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## Roberts v. State Respondent's Brief Dckt. 44817

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IN THE SUPREME COURT OF THE STATE OF IDAHO

<b>STEVEN EUGENE ROBERTS, III,</b>	)	
	)	<b>No. 44817</b>
<b>Petitioner-Appellant,</b>	)	
	)	<b>Ada County Case No.</b>
<b>v.</b>	)	<b>CV-PC-2016-5792</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Defendant-Respondent.</b>	)	
<hr style="border: 1px solid black;"/>		

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE STEVEN J. HIPPLER  
District Judge**

---

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## STATEMENT OF THE CASE

### Nature of the Case

Steven Eugene Roberts, III, appeals from the district court's order summarily dismissing his post-conviction petition.

### Statement of Facts and Course of Proceedings

In its unpublished opinion affirming Roberts' judgment of conviction for first-degree arson, the Idaho Court of Appeals described the underlying facts and course of proceedings as follows:

Based upon evidence submitted at trial, on September 1, 2012, at 4:11 a.m., the Boise City Fire Department responded to a report of a fire at a residence and firefighters were on scene within three to four minutes. Boise firefighters extinguished the fire located on a patio in the back of the house and observed several canisters near the fire's origin that smelled of gasoline.

A fire investigator observed a broken window near the fire damage, which appeared to have been broken from outside the residence. The investigator also observed canisters containing gasoline placed around a flower pot with one of the canister's nozzles placed directly into the pot. The valve of a fire-damaged propane tank attached to a barbeque grill on the patio was turned to the "on" position. Based on these observations, the fire investigator concluded that an ignitable liquid was poured onto a part of the patio and the fire was intentionally set, but that the fire largely burned itself out before it reached the interior of the house. He testified that the fire burned for approximately six to eight minutes before it was extinguished.

Boise police investigators found blood stains around the broken window. Several samples of the stains were collected and sent to the Idaho State Lab for testing, which presumptively matched the DNA of Steven Roberts. The officers then obtained a DNA sample from Roberts, which confirmed his DNA at the scene of the fire. Roberts was charged with one count of arson in the first degree, Idaho Code § 18-802; burglary, I.C. § 18-1401; and a persistent violator

enhancement, I.C. § 19–2514. Roberts waived his right to a jury trial and requested a bench trial.

At trial, Roberts testified in his own defense. He testified that on the night in question, he took his girlfriend's car without her permission and met up with his friend, J.M., at a bar. After meeting up with J.M., he went to the residence in question with a woman he had met earlier that night and who told him the house was haunted. He testified that something frightened him while he was there so he ran, tripped, and fell through the window on the back porch, cutting his arm. He then returned to the bar to meet up with J.M. Roberts denied setting a fire or touching any gasoline cans while at the residence.

J.M. also testified at trial, stating that Roberts left the bar several times during the evening, including a couple of hours before closing time. He testified that Roberts last returned to the bar a few minutes before closing, around the time that everyone was leaving, and that the business closes at 4:00 a.m. He also testified that Roberts smelled of gasoline and had a cut on his arm. When asked, Roberts told him he had been in a fight. Roberts' girlfriend testified that he told her he cut his arm by falling against a dumpster.

State v. Roberts, Docket No. 42534, 2015 Unpublished Opinion No. 637, pp.1-2 (Idaho App. September 17, 2015).

The district court entered a guilty verdict on both charges. Id., p.2. The court then imposed a unified 30-year sentence with 10 years fixed for first-degree arson, and a concurrent unified 10-year sentence with five years fixed for burglary. Id. On direct appeal, Roberts asserted that the state presented insufficient evidence to support the first-degree arson conviction. Id., pp.3-4. The Court of Appeals rejected Roberts' argument and affirmed the judgment of conviction. Id.

In March 2016, Roberts filed a *pro se* petition for post-conviction relief. (R., pp.5-19.) Roberts later filed a supporting affidavit. (R., pp.53-78.) Relevant to this appeal, Roberts raised the following claims: (1) the trial court committed judicial misconduct at the sentencing hearing

by relying on its own scientific assumptions in rejecting Roberts' assertion that he broke the window at the residence after he tripped and accidentally fell through it; (2) the trial court erred by: (a) denying Roberts the opportunity to utilize an expert witness to support his theory regarding how the window was broken, and (b) failing to ask Roberts clarifying questions during the trial about the window, as the court did with several of the state's witnesses; (3) the prosecutor committed misconduct by failing to inform Roberts which of its disclosed photos it planned to utilize at trial; and (4) appellate counsel was ineffective for failing to attempt to raise the judicial misconduct claim as fundamental error on direct appeal. (Id.; see also Appellant's brief, pp.6-10 (identifying these four claims as being relevant to the issues raised in this appeal).) The district court granted Roberts' motion for appointment of counsel to represent him in the proceeding, but no amended petition was filed. (R., pp.31, 169.)

