10-7-2016

Ash v. State Appellant's Brief Dckt. 44295

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRY LEE ASH, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 44295 Ada Co. CV-PC-15-2064

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

HONORABLE PATRICK OWEN,
District Judge

Deborah Whipple
ISBA#4355
Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
deb@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
Idaho Attorney General
Paul Panther
Deputy Attorney General
Chief, Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. Table of Authorities ii

II. Statement of the Case 1

A. Nature of the case 1

B. Procedural History and Statement of Facts 1

III. Issues Presented on Appeal 3

IV. Argument 4

A. Mr. Ash Raised a Genuine Issue of Material Fact as to Whether Counsel Was Ineffective in Failing to Move to Dismiss the Second Prosecution as a Violation of His Constitutional Protections Against Double Jeopardy 4

1. Standard of Review 4

2. Argument 5

B. Mr. Ash Raised a Genuine Issue of Material Fact as to Whether the Prosecutor's Misconduct in the Initial Trial Precluded the Retrial Under the State and Federal Protections Against Double Jeopardy 9

1. Standard of Review 9

2. Argument 9

V. Conclusion 20

TABLE OF AUTHORITIES

FEDERAL CASES

Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957).....18

Jacob v. Clarke, 52 F.3d 178 (8th Cir. 1995).....13

Lockhart v. Nelson, 488 U.S. 33, 109 S. Ct. 285 (1988).....13

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).....2

Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083 (1982)..... passim

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).....5, 6

United States v. Catton, 130 F.3d 805 (7th Cir. 1997).....13

United States v. Doyle, 121 F.3d 1078 (7th Cir. 1997).....13

United States v. Pavloyianis, 996 F.2d 1467 (2nd Cir. 1993).....13

United States v. Wallach, 979 F.2d 912 (2nd Cir. 1992), *cert. denied*, 508 U.S. 939, 113 S.Ct. 2414 (1993).....12, 13

STATE CASES

Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009).....11

Berg v. State, 131 Idaho 517, 960 P.2d 738 (1998).....10

Berglund v. Potlatch Corp., 129 Idaho 752, 932 P.2d 875 (1996).....15

Bias v. State, 159 Idaho 696, 365 P.3d 1050 (Ct. App. 2015).....10

Bonner County v. Cunningham, 156 Idaho 291, 323 P.3d 1252 (Ct. App. 2014).....11

Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992).....14, 18

Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975).....11

Cootz v. State, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996).....10

DeRushé v. State, 146 Idaho 599, 200 P.3d 1148 (2009).....11

Ex parte Mitchell, 977 S.W.2d 575 (Tex.Crim.App. 1997).....14

Mintun v. State, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007).....10

Murillo v. State, 144 Idaho 449, 163 P.3d 238 (Ct. App. 2007).....11

Noel v. State, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).....11

People v. Dawson, 427 N.W.2d 886 (Mich. 1988).....14

Phillips v. State, 108 Idaho 405, 700 P.2d 27 (1985) 5

Pool v. Superior Court in and For Pima County, 677 P.2d 261 (Az. 1984) 13, 17

Ridgley v. State, 148 Idaho 671, 227 P.3d 925 (2010).....5

Rossignol v. State, 152 Idaho 700, 274 P.3d 1 (Ct. App. 2012), *review denied* (2012) 10

