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IN THE SUPREME COURT OF THE STATE OF IDAHO

KYLE STEVEN BOWER,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT NO. 46088-2018

CANYON COUNTY NO. CV2016-5277

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REPLY BRIEF OF APPELLANT KYLE STEVEN BOWER

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APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

---

HONORABLE GENE A. PETTY  
District Judge

---

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ATTORNEYS FOR RESPONDENT

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## II. ARGUMENT IN REPLY

### A. Mr. Bower Did Not Forfeit His Prosecutorial Misconduct Claims Under I.C. § 19-4901(b) and He Established that Prosecutorial Misconduct Violated his Constitutional Rights

As argued in Mr. Bower’s opening brief, he established that prosecutorial misconduct violated his due process rights by a preponderance of the evidence. In response, the state argues the district court correctly found that Mr. Bower forfeited his due process claims under I.C. § 19-4901(b) because they could have been raised on direct appeal under the fundamental error doctrine under *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). The state — and the Court of Appeals in *Grove v. State*, 161 Idaho 840, 392 P.3d 18 (Ct. App. 2017) — assert that all constitutional claims (except Sixth Amendment ineffective assistance of counsel claims) can only be raised in post-conviction relief when the petitioner makes “a substantial factual showing . . . that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.” I.C. § 19-4901(b); *see also Thumm v. State*, No. 45290, 2019 WL 848061, at \*14 (Idaho Feb. 22, 2019)(pet for re’hrg pending). Otherwise, according to the state and *Grove*, a petitioner can only secure relief for a prejudicial constitutional violation to which his trial counsel failed to object, if that failure to object also meets the highly deferential standard necessary to establish

ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

However, constitutional claims that require factual development beyond the appellate record, which are technically possible to raise (and lose) on direct appeal, are not claims that “could have been raised on direct appeal” pursuant to I.C. § 19-4901(b). Rather, Section § 19-4901(b) permits a defendant to reserve claims requiring factual development for post-conviction relief proceedings and renders such a claim res judicata should a defendant elect to raise it on direct appeal. *Kraft v. State*, 100 Idaho 671, 673, 603 P.2d 1005, 1007 (1979); *Aragon v. State*, 114 Idaho 758, 766, 760 P.2d 1174, 1182 (1988). Moreover, § 19-4901(a)(1) plainly provides a remedy when “the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state,” not just for Sixth Amendment violations of the right to ineffective assistance of counsel.

Unlike the petitioners in *Grove* and *Thumm*, Mr. Bower did not raise claims of prosecutorial misconduct on direct appeal as fundamental error. Because trial counsel did not object to the misconduct, I.C. § 19-4901(b) permitted Mr. Bower to properly reserve the issue for post-conviction relief, where he could develop a factual record to support his claims. Accordingly, the district court erred in concluding that Mr. Bower’s prosecutorial misconduct claims were ones that could have been raised on direct appeal and in dismissing his petition for post-conviction relief.

**1. “Could have been raised on direct appeal” pursuant to I.C. § 19-4901(b) means more than the technical possibility of raising an issue on direct appeal without a sufficient factual record**

Idaho Code § 19-4901(b) does not require a defendant to raise a constitutional claim on direct appeal that requires factual development beyond the appellate record only to receive an adverse decision that will become res judicata. Instead, precedent has construed I.C. § 19-4901(b)’s “could have been raised” as not applying to claims that are more appropriately presented in post-conviction relief, notwithstanding the technical possibility to raise them on direct appeal.

In *Kraft*, the Court construed a prior version of I.C. § 19-4901(b), which provided that post-conviction relief neither substituted nor affected any remedy incident to trial court proceedings or of an appeal from the conviction or sentence. *Kraft*, 100 Idaho at 674, 603 P.2d at 1008. The Court held that counsel’s competence becomes res judicata when raised on direct appeal but may be reserved “more properly for a post-conviction hearing.” *Kraft*, 100 Idaho at 674, 603 P.2d at 1008.

In 1986, the legislature amended Section § 19-4901(b) to indicate an issue may not be considered in post-conviction proceeding when it could have been raised on direct appeal (and was not). *Aragon*, 114 Idaho at 766, 760 P.2d at 1182. This amendment codified the pre-existing case law enunciated in *Kraft* “that in actions between the same parties upon the same claim, the former adjudication (here, direct appeal) concludes parties ‘but also as to every matter which might or should

have been litigated in the first suit.” *Aragon*, 114 Idaho at 766, 760 P.2d at 1182, quoting *Kraft*, 100 Idaho at 673, 603 P.2d at 1007.

