Electronically Filed
8/21/2018 1:45 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK BLACK,	)	
	)	**No. 45432**
Petitioner-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CV01-17-5039**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE JASON D. SCOTT
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR DEFENDANT-RESPONDENT

JOHN C. LYNN
500 W. Bannock St.
Boise, Idaho 83702
(208) 860-5258
E-mail: john@johnlynnlaw.com

ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Mark Black appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the following factual background of the case, adopted by the state on appeal:

> In the underlying criminal case (Ada County Case No. CR-FE-2015-13589), Black pleaded guilty, in return for dismissal of all other charges, to trafficking in heroin in violation of I.C. § 37-2732B(a)(6)(B). That statute required the trial court to sentence Black to at least ten years of fixed prison time. In compliance with it, on April 8, 2016, the trial court imposed an aggregate fifteen-year sentence, with ten years fixed. A judgment of conviction was entered a few days later, on April 11, 2016. Black didn't appeal.
>
> He did, however, retain new counsel, replacing the public defender, to pursue a motion under I.C.R. 33(c) to withdraw his guilty plea, arguing that section 37-2732B(a)(6)(B) is unconstitutional. The Court denied that motion on jurisdictional grounds, as it wasn't filed until after the time for appeal had expired. Black also filed a motion under I.C.R. 35(b) for a reduced sentence. That motion was timely, but it was denied on the merits.
>
> On March 21, 2017, Black filed a petition for post-conviction relief. His frontline claim is that section 37-2732B(a)(6)(B) is unconstitutional, on any of nine different theories. (Pet ¶ 9.) It also includes a second claim that his trial counsel rendered ineffective assistance by failing to challenge section 37-2732B(a)(6)(B)'s constitutionality. (Pet. ¶ 10.)
>
> On June 16, 2017, the State moved for summary dismissal, arguing that Black's trial counsel didn't render ineffective assistance because section 37-2732B(a)(6)(B) isn't actually unconstitutional. That argument, on its face, was directed only to Black's claim for ineffective assistance, though it obviously has implications for his frontline claim as well. On reply, the State more clearly challenged the frontline claim, arguing that, by pleading guilty, Black waived his right to challenge section 37-2732B(a)(6)(B)'s

> constitutionality. Black responded by moving to strike this new argument, having been made for the first time on reply.
>
> Both the State's motion for summary dismissal and Black's motion to strike were argued on August 15, 2017. During the hearing, the Court ordered post-hearing briefing regarding Black's frontline claim that section 37-2732B(a)(6)(B) is unconstitutional. Specifically, the Court required the parties to brief not only whether that claim fails for the reason the State advanced on reply—that Black's guilty plea effected a waiver of constitutional challenges to section 37-2732B(a)(6)(B)—but also whether that claim fails for the related reason that Black failed to raise any such challenges in an appeal from the conviction.
>
> The opportunity to submit post-hearing briefing negated any prejudice to Black arising from the State's asserting on reply a new argument challenging his frontline claim. The Court therefore denied Black's motion to strike. As already noted, the post-hearing briefing was completed on September 12, 2017, at which point the State's motion for summary dismissal was taken under advisement.

(R., pp.148-50.)[1]

The district court denied Black's claim that Section 37-2732B(a)(6)(B) is unconstitutional, finding that, "even assuming *arguendo* that Black's showing raises a substantial doubt about the reliability of the finding of guilt, he identifies no reason the constitutional challenges he raises now couldn't have been raised in a timely fashion, in the trial court or on appeal or both." (R., p.152.) The district court applied the statutory bar on raising "[a] claim or issue that … could have been raised on appeal" for the first time in post-conviction, and accordingly dismissed this claim. (R., p.152 (quoting Grove v. State, 161 Idaho 840, 850, 392 P.3d 18, 28 (Ct. App. 2017)).)

[1] The state received two copies of the Clerk's Record in this case; one 168-page volume containing the district court's Order Denying Motion to Withdraw Guilty Plea and Motion for Reconsideration of Sentence (R., pp.5-9), and one 163-page volume omitting that order. To avoid confusion and to maintain consistent pagination this brief will cite only to the 168-page volume of the record.

Moving on to Black's second claim, the district court analyzed whether counsel was ineffective for failure to file a motion challenging the statute's constitutionality. (R., pp.153-55.) Noting that "not filing a motion isn't deficient performance if not filing it was 'reasonable given the prevailing legal standards at the time of the trial,'" the court concluded "there is no genuine dispute about the fact that it was reasonable, under the prevailing legal standards at the operative time, for trial counsel not to pursue" constitutional challenges against the trafficking statute, and as such "Black is unable to prove that trial counsel's performance was deficient, even assuming *arguendo* that one of these challenges might have succeeded." (R., pp.154-55.)