Short v. State, 135 Idaho 40, 13 P.3d 1253 (Ct. App. 2000) 10

Sivak v. State, 112 Idaho 197, 731 P.2d 192 (1986).....15

State v. Breit, 930 P.2d 792 (N.M. 1996) 14, 17, 18

State v. Colton, 663 A.2d 339 (Conn. 1995).....13, 14

State v. Corbus, 151 Idaho 368, 256 P.3d 776 (Ct. App. 2011) 15, 19

State v. D'Auira, 492 S.E.2d 918 (Ga.App. 1997).....14

State v. Dunlap, 155 Idaho 345, 313 P.3d 1 (2013).....9

State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011).....8, 19

State v. Fuller, 374 N.W.2d 722 (Minn. 1985).....14

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992) 15

State v. Kennedy, 666 P.2d 1316 (Or. 1983).....13, 16, 17

State v. Lankford, ___ Idaho ___, ___ P.3d ___, 2016 WL. 4010851 (2016).....9

State v. Lettice, 585 N.W.2d 171 (Wis.App. 1998) 14

State v. Martinez, 86 P.3d 1210 (Wash.App. 2004) 15

State v. McKeeth, 136 Idaho 619, 38 P.3d 1275 (Ct. App. 2001).....15

State v. Minnitt, 55 P.3d 774 (Az. 2002) 13

State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991) 15

State v. Randles, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989) 15

State v. Reichenberg, 128 Idaho 452, 915 P.2d 14 (1996).....15

State v. Rogan, 984 P.2d 1231 (Hawai'i 1999) 14, 18

State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1983) 15

State v. Stewart, 149 Idaho 383, 234 P.3d 707 (2010).....15

State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980) 15

Stevens v. State, 156 Idaho 396, 327 P.3d 372 (Ct. App. 2013) 5, 8

FEDERAL STATUTES

U.S. Const. Amend. 5 .....3, 4

U.S. Const. Amend. 6 3

U.S. Const. Amend. 14 .....3, 4

STATE STATUTES

A.R.S. Const. Art. 2, § 10 17

Idaho Code § 19-4901.....10, 11

Idaho Code § 19-4906.....4

Idaho Code § 73-113(2).....11

Idaho Const. Art. I, § 13 .....3, 4, 9, 10, 15

Or. Const. Art. I, § 12 16

II. STATEMENT OF THE CASE

A. *Nature of the Case*

Terry Ash is appealing from the summary dismissal of his petition for post-conviction relief. R 209-212. Relief should be granted because Mr. Ash raised a genuine issue of material fact as to whether he was deprived of effective assistance of counsel when his attorney failed to move to dismiss on the basis of double jeopardy after the state caused a mistrial in his first trial by eliciting a comment on Mr. Ash's exercise of his right to remain silent. Mr. Ash also raised a genuine issue of material fact as to whether prosecutorial misconduct in bringing the second prosecution after the state had caused the mistrial in the first trial violated Mr. Ash's state and federal constitutional protections against double jeopardy.

B. *Procedural History and Statement of Facts*

On March 12, 2012, the state tried Mr. Ash for DUI. I.C. § 18-8004. R 5, 95. In her case in chief, the prosecutor asked the arresting officer: "Now, after he performed those FSTs and you arrested him, did he say anything about drinking any more alcohol besides the one beer?" The officer responded: "He decided not to say anything more after that." R 95 (Tr. 3/12/12, p. 1, ln. 10-13).

Defense counsel immediately moved for a mistrial. R 96-97 (Tr. 3/12/12, p. 2, ln. 1-p. 3, ln. 1.) After an opportunity for briefing and arguments, the district court declared a mistrial. R 110-111 (Tr. 3/13/12, p. 16, ln. 23-p. 17, ln. 2).

In its arguments, the state requested that the court find that the prosecutor did not commit misconduct. R 105 (Tr. 3/13/12, p. 13, ln. 3-9). The court declined this invitation. The court found that the question elicited information about statements made post-arrest. However, the

state had not established a foundation that Miranda[1] rights were given and waived. Nor had the state laid a foundation to show that post-arrest statements were volunteered. The court further noted that in her affidavit supplied in support of objection to mistrial, the prosecutor stated that her strategy was to use evidence of post-arrest silence to box Mr. Ash into a more difficult decision on whether to testify. The court noted two fundamental problems: first, the state is not permitted to begin its case in chief by impeaching testimony which has not been given no matter how well founded the belief that the testimony will eventually be given; second, the state cannot impeach a defendant's testimony with evidence of post-arrest silence. R 107-110 (Tr. 3/13/12, p. 13, ln. 10-p. 16, ln. 15).

The state apparently understood the significance of a finding of prosecutorial misconduct as it sent a second prosecutor to argue and specifically request a finding of no prosecutorial misconduct. R 105-107 (Tr. 3/13/12, p. 11, ln. 13-p. 13, ln. 10). However, Mr. Ash's attorney apparently did not understand the significance. He did not move to dismiss on the basis of double jeopardy. State's Ex. 1-3 (transcript of second trial).

At the second trial, the jury convicted Mr. Ash of DUI. State's Ex. 1 (Ex. Disc p. 70 (Tr. 6/12/12, p. 247, ln. 16-21)). Mr. Ash also admitted a prior DUI within 15 years and persistent violator status. State's Ex. 1 (Ex. Disc p. 72 (Tr. 6/12/12 p. 255, ln. 12-24); p. 74 (Tr. 6/12/12 p. 263, ln. 14-20)).

The court sentenced Mr. Ash to life with a minimum fixed term of 15 years, a sentence that imprisons him at minimum until he is 70 years old. State's Ex. 1 (Ex. Disc p. 81 (Tr. 10/17/12 p. 294, ln. 22-p. 295, ln. 3)).

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Mr. Ash filed a Rule 35 motion for reduction of sentence which the court denied. State's Ex. 4 (Ex. Disc p. 104-111).