Ineffective assistance of counsel claims are “preferably” brought in post-conviction relief but are “properly raised on direct appeal” when the defendant claims it is clear from the record that trial counsel was ineffective. *State v. Pugsley*, 128 Idaho 168, 174, 911 P.2d 761, 767 (Ct. App. 1995); see also *State v. Doe*, 136 Idaho 427, 433–34, 34 P.3d 1110, 1116–17 (Ct. App. 2001); *State v. Brown*, 130 Idaho 865, 870, 949 P.2d 1072, 1077 (Ct. App. 1997). Nonetheless, ineffective assistance of counsel claims are not barred by I.C. § 19-4901(b) for failing to raise them on direct appeal because they are “more appropriately” presented in post-conviction where an evidentiary record can be developed. *Sparks v. State*, 140 Idaho 292, 295–96, 92 P.3d 542, 545–46 (Ct. App. 2004); see also *State v. Koch*, 116 Idaho 571, 573, 777 P.2d 1244, 1246 (Ct. App. 1989) (addressing ineffective assistance of counsel on direct appeal but repeating “the admonition that ineffective assistance of counsel is not a subject ordinarily well suited to a direct appeal”).

The phrase “could have been raised” refers to claims that are cognizable and appropriately raised on direct appeal. Consistent with *Krafts* and *Aragon*, a defendant may raise an issue that generally requires factual development on direct appeal arguing the error is clear or reserve the claim for post-conviction but may not raise the issue in both proceedings.



**2. Constitutional claims requiring factual development beyond the appellate record are not claims that “could have been raised on direct appeal” pursuant to I.C. § 19-4901(b)**

Un-objected to fundamental error that is not “clear or obvious” under the *Perry* fundamental error doctrine can technically be raised (and lost) on direct appeal. However, such an error presents factual issues more appropriately addressed via a petition for post-conviction relief.

Recently, the Idaho Supreme Court “reemphasize[d] that in order to satisfy [the second *Perry* prong] a defendant bears the burden of showing clear error in the record,” meaning “must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object.” *State v. Miller*, No. 46517, 2019 WL 1217673, at \*2 (Idaho Mar. 15, 2019). Where the record contains no “evidence regarding whether counsel’s decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief.” *Id.* at \*2. Further, whereas a defendant previously satisfied *Perry*’s third prong by “proving there is a reasonable possibility that the error affected the outcome of the trial” [*State v. Herrera*, 164 Idaho 261, 429 P.3d 149, 155 (2018), *reh’g denied* (Nov. 13, 2018)], *Miller* “clarified” that the appellate record must establish that the unpreserved error “*actually* affected the outcome of the trial proceedings.” *Miller*, No. 46517, 2019 WL 1217673, at \*2 (emphasis added).

Unless the appellate record establishes that an un-objected to error is “clear or obvious” and actually effected the outcome without needing any additional information not contained in the appellate record, it is properly reserved for post-conviction relief to develop a factual record. Mr. Bower properly reserved his prosecutorial misconduct claims for post-conviction relief and did not waive those issues by failing to raise them on direct appeal.

**3. I.C. § 19-4901(b) provides a remedy for constitutional claims requiring factual development in addition to Sixth Amendment claims of ineffective assistance of counsel**

“Not all issues. . . are barred by res judicata in post-conviction proceedings for failure to argue them on direct appeal, including ineffective assistance of counsel claims, which are a matter for post-conviction relief.” Aragon, 114 Idaho at 766 n.12, 760 P.2d at 1182 n.12. Although ineffective assistance of counsel claims clearly *could* be raised on direct appeal, they are not barred by Section 19-4901(b) because they are more *appropriately* raised in post-conviction relief. A defendant can choose to raise the issue on direct appeal, resulting in an averse ruling that becomes res judicata, or reserve the issue for the more appropriate forum. *Kraft*, 100 Idaho at 674, 603 P.2d at 1008; *see also Koch*, 116 Idaho at 573, 777 P.2d at 1246 (noting post-conviction relief is the “better method” to present an ineffective assistance of counsel claim but considering the issue since it was presented); *Sparks v. State*, 140 Idaho 292, 295–96, 92 P.3d 542, 545–46 (Ct. App. 2004) (district court erred in

finding the petitioner waived ineffective assistance of counsel claims by failing to raise them on direct appeal because the appellate record is rarely adequate to review such claims and they are more appropriately presented in post-conviction where an evidentiary record can be developed).

The state distinguishes ineffective assistance of counsel claims, arguing the reason Section 19-4901(b) does not bar such claims is because their “very nature” precludes their consideration during trial “while the defendant is still represented by the allegedly ineffective trial counsel.” However, the state cites no authority establishing it is the concept of waiver, rather than the absence of necessary record, that places ineffective assistance of counsel outside the Section 19-4901(b) bar.

