlap V, 313 P.3d at 21. Obviously, the SAPD was aware of this claim when the opening brief was filed with this Court, recognized its futility, and simply chose to raise stronger arguments on appeal.

Dunlap has also failed to establish prejudice because the claim fails on its merits. At the time Dunlap murdered Tonya in 1991, the relevant portion of I.C. § 19-2515(c) (1991), read as follows:

> Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

In 2006, the relevant portion of I.C. § 19-2515(3) was amended as follows:

> Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless:

> (b) The jury, or the court if a jury is waived, finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance. Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust. The jury shall not direct imposition of a sentence of death unless it unanimously determines that the penalty of death should be imposed.

I.C. § 19-2515(3) (2006).

Dunlap contends the change from, "unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust," to "unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust," unconstitutionally reduced the state's burden of proof, thereby resulting in an *ex post facto* violation. (Brief, pp.49-51.)

The United States Constitution, article I, § 10, prohibits the enactment of *ex post facto* laws. As explained in State v. Byers, 102 Idaho 159, 166, 627 P.2d 788 (1981) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)), the United States Supreme Court has defined what constitutes an *ex post facto* violation as follows:

> 1st, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Dunlap's claim is based upon the fourth category and the contention that the amendment, "unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust," is a more lenient standard

than whether the mitigating circumstances "outweigh the gravity of any aggravating circumstances found and make imposition of death unjust." (Brief, pp.49-53.) However, the challenged language does not change the burden of proof. Rather, the question under both phrases is whether the mitigation makes imposition of the death penalty unjust. In other words, the question is not the quantum of mitigation, i.e., whether the mitigation "outweigh[s]" the aggravating circumstance or the mitigation is "sufficiently compelling," but whether the mitigation makes the death penalty unjust.

Nevertheless, assuming the state has the burden of establishing the mitigation does not make imposition of the death penalty unjust and that the amendment somehow changed that burden, the amendment actually increased the state's burden. As recognized by the district court (#41105, R., pp.2275-77), under the prior statute the state had the burden of establishing the mitigating circumstances did not outweigh any aggravating circumstance thereby making imposition of the death penalty unjust. Under the new statute, the state has the burden of establishing the mitigating circumstances are not sufficiently compelling to make imposition of the death penalty unjust. Under Dunlap's analysis, the amendment increases the state's burden by requiring the state to disprove the mitigating circumstances are not sufficiently compelling, while previously the state was merely required to establish they did not outweigh the mitigating circumstances.

Further, as recognized by the district court (id., pp.2277-78), this Court has already determined the changes made to I.C. § 19-2515 are substantive in nature. In State v. Lovelace, 140 Idaho 73, 77-78, 90 P.3d 298 (2004), this Court addressed the changes in I.C. § 19-2515 and concluded they are merely procedural changes that are not subject to the *Ex Post Facto* Clause. As explained in Dobbert v. Florida, 432 U.S. 282, 293

(1977) (internal quotes and citations omitted) (emphasis added), the *Ex Post Facto* Clause generally does not apply to procedural matters:

> It is equally well settled, however, that the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.
>
> Even though it may work to the disadvantage of a defendant, **a procedural change is not *ex post facto*.**

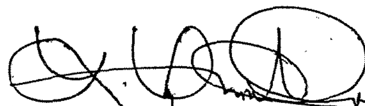
Because the changes to I.C. § 19-2515 are procedural in nature, do not change the burden, and if they do change the burden actually increase it for the state, Dunlap has failed to establish either deficient performance or prejudice as a result of the SAPD's tactical decision to winnow this claim on direct appeal.

Dunlap has failed to establish any error in the summary dismissal of his successive Amended Petition for Post-Conviction Relief.

## CONCLUSION

The state respectfully requests that the district court's Memorandum Decision and Order summarily dismissing Dunlap's successive Amended Petition for Post-Conviction Relief be affirmed.

DATED this 9th day of July, 2014.



L. LaMONT ANDERSON
Deputy Attorney General
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 9th of July, 2014, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

| | | |
|---|---|---|
| Federal Defender Services of Idaho<br>Teresa Hampton<br>702 W. Idaho Street, Suite 900<br>Boise, ID 83702 | X | U.S. Mail |
| | ____ | Hand Delivery |
| | ____ | Overnight Mail |
| | ____ | Facsimile |
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