Mr. Ash appealed. The Court of Appeals denied relief. R 7. He then filed a petition for review which was also denied and the remittitur issued. *Id.* Thereafter, Mr. Ash filed a timely *pro se* petition for post-conviction relief. R 5-21.

The district court appointed counsel and counsel filed an amended petition. R 151-154. The amended petition did not abandon any of the claims in the *pro se* petition but did add two additional claims. *Id.* Specifically, counsel raised a claim of ineffective assistance of trial counsel in failing to object to the second prosecution under state and federal constitutional protections against double jeopardy. R 151-152. Counsel also raised a claim that the second prosecution violated Mr. Ash's state and federal constitutional rights against double jeopardy. R 152-153.

The state filed a motion for summary dismissal. R 135-136. Mr. Ash objected and moved for summary judgment in his favor. R 155-163. The court summarily dismissed the petition. R 189-207.

The court entered a final judgment and this appeal timely follows. R 208-212.

III. ISSUES PRESENTED ON APPEAL

1. Did Mr. Ash raise a genuine issue of material fact as to whether trial counsel was ineffective in failing to move to dismiss the second prosecution as a violation of his state and federal constitutional protections against double jeopardy? U.S. Const. Amends. 5, 6, and 14; Idaho Const. Art. I, § 13.

2. Did Mr. Ash raise a genuine issue of material fact as to whether the second prosecution denied his constitutional protections against double jeopardy? U.S. Const. Amends. 5 and 14; Idaho Const. Art. I, § 13.

IV. ARGUMENT

A. *Mr. Ash Raised a Genuine Issue of Material Fact as to Whether Counsel Was Ineffective in Failing to Move to Dismiss the Second Prosecution as a Violation of His Constitutional Protections Against Double Jeopardy*

The district court erred in summarily dismissing Mr. Ash's ineffective assistance of counsel claim because he did raise a genuine issue of material fact as to whether counsel was ineffective in not moving to dismiss on double jeopardy grounds. The district court declined the state's invitation to find no misconduct on the prosecutor's part in its ruling granting a mistrial. Moreover, the prosecutor's affidavit in support of the state's opposition to a mistrial is internally inconsistent averring that she both knows Fifth Amendment law and that she did not intend to elicit testimony that would violate Mr. Ash's Fifth Amendment right to remain silent - yet she clearly did elicit such testimony. Given the lack of a ruling by the district court finding no misconduct, Mr. Ash has raised a genuine issue of material fact as to whether his counsel was ineffective.

1. Standard of Review

> Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the trial court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under IRCP 56. When reviewing the grant of a motion for summary judgment, this Court applies the same standard used by the district court in ruling on the motion. Likewise, when reviewing a district's order of summary dismissal in a post-conviction relief proceeding, we apply the same standard as that applied by the district court. Thus, when reviewing such a dismissal, this Court must determine whether a genuine issue of fact exists based on the

pleadings, depositions and admissions together with any affidavits on file. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010) (internal quotations and citations omitted).

"[I]f the petitioner's alleged facts are uncontroverted by the State . . . [they] must be regarded as true." *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985), as quoted in *Ridgley v. State, supra.*

Moreover, "if the petition, affidavits and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed." *Stevens v. State*, 156 Idaho 396, 405, 327 P.3d 372, 381 (Ct. App. 2013).

A claim of ineffective assistance of counsel is analyzed under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To prevail a petitioner must prove: 1) counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) this deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065. Prejudice is shown if there is a reasonable probability that a different result would have been obtained had the attorney acted properly. *Id.*

2. Argument

In his amended petition, Mr. Ash stated that the prosecutor deliberately elicited information which commented on his right to remain silent while in custody. Further, the prosecutor admitted in her affidavit to the court that she wanted the jury to know that he had declined to answer post-arrest questions as part of an intentional strategy to control Mr. Ash's anticipated testimony. The prosecutor's action resulted in a mistrial. R 152.

Mr. Ash further stated that counsel's failure to object to a second trial was below an

objectively reasonable standard of competence and that he was prejudiced because such an objection should have been sustained on double jeopardy grounds. *Id.*

In her affidavit submitted in support of opposition to Mr. Ash's motion for mistrial, the trial prosecutor averred:

> . . .
>
> 15. Your affiant understands how the Fifth Amendment applies to suspect and defendants rights and would not intentionally attempt to violate that right.
>
> 16. Your affiant did not intentionally attempt to elicit testimony that would violate the Defendant's Fifth Amendment right to silence.
>
> . . .
>
> 19. Your affiant did not know the Defendant invoked his right to remain silent and believed the testimony would be admissible. Your affiant notes that the Defendant continued to make unprompted statements on the way to the Ada County Jail reflected the Defendant's awareness that he was impaired and would likely be convicted.