Instead, ineffective assistance of counsel is appropriately raised in post-conviction relief because the record on direct appeal is rarely sufficient to support the claims. *See State v. Blackburn*, 99 Idaho 222, 222–23, 579 P.2d 1205, 1205–06 (1978) (appellate record was devoid of facts to support defendant’s claims and proper forum for raising allegations based on matters outside the record is post conviction); *Sparks*, 140 Idaho at 295–96, 92 P.3d at 545–46 (ineffective assistance of counsel claims should almost invariably be brought in post-conviction relief where an evidentiary record can be developed); *State v. Brazzell*, 118 Idaho 431, 433, 797 P.2d 139, 141 (Ct. App. 1990) (ineffective assistance is rarely appropriate

in direct appeal and is usually reserved “to post-conviction relief proceedings, where a fuller record can be developed”).

“Post-conviction counsel must have the ability to develop a separate evidentiary record on an ineffective assistance of counsel claim, including the ability to call witnesses and present evidence in a separate civil proceeding.” *State v. Doe*, 136 Idaho 427, 433–34, 34 P.3d 1110, 1116–17 (Ct. App. 2001). Our courts have historically declined to consider ineffective assistance of counsel on direct appeal to provide a defendant a meaningful opportunity to develop factual support for his claims. *State v. Brown*, 130 Idaho 865, 870, 949 P.2d 1072, 1077 (Ct. App. 1997) (this case does not present the rare situation where the adequacy of trial counsel's performance can be determined by simply reviewing the available transcripts. only secure relief for a due process violation if that violation occurred as a result of ineffective assistance of counsel); *State v. Kellis*, 129 Idaho 730, 733, 932 P.2d 358, 361 (Ct. App. 1997) (declining to review ineffective assistance of counsel on direct appeal to provide opportunity to present claim in post-conviction relief).

Ineffective assistance of counsel are not barred by I.C. § 19-4901(b) because the claims generally require factual development beyond the appellate record. Section 19-4901(b) similarly does not bar other constitutional claims requiring factual development because they are not clear or obvious under *Perry*.

**4. The substantial showing of unreliability and due diligence is inapplicable unless the issue could have been raised on appeal**

According to the state, I.C. § 19-4901(b) “unambiguously bars post-conviction petitioners from raising direct constitutional claims unless those claims could not have, in the exercise of due diligence, been raised earlier.” Respondent’s Brief, p. 22. The state is incorrect. Under the statute’s plain language, petitioners are only required to establish that an issue raises a substantial doubt about the conviction’s reliability and diligently could not have been presented earlier when the issue “could have been raised on direct appeal.” I.C. § 19-4901(b). Direct constitutional claims that are not reviewable under *Perry* are not issues that could have been raised on direct appeal and can be reserved for post-conviction relief. Because such claims cannot be raised on direct appeal, the substantial showing requirement is inapplicable.

The state cites to *Thumm* in which the Court held that I.C. § 19-4901(b) barred the petitioner’s prosecutorial misconduct claims even though he only could have raised the claim on direct appeal under fundamental error standard. However, unlike Mr. Bower, the *Thumm* petitioner raised some unobjected to instances of prosecutorial misconduct on direct appeal, arguing they were reviewable under *Perry*. *Thumm*, 153 Idaho at 542, 285 P.3d at 357. On appeal in the post-conviction case, the Court held that I.C. § 19-4901(b) barred those claims in

the absence of evidence that they could not have been presented earlier in the exercise of due diligence. *Thumm*, No. 45290, 2019 WL 848061, at \*16.

*Thumm* is consistent with precedent interpreting I.C. § 19-4901(b) to require a petitioner to choose his forum — direct appeal *or* post-conviction relief — for claims that could benefit from factual development. *Kraft*, 100 Idaho at 674, 603 P.2d at 1008; *see also Saxton*, 133 Idaho 546, 549, 989 P.2d 288, 291 (Ct. App. 1999) (if an appellate court were to reach the merits of the ineffective assistance of counsel claim on direct appeal, the absence of any factual record would generally require an adverse decision to the appellant, which would become res judicata).

When a defendant chooses to litigate fundamental error on appeal — even when certain to fail without factual support — I.C. § 19-4901(b) bars re-litigation of the error in post-conviction relief. However, I.C. § 19-4901(b) does not require defendants to doom such claims on direct appeal and, instead, allows them to reserve the issue for post-conviction relief.

**5. I.C. § 19-4901’s plainly provides a remedy for prejudicial fundamental errors that deprive a defendant of his right to a fair trial even where that error did not occur as a result of ineffective assistance of counsel**

Post-conviction relief is available to claim that the defendant’s conviction or sentence violates “the constitution of the United States or the constitution or laws of this state.” I.C. § 19-4901(1)(a). According to the state, the legislature actually intended to provide relief for prejudicial constitutional violations only when they

occur as a result of counsel's ineffective assistance, were revealed by changing precedent or supported by newly discovered facts.