After a hearing (see generally Tr.), the district court granted the state's motion to summarily dismiss the petition (R., pp.169-190). Specifically, with respect to Claims 1-3 as set forth above, the district court concluded that Roberts forfeited these claims by failing to raise them to the district court or on direct appeal. (R., pp.173-174 (citing Bias v. State, 159 Idaho 696, 702, 365 P.3d 1050, 1056-1067 (Ct. App. 2015); see also I.C. § 19-4901(b).) Further, the district court concluded that Roberts' ineffective assistance of appellate counsel claim was precluded by Mintun v. State, 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007), which held that a counsel's failure to raise unpreserved issues on appeal cannot form the basis of a meritorious post-conviction claim. (R., pp.185-186). Roberts timely appealed. (R., pp.191-193.)



## ISSUE

Roberts' brief does not contain an issue statement, but contains the following heading in its Argument section:

The district court erred when it summarily denied the post-conviction relief petition because the effect of its ruling make [sic] certain claims unreviewable

(Appellant's brief, p.4 (capitalization modified).)

The state rephrases the issue on appeal as:

Has Roberts failed to demonstrate that the district court erred by summarily dismissing his post-conviction petition?

## ARGUMENT

### Roberts Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

#### A. Introduction

Roberts contends that the district court erred by summarily dismissing his post-conviction petition. (See generally Appellant’s brief.) Specifically, Roberts appears to assert error with respect to the dismissal of four of his post-conviction claims: (1) judicial misconduct at sentencing; (2) district court error in failing to allow Roberts to fully present his defense; (3) prosecutorial misconduct; and (4) ineffective assistance of appellate counsel. (Id.) A review of the record and Roberts’ appellate brief reveals that Roberts has failed to assign any specific error to the district court; and/or he has failed to adequately support his assertions with authority. In any event, the district court correctly dismissed Roberts’ petition.

#### B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

#### C. The District Court Correctly Concluded That Roberts Failed To Make A *Prima Facie* Showing For Post-Conviction Relief

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent

civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Additionally, a post-conviction petition is not a substitute for a direct appeal, and any issue which could have been raised to the trial court or on direct appeal, but was not, is forfeited. I.C. § 19-4901(b); see also Bias, 159 Idaho at 702-703, 365 Idaho at 1056-1057. A post-conviction petition may overcome this forfeiture only if "it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, 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." Id.

It is a well-settled tenet of appellate review that the “party alleging error has the burden of showing it in the record.” Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014) (citation omitted). It is equally well-settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for unspecified errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983). Moreover, “[a] party waives an issue on appeal if either authority or argument are lacking.” State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)).

In this case, the district court summarily dismissed three of Roberts’ post-conviction claims on the ground that Roberts forfeited them by failing to raise them to the trial court or on direct appeal. (R., pp.173-174.) Specifically, the court concluded that the following claims were forfeited: (1) the trial court committed judicial misconduct at the sentencing hearing by relying on its own scientific assumptions in rejecting Roberts’ assertion that he broke the window at the residence after he tripped and accidentally fell through it; (2) the trial court erred by: (a) denying Roberts the opportunity to utilize an expert witness to support his theory regarding how the window was broken, and (b) failing to ask Roberts clarifying questions during the trial about the window, as the court did with several of the state’s witnesses; (3) the prosecutor committed misconduct by failing to inform Roberts which of its disclosed photos it planned on utilizing at trial. (Id.) The district court correctly dismissed these claims based upon applicable law.

The district court also properly dismissed Roberts’ claim that his appellate counsel was ineffective for failing to attempt to raise his judicial misconduct claim as fundamental error on

direct appeal. (R., pp.185-186.) In Mintun v. State, 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007), the Idaho Court of Appeals held that a claim alleging ineffective assistance of appellate counsel for failing to raise an issue as fundamental error “is not meritorious” for a number of reasons, including: a rule allowing such a claim “would be impractical, inefficient, and often disadvantageous to defendants whose interest would be better served by presenting such a claim in a post-conviction action asserting ineffective assistance of trial counsel” for failing to object to the alleged error in the trial court; and a trial counsel’s failure to object to errors may be done for legitimate strategic or tactical purposes, and the record on appeal would rarely show this strategy. Id.