R 120-121.[2]

The state specifically requested that the district court not find that the prosecutor had committed misconduct in eliciting the comment on Mr. Ash's post-arrest silence. R 106-107 (Tr. 3/13/12 p. 12, ln. 13-p. 13, ln. 9). However, the court declined to make such a ruling. R 107-110 (Tr. 3/13/12 p. 13, ln. 11-p. 17, ln. 3).

In the post-conviction case, when arguing for summary dismissal, the prosecutor (a different prosecutor from the trial prosecutor) made this comment:

> But clearly [the trial prosecutor's] affidavit, which is the current state of the record, says she didn't know [that it was impermissible to elicit comments on the defendant's post-arrest silence]. As a personal issue, do I – am I okay with that?

[2] This quotation reproduces the grammatical errors in the original.

> No. But, clearly, we have to – the Court has to make rulings based upon the state of the record and the state of the law in Idaho.

Tr. 4/25/16, p. 16, ln. 9-14.

The district court dismissed Mr. Ash's claim of ineffective assistance in not moving to dismiss the second trial. The court found that the prosecutor did act intentionally in asking about Mr. Ash's post-arrest silence. However, the court further concluded that there was nothing in the record to show that the state intended thereby to provoke Mr. Ash into moving for a mistrial; rather she simply did not understand the law on comments on silence. Therefore, the court concluded, a double jeopardy objection would not have been well founded and there was not ineffective assistance. R 201-202.

Generally, when a defendant moves for a mistrial, double jeopardy does not bar a retrial. *Oregon v. Kennedy,* 456 U.S. 667, 673, 102 S.Ct. 2083, 2088 (1982). However, *Kennedy* established a narrow exception for cases wherein the prosecutor intended to provoke the motion for mistrial. *Id.,* 456 U.S. at 679, 102 S.Ct. at 2091.

In this case, the court did not determine in the first trial whether the prosecutor intended to provoke a mistrial. And, while the prosecutor filed an affidavit denying her intention to violate Mr. Ash's Fifth Amendment rights, her affidavit nonetheless attested to an intentional strategy to violate Mr. Ash's rights. As evidenced by the affidavit, she intended to question Mr. Ash about his post-arrest silence. The prosecutor claimed she did not realize that he had invoked his right to remain silent despite reviewing a video containing the invocation. R 120. But, the prosecutor made no claim that she did not realize that Mr. Ash was arrested at the time he declined to speak. In fact, her question was "after . . . you arrested him did he say anything . . ."

R R 95 (Tr. 3/12/12, p. 1, ln. 10-13). And, she further made no claim that she did not understand that per *State v. Ellington,* 151 Idaho 53, 59-60, 253 P.3d 727, 733-734 (2011), the right to remain silent attaches upon custody and thus a prosecutor may not use any post-custody silence to infer guilt in its case-in-chief. (The prosecutor had to be aware of *Ellington* at the time she created her affidavit because her affidavit was drafted after the court had discussed *Ellington* in detail with defense counsel and the prosecutor. R 100-104 (Tr. 3/12/12 p. 6, ln. 8-p. 10, ln. 3).) In fact, the prosecutor specifically averred that she understood Fifth Amendment law. Further, as noted by the district court, there is no question but that the prosecutor could not use Mr. Ash's silence to infer guilt in its case in chief. R 107-110 (Tr. 3/13/12, p. 13, ln. 10-p. 16, ln. 15); *State v. Ellington, supra.*

Thus, the prosecutor's affidavit was internally inconsistent. Either she was in error when she claimed that she knew Fifth Amendment law or she was in error when she claimed that she did not intend to violate Mr. Ash's Fifth Amendment rights and did not intentionally elicit testimony to do so.

In either case, there remains, even after the affidavit, a genuine issue of material fact as to whether the prosecutor intended to provoke a mistrial thus raising a double jeopardy bar to the second trial.

The court erred in not allowing an evidentiary hearing wherein Mr. Ash could present testimony and evidence to establish prosecutorial misconduct which would have precluded a second trial per *Kennedy, supra.* He could have further established that counsel was therefore ineffective in failing to object to the second trial. *Stevens v. State, supra.*

B. *Mr. Ash Raised a Genuine Issue of Material Fact as to Whether the Prosecutor's Misconduct in the Initial Trial Precluded the Retrial Under the State and Federal Protections Against Double Jeopardy*

In addition to a remand for an evidentiary hearing on the ineffective assistance of counsel claim, this Court should also remand for an evidentiary hearing on the direct double jeopardy claim. The second trial violated Mr. Ash's state and federal constitutional protections against double jeopardy. The district court should have held a hearing on this claim.