The state claims such a construction is necessary to protect the courts from sandbagging by indigent defendants represented by overworked public defenders who (apparently) intentionally sit on fundamental errors so they can be raised in post-conviction relief. Of larger concern: "Practitioners of criminal law must find it disquieting to be told that only the discretionary largesse of an appellate court stands between them and the bar of res judicata. *State v. Darbin*, 109 Idaho 516, 524, 708 P.2d 921, 929 (Ct. App. 1985) (J. Burnett, concurring).

The attorney representing a defendant whose trial attorney missed a constitutional error resulting in an unconstitutional conviction is left with two entirely ineffectual remedies: raise the non "clear or obvious" fundamental error on appeal and have the claim foreclosed by res judicata in post-conviction relief or, (2) "forfeit" the issue by not raising the issue on direct appeal. This "gotcha" interpretation of the statute is not supported by its plain language or intent.

The central purpose of any system of criminal justice is to convict the guilty and free the innocent. *United States v. Nobles*, 422 U.S. 225, 230 (1975). Before we continue to tightened procedural bars that close the judiciary's doors for the accused, it is important to remember finality doesn't not always equate justice. That Chris Tapp could not navigate post-conviction relief procedures sufficient to survive

summary dismissal during his many knocks at the court's door did not make his confession less false or the victim's murderer less free. *See Tapp v. State*, No. 43347, 2017 WL 993188, at \*4 (Idaho Ct. App. Mar. 15, 2017); *Tapp v. State*, No. 40197, 2013 WL 6171026, at \*12 (Idaho Ct. App. Nov. 21, 2013); *see also* <https://www.idahostatesman.com/news/local/crime/article230476419.html#storylink=cpy> (Brian Drripp confessed and charged with murder after his DNA matched that of the semen tested after the crime and other articles tested years later); <https://www.idahostatesman.com/news/local/crime/article230630919.html> (none of Tapp's DNA found on crime scene evidence and "FBI investigators, a polygraph expert, DNA experts, false-confession experts and victim's own mother concluded Tapp falsely confessed under coercion).

Ineffective assistance of counsel is highly deferential and the attorney for a defendant deprived of his right to fair trial might not have been so objectively unreasonable (without the aid of hindsight) to have provided ineffective assistance of counsel. The post-conviction relief act provides a remedy for such defendants.

**C. Mr. Bower Established that he Received Ineffective Assistance of Counsel in Violation of the Sixth Amendment by a Preponderance of the Evidence**

The district court found Mr. Bower was not prejudiced by his trial counsel's failure to argue that the charges were improperly joined under I.C.R. 8 because the state established a prima facie showing of a common scheme and plan. The state



asks this Court to affirm the district court, in part, because the Court of Appeals concluded that the state made “at least a prima facie showing that the evidence of Bower's conduct alleged would have been admissible in both trials. The state argues that the Court of Appeals thus already determined that a motion to sever the charges pursuant to I.C.R. 8(a) would have been unsuccessful and the matter is now res judicata.

As noted by the state, issue preclusion protects litigants from re-litigating an identical issue with the same party or its privy.” The question on direct appeal was whether the issue of Rule 8 joinder was preserved on appeal by the Rule 14 motion. *State v. Bower*, No. 41336, 2015 WL 654467, at \*4 (Idaho Ct. App. Feb. 13, 2015). The Court’s comment that the state made a prima facie showing of a common scheme did not address the issue of whether a properly argued and preserved Rule 8 motion should have been granted.

For all the reasons argued in Mr. Bower’s opening brief, he established that he received ineffective assistance of counsel and the district court erred in dismissing Mr. Bower’s post-conviction relief petition.

### **III. CONCLUSION**

As argued above and in Mr. Bower’s opening brief, he established that he received ineffective assistance of counsel in violation of the Sixth Amendment and that the state violated his right to due process as protected by the Fourteenth

Amendment. This Court should reverse the district court's judgment denying Mr. Bower's petition and remand with instruction to grant his requested relief.

Respectfully submitted this 30th day of May 2019.

FYFFE LAW, LLC

/s/ Robyn Fyffe  
ROBYN FYFFE  
Attorney for Kyle Bower

#### **CERTIFICATE OF SERVICE**

I CERTIFY that on May 30, 2019, I served the foregoing document via the File and Serve system to the email that was identified as the service contact for the Criminal Appellate Unit of the Office of the Attorney General.

/s/ Robyn Fyffe  
ROBYN FYFFE