On appeal, Roberts has not specifically argued that the district court erred either in its application of the I.C. § 19-4901(b) procedural bar to Claims 1-3, or by applying the holding in Mintun to dispose of Roberts’ ineffective assistance of appellate counsel claim. (See Appellant’s brief.) Instead, Roberts contends that by dismissing Claims 1-3 on the ground that Roberts failed to raise those claims on direct appeal, and then by dismissing Roberts’ claim that his appellate counsel was ineffective pursuant to the holding in Mintun, the district court “created a class of claimed error that is essentially unreviewable.” (Appellant’s brief, pp.10-12.) The “combination” of these two grounds, Roberts asserts, “whipsaws the petitioner,” by preventing review of these claims. (Id.)

Roberts has cited no constitutional or statutory basis for his general claim that it was unfair that he did not have some other, less restrictive means of obtaining review of the merits of Claims 1-3. He has therefore failed to assign any specific error to the district court, and/or has

failed to support his general assertion with authority. This argument is therefore precluded on appeal. Hoisington, 104 Idaho at 159, 657 P.2d at 23; Freitas, 157 Idaho at 267, 335 P.3d at 607; Zichko, 129 Idaho at 263, 923 P.2d at 970.

In any event, Roberts is incorrect that he was precluded from obtaining review of Claims 1-3. Idaho and federal law provide numerous avenues through which Roberts could, if he had met the procedural requirements, have raised his judicial misconduct, denial of right to present a defense, and prosecutorial misconduct claims to the state and federal district court and/or the Idaho appellate courts:

- A contemporaneous objection to the trial court; and then, if the trial court denied relief, raising the issue on direct appeal;
- Attempting to raise the claim as fundamental error on direct appeal subject to the limitations of the State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010) fundamental error standard;
- An I.C.R. 35 motion for reduction of sentence (with respect to his judicial misconduct at sentencing claim);
- An initial post-conviction petition, in which Roberts could attempt to demonstrate that the claims could not have been raised previously (I.C. § 19-4901(b));
- An initial post-conviction petition, in which Roberts could allege that his trial counsel was ineffective for failing to raise the defaulted claims to the trial court through a contemporaneous objection pursuant to Strickland v. Washington, 466 U.S. 668, 687-688 (1984);
- A successive post-conviction petition, in which Roberts could attempt to raise the claims directly, or through an ineffective assistance of trial counsel claim, if he could demonstrate sufficient reason why the claims could not have been raised previously. I.C. § 19-4908;

- A federal habeas petition, in which Roberts could attempt to show either that he properly exhausted the forfeited claims in state court, that there existed sufficient cause why he failed to exhaust the claims, or that his post-conviction counsel was ineffective for failing to raise the corresponding ineffective assistance of trial counsel claims in state court. 28 U.S. Code § 2254; Coleman v. Thompson, 501 U.S. 722, 750 (1991); Martinez v. Ryan, 566 U.S. 1 (2012).

Roberts' claim on appeal in this case is essentially that he did not have access to yet *another* means to obtain review of the merits of his forfeited claims – presumably, through his ineffective assistance of appellate counsel claim that was precluded by Mintun. However, as noted above, Roberts has failed to adequately support this argument with authority, assign specific error to the district court, or provide any argument that Mintun was wrongly decided or should otherwise be overruled.

There is no constitutional right to the effective assistance of post-conviction or post-conviction appellate counsel. Pennsylvania v. Finley, 481 U.S. 551 (1987). Further, post-conviction relief is restricted in terms of what type of claims may be raised, and what required procedures must be followed. I.C. § 19-4901, *et seq.* This creates a reality in which an individual convicted of a crime does not have the absolute right to review of the merits of a claim in the manner and time of his choosing, independent of applicable law.

Roberts has failed to adequately present any issue for appellate review and/or has failed to adequately support any issue with authority. In any event, Roberts has also failed to demonstrate that the district court erred in summarily dismissing his post-conviction petition. This Court should therefore affirm the district court's summary dismissal of Roberts' post-conviction petition.

CONCLUSION

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

DATED this 4th day of December, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of December, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

GREG S. SILVEY  
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/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

MWO/dd