1. *Standard of Review*

This Court reviews constitutional claims *de novo. State v. Lankford,* ___ Idaho ___, ___ P.3d ___, 2016 WL 4010851 *2 (2016); *State v. Dunlap,* 155 Idaho 345, 361, 313 P.3d 1, 17 (2013).

2. *Argument*

In the seventh claim in his amended petition, Mr. Ash raised a direct constitutional claim of violation of the state and federal constitutional protections against double jeopardy. R 152-153. In his amended petition, Mr. Ash pointed out the prosecutorial misconduct which prohibited a retrial and then set out his claim:

> Petitioner's rights to be free from double jeopardy are guaranteed under Amendment V of the United States Constitution and Article I §13 of the Idaho Constitution. Petitioner's rights were violated by the second prosecution and conviction under these circumstances. Therefore, Petitioner's conviction is illegal and should be set aside by the court.

R 153.

The district court mistakenly addressed this as a claim of prosecutorial misconduct as opposed to a violation of the state and federal constitutional protections against double jeopardy. R 203. However, in determining the prosecutorial misconduct question, the district court

concluded that "double jeopardy had not attached" so as to prevent the second trial. *Id.* The court further concluded that Mr. Ash could not raise a prosecutorial misconduct claim because the issue was not raised in direct appeal. *Id.*

If prosecutorial misconduct does not rise to the level of a constitutional violation, but is mere trial error, then it may be that failure to raise the issue in direct appeal is a waiver. *See Bias v. State*, 159 Idaho 696, 702-703, 365 P.3d 1050, 1056-1057 (Ct. App. 2015), stating with regard to a claim of prosecutorial misconduct raised for the first time in post-conviction, "*Mintun* [*v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007),] did not hold, even tangentially, that an unpreserved trial error itself can be raised in a post-conviction proceeding."

However, constitutional errors clearly can be raised for the first time in post-conviction. Idaho Code § 19-4901(a)(1) states that post-conviction is available to "[a]ny person who has been convicted of, or sentenced for a crime and who claims: (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state[.]"

Examples of constitutional issues raised and determined for the first time in post-conviction include:

> • **Violation of plea agreement:** *Berg v. State*, 131 Idaho 517, 519, 960 P.2d 738, 740 (1998) ("Berg asserted that the prosecutor breached the parties' plea agreement by recommending that he be sentenced to prison rather than recommending a retained jurisdiction."); *Short v. State*, 135 Idaho 40, 41, 13 P.3d 1253, 1254 (Ct. App. 2000).
>
> • **Violation of the right to testify:** *Rossignol v. State*, 152 Idaho 700, 706, 274 P.3d 1, 7 (Ct. App. 2012), *review denied* (2012) ("[T]he issue of the failure of a defendant to testify may be viewed in post-conviction proceedings either as a claim of ineffective assistance of counsel or as a claim of a deprivation of a constitutional right."); *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App.

1996); *DeRushé v. State*, 146 Idaho 599, 603-04, 200 P.3d 1148, 1152-53 (2009) ("The district court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify on his own behalf[.]"); *Barcella v. State*, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009).

• **Due process right to participate in defense:** *Murillo v. State*, 144 Idaho 449, 452, 163 P.3d 238, 241 (Ct. App. 2007) ("Murillo argues that he was rendered unable to participate in his defense because he had an insufficient opportunity to confer with his trial counsel with the aid of an interpreter and was not provided with copies or oral translations of documents related to his case.")

• **Adequacy of plea colloquy:** *Noel v. State*, 113 Idaho 92, 94, 741 P.2d 728, 730 (Ct. App. 1987) ("Noel's petition alleged, among other things, that he was not adequately advised by his legal counsel, or by the court, of the 'requisite specific intent to commit murder, nor of the possible consequences of a guilty plea.'").

• **Suggestiveness of line-up and other issues:** *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975) ("He maintains the district court should have investigated through the medium of an evidentiary hearing his application wherein he raised questions as to: (1) the unfair suggestiveness of the lineup; (2) the lack of counsel at the lineup; (3) pleas induced by false statements of counsel; and (4) appellant's mental capacity during the criminal proceedings.")

Idaho Code § 19-4901(b) does not preclude a petitioner from raising a constitutional claim for the first time in post-conviction. While the subsection refers to issues which could have been raised on direct appeal but were not as forfeited, that waiver can not apply to constitutional claims, jurisdictional claims, or claims that the sentence exceeds the maximum authorized by law. All of those claims are specifically authorized by I.C. § 19-4901(a) and all also can be raised in direct appeal. Section 19-4901(b) must be construed so as to not preclude the claims authorized by section 19-4901(a) and thus be limited to mere trial errors because "[i]nterpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored." I.C. § 73-113(2). *See also, Bonner County v. Cunningham*, 156 Idaho 291, 295, 323 P.3d 1252 (Ct. App. 2014) (noting the fundamental principle of statutory construction

requiring an interpretation that gives effect to all the words of the statute and does not render any part of the statute a nullity).

Mr. Ash's state and federal constitutional claims of double jeopardy violation were properly raised in post-conviction and were not waived.

For the reasons discussed above, the retrial was a violation of constitutional double jeopardy protections because the *Kennedy* exception applies as the prosecutor acted intentionally in eliciting testimony in the first trial which commented on Mr. Ash's exercise of his right to remain silent. The district court should have allowed an evidentiary hearing for Mr. Ash to present evidence in support of this conclusion.

In addition, the court should have allowed an evidentiary hearing wherein Mr. Ash could present testimony to establish that even if the prosecutor did not intend to provoke a mistrial, she acted with the requisite intent to preclude a retrial under the expansion of the *Kennedy* exception set out in *United States v. Wallach,* 979 F.2d 912 (2nd Cir. 1992), *cert. denied,* 508 U.S. 939, 113 S.Ct. 2414 (1993), or under an even broader exception consistent with the Idaho Constitution's greater protection against double jeopardy.

The *Wallach* court wrote:

> Since *Kennedy* bars a retrial on jeopardy grounds where the prosecutor engages in misconduct for the purpose of goading the defendant into making a successful mistrial motion that denied the defendant the opportunity to win an acquittal, the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal.

979 F.2d at 916.

The court reasoned that the extension of *Kennedy* should apply where "the misconduct of

the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id.*

Following *Wallach*, other courts have either extended *Kennedy* or have left open the question of whether, in the proper case, the *Wallach* extension should be adopted. *State v. Minnitt,* 55 P.3d 774, 781 (Az. 2002) (intentional and pervasive misconduct which structurally impairs the trial results in double jeopardy bar to retrial); *State v. Colton,* 663 A.2d 339, 346 (Conn. 1995) (adopts *Wallach* exception for misconduct undertaken with the intent to prevent an acquittal that the prosecutor believed likely to occur without the misconduct); *Jacob v. Clarke,* 52 F.3d 178, 181 (8th Cir. 1995) (noting that several circuits have struggled with the question of whether to extend *Kennedy* and commenting that *Lockhart v. Nelson,* 488 U.S. 33, 109 S.Ct. 285 (1988), suggests that the extent of the exception remains an open question); *United States v. Doyle,* 121 F.3d 1078, 1085 (7th Cir. 1997) (leaving open the question of whether the circuit would adopt a *Wallach* extension of *Kennedy* under the right circumstances); *United States v. Pavloyianis,* 996 F.2d 1467, 1473-1474 (2nd Cir. 1993) (noting that the extent of the *Kennedy* exception remains an open question); *United States v. Catton,* 130 F.3d 805, 807 (7th Cir. 1997) (noting the extent of the *Kennedy* exception remains an open question).

Likewise, several courts have expanded the *Kennedy* exception under their state constitutional protections against double jeopardy. The first of these was Oregon in the remand of *Kennedy. State v. Kennedy,* 666 P.2d 1316, 1326 (Or. 1983) (retrial barred when improper official conduct is so prejudicial to the defendant that it cannot be cured short of a mistrial and official knew that the conduct was improper and prejudicial and either intended or was indifferent to the resulting mistrial or reversal). *See also, Pool v. Superior Court in and For*

Pima County, 677 P.2d 261, 271-272 (Az. 1984) (expanding double jeopardy protection under state constitution); *State v. Fuller,* 374 N.W.2d 722, 727 (Minn. 1985) (leaving open question of whether state constitution provides greater double jeopardy protection than set out in *Kennedy*); *People v. Dawson,* 427 N.W.2d 886 (Mich. 1988) (leaving open the question of whether the state constitution provides greater protection than the federal); *Commonwealth v. Smith,* 615 A.2d 321, 325 (Pa. 1992) (state constitution prohibits retrial when prosecutor intentionally acts to prejudice defendant and deny a fair trial); *State v. Colton,* 663 A.2d 339, 346 (Conn. 1995) (*Kennedy* should be extended to bar a new trial, even in the absence of mistrial or reversal because of prosecutorial misconduct, if the prosecutor in the first trial engaged in misconduct with the intent to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of the misconduct)*; State v. Breit,* 930 P.2d 792 (N.M. 1996) (adopting a "willful disregard" standard under state constitution); *Ex parte Mitchell,* 977 S.W.2d 575, 580 (Tex.Crim.App. 1997) (under state constitution retrial is jeopardy-barred not only when state deliberately provoked the defense motion for mistrial but also where the motion for mistrial was due to reckless behavior on the part of the state); *State v. D'Auira,* 492 S.E.2d 918, 920 (Ga.App. 1997) (when defendant's conviction is reversed on appeal, prosecutorial misconduct bars retrial when the prosecutor intended "to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct"); *State v. Lettice,* 585 N.W.2d 171, 181 (Wis.App. 1998) (even in the absence of a motion for mistrial, the double jeopardy clause bars retrial when the prosecutorial misconduct is undertaken to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of the misconduct); *State v. Rogan,* 984 P.2d 1231, 1249 (Hawai'i 1999) (under state constitution reprosecution is barred

when, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial); *State v. Martinez,* 86 P.3d 1210 (Wash.App. 2004) (retrial barred under court rule even when it might not have been barred under the *Kennedy* exception in a case involving prosecutor's withholding of exculpatory evidence).

Idaho's Constitution provides: "No person shall be twice put in jeopardy for the same offense[.]" Const. Art. I, § 13. In the past Idaho's Supreme Court and Court of Appeals have held that the state constitutional protection is co-extensive with the federal constitutional protection. *State v. McKeeth,* 136 Idaho 619, 624, 38 P.3d 1275, 1280 (Ct. App. 2001), citing *Berglund v. Potlatch Corp.,* 129 Idaho 752, 757, 932 P.2d 875, 880 (1996); *State v. Reichenberg,* 128 Idaho 452, 457-58, 915 P.2d 14, 19-20 (1996); *State v. Sharp,* 104 Idaho 691, 693, 662 P.2d 1135, 1137 (1983); and *State v. Randles,* 115 Idaho 611, 615, 768 P.2d 1344, 1348 (Ct. App. 1989). However, the Idaho courts have also analyzed double jeopardy cases to find greater protection under the state constitution than under the federal constitution. *State v. Corbus*, 151 Idaho 368, 372, 256 P.3d 776, 781 (Ct. App. 2011), citing *State v. Thompson,* 101 Idaho 430, 434-35, 614 P.2d 970, 974-75 (1980); *Sivak v. State,* 112 Idaho 197, 211-12, 731 P.2d 192, 206-07 (1986); *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680 (1991), *overruled on other grounds by State v. Card,* 121 Idaho 425, 825 P.2d 1081 (1991); and *State v. Stewart,* 149 Idaho 383, 234 P.3d 707 (2010). As *Corbin* concludes: "Our review of the Idaho Supreme Court cases . . . demonstrates that the available authority does not provide a clear answer to the question of which analytical theory should be applied in double jeopardy cases which allege a violation of the Double Jeopardy Clause of the Idaho Constitution." *Corbus*, 151 Idaho at 375, 256 P.3d at 783.

In *State v. Guzman,* 122 Idaho 981, 988, 842 P.2d 660, 667 (1992), the Supreme Court

noted that independent state analysis of constitutional protections does not mean that the state court will necessarily reach a different result from the United State Supreme Court; "it only means that we are free to do so, if it is determined that a different rule better effectuates our counterpart Idaho constitutional provision."

With regard to the state constitutional protection against double jeopardy, Idaho has sometimes adopted the same analysis and reached the same results as would have been applicable under the federal constitution, but, importantly, as noted above, Idaho has also extended the protection in cases where to do so better effectuates our state constitutional provision.

In this case, this Court could determine that it must decide whether the exception of *Kennedy* should be extended. In that event, it should find that our state constitutional protection against double jeopardy demands an extension of the *Kennedy* exception to include the type of misconduct that occurred in Mr. Ash's case - intentional violation of the defendant's constitutional right to remain silent regardless of whether the intent was to goad the defense into moving for a mistrial or the intent was to comment upon the defendant's exercise of his right so as to prejudice the defense and obtain an acquittal.

Oregon's constitution like Idaho's states that "No person shall be put in jeopardy twice for the same offence (sic)." Or. Const. Art. I, § 12. On remand in *Kennedy,* the Oregon Supreme Court adopted this standard: retrial is prohibited when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. *State v. Kennedy*, 666 P.2d at 1326. In adopting this test, the Oregon Supreme Court emphasized that the state constitutional provision was intended as a protection

against the harassment, embarrassment and risk of successive prosecutions, not as a sanction for judicial or prosecutorial error. The protective nature of the constitutional provision is best served by a rule that extends beyond intentional provocation to cover other possible abuses. *Id.*, at 1325.

Arizona's state constitution, like Idaho's and Oregon's, provides that no person shall "be twice put in jeopardy for the same offense." A.R.S. Const. Art. 2, § 10. And, like Oregon, Arizona interprets the clause to protect against multiple trials, rather than as a means to sanction the government. *Pool v. Superior Court in and For Pima County,* 677 P.2d at 271. So, like Oregon, Arizona adopted a broader exception than set out under the federal constitution in *Kennedy.*

First, the Arizona Supreme Court noted that in the case before it, a claim of ignorance as to the impropriety of his actions by the prosecutor would not salvage the case. "The law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not." *Pool,* 677 P.2d at 270. The Court then adopted a three part test which bars retrial when the misconduct is pursued for any improper purpose with indifference to a significant resulting danger of mistrial or reversal. *Id.*, 667 P.2d at 271.

In *State v. Breit, supra,* the New Mexico Supreme Court concluded, "[W]e are compelled to join other states in concluding that the narrow *Kennedy* rule based solely on prosecutorial intent does not adequately protect double-jeopardy interests." 930 P.2d at 795. In reaching this conclusion, the Court looked to the words of Justice Black:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged

> offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223 (1957) as quoted in *Breit*, 930 P.2d at 796. The Court then concluded: "Defendants should be protected from reprosecution once a prosecutor's actions, regardless of motive or intent, rise to such an extreme that a new trial is the only recourse." *Id.*, 930 P.2d at 800. The Court further agreed with the Arizona Supreme Court that prosecutor ignorance could not always lift the bar of double jeopardy. "Rare are instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing." *Id.*, 930 P.2d at 803. Thus, New Mexico has adopted a "willful disregard" standard as opposed to the *Kennedy* "intent to goad the defendant into moving for a mistrial" standard. *Id.*

Pennsylvania also provides greater double jeopardy protection under its state constitution than the *Kennedy* standard. *Commonwealth v. Smith, supra,* a death penalty case, holds that the state constitution bars a retrial when the conduct of the prosecutor is undertaken to prejudice the defendant to the point of the denial of a fair trial. 615 A.2d 321, 325.

Hawaii offers greater protection under its state constitution, prohibiting retrial after a mistrial or reversal on appeal when prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied the defendant his or her right to a fair trial. *State v. Rogan, supra.* In *Rogan,* a retrial was prohibited after the conviction in the first trial was reversed because of prosecutorial misconduct in appealing to racial prejudice in closing argument. (Rogan's conviction was reversed after his motion for a mistrial was denied.) *Id.*

Idaho takes the state and federal constitutional rights to remain silent very seriously. *See,*

State v. Ellington, 151 Idaho at 60, 253 P.3d at 734, noting that despite a split in federal authority, Idaho holds that a defendant's right to remain silent attaches upon custody, not arrest or interrogation, and thus a prosecutor may not use any post-custody silence to infer guilt in its case-in-chief. Likewise, Idaho takes the protection against double jeopardy seriously and has previously found greater protections under the state constitution than afforded by the federal constitution. *See, State v. Corbus, supra.*

In this tradition, Idaho should adopt a broader exception than the *Kennedy* exception. To best protect her citizens from the ills of double jeopardy, Idaho should adopt a standard akin to those of her sister states which bar retrial on the basis of double jeopardy when prosecutorial misconduct has so prejudiced the rights of the defendant that the only recourse is a mistrial or reversal. Moreover, Idaho should refrain from lifting the bar of double jeopardy when the prosecutorial misconduct is a result of a violation of the most basic rules which every prosecutor, no matter how inexperienced, should be required to know prior to appearing in a criminal case.

Thus, in this case, the summary dismissal of Mr. Ash's claim of ineffective assistance of counsel should be reversed and the matter remanded for an evidentiary hearing. He should be allowed to present proof that the mistrial precluded a retrial under the *Kennedy* standard and that his counsel was ineffective in failing to move for dismissal. In addition, he should be allowed to present proof that a retrial was precluded under a broader exception than set out in *Kennedy* and that the state of the law was such that his attorney was objectively deficient in failing to move for a mistrial under the broader exception.

V. CONCLUSION

Mr. Ash raised two genuine issues of material fact: 1) whether counsel was ineffective in failing to move to dismiss the second prosecution on the basis of double jeopardy; and 2) whether the second trial violated his state and federal constitutional protections against double jeopardy. The district court erred in summarily dismissing these claims. He now asks this Court to reverse the summary dismissal and remand with instructions to grant an evidentiary hearing.

Respectfully submitted this 7th day of October, 2016.

/s/Deborah Whipple
Deborah Whipple
Attorney for Terry Ash

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 7th day of October, 2016.

/s/Deborah Whipple
Deborah Whipple