The court's finding on deficient performance was dispositive; nevertheless, the district court made the following observation regarding the prejudice prong:

> Consequently, Black's nine challenges to section 37-2732B(a)(6)(B)'s constitutionality need not be analyzed on the merits. That said, the Court will observe that none of them strike the Court as at all likely to have succeeded. Although the Court doesn't disagree with Black that section 37-2732B punishes some defendants too harshly, it doesn't appear to be constitutionally infirm, at least not on any of Black's theories.

(R., p.155.)

The district court granted the state's motion for summary dismissal and dismissed Black's petition for post-conviction relief. (R., pp.155, 157.) Black timely appealed. (R., pp.159-61.)

ISSUES

Black states the issues on appeal as:

> (1) Did the District Court err by ruling that Appellant waived his frontline claim that the statutory scheme in issue is unconstitutional?
>
> (2) Did the District Court err by ruling that Appellant's constitutional challenge would not have been successful on the merits, and therefore, trial counsel's failure to challenge was not deficient?

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Black failed to show the district court erred in dismissing his claim that Idaho's trafficking statute is unconstitutional?

II. Has Black failed to show the district court erred in dismissing his claim of ineffective assistance of counsel?

ARGUMENT

I.
The District Court Correctly Dismissed Black's Constitutional Claim On Procedural Grounds For Failure To Raise It On Direct Appeal

A. Introduction

Black contends the district court erred by dismissing his freestanding claim that Idaho's trafficking statute is unconstitutional. (Appellant's brief, pp.5-11.)

Black fails to show error. The district court correctly concluded that because Black could have raised his constitutional issue on direct appeal, but did not, he could not raise it in post-conviction. (R., pp.152-53.) The district court therefore correctly dismissed this claim.

B. Standard Of Review

On appeal from an order of summary dismissal, Idaho's appellate courts "apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief." Caldwell v. State, 159 Idaho 233, 237, 358 P.3d 794, 798 (Ct. App. 2015). Questions of law are freely reviewed. Id.

C. Because Black Could Have Raised His Constitutional Challenge On Direct Appeal, But Did Not, He Could Not Raise It On Post-Conviction

"The scope of post-conviction relief is limited." Grove, 161 Idaho at 850, 392 P.3d at 28; Knutsen v. State, 144 Idaho 433, 438, 163 P.3d 222, 227 (Ct. App. 2007). Idaho Code Section 19-4901(a) states: "Any person who has been convicted of, or sentenced for, a crime, and who claims ... [t]hat the conviction or the sentence was in

violation of the constitution of the United States ... may institute ... a proceeding under this act to secure relief." Nevertheless, a petition for post-conviction relief is "not a substitute" for trial court proceedings or an appeal. I.C. § 19-4901(b); Grove, 161 Idaho at 850, 392 P.3d at 28.

Accordingly, "any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings." I.C. § 19-4901(b); Grove, 161 Idaho at 850, 392 P.3d at 28; Mendiola v. State, 150 Idaho 345, 348-49, 247 P.3d 210, 213-14 (Ct. App. 2010). Idaho's Uniform Post-Conviction Procedure Act sets forth one limited exception to this general rule: an unpreserved issue may be raised for the first time on post-conviction 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." I.C. § 19-4901; Mendiola, 150 Idaho at 348-49, 247 P.3d at 213-14.

Black concedes he did not file a direct appeal in the underlying criminal case. (Appellant's brief, p.1; R., p.148.) The district court therefore correctly concluded that because Black did not raise his constitutional claim in a direct appeal, despite having the opportunity to do so, he could not raise the claim in post-conviction. (R., p.152.) The district court also correctly concluded that Black failed to show the narrow exception to this rule would apply:

> Even assuming *arguendo* that Black's showing raises a substantial doubt about the reliability of the finding of guilt, he identifies no reason the constitutional challenges he raises now couldn't have been raised in timely fashion, in the trial court or on appeal or both. Indeed, he expressly claims his trial counsel rendered ineffective assistance for failure to raise them in

> front of the trial court. (Pet. ¶ 10.) Thus, section 19-4901(b)'s general rule applies, not its exception. Black's frontline claim therefore is dismissed.

(R., p.152.)

On appeal Black argues the district court erred, and contends the general rule barring unpreserved claims in post-conviction should not apply here. (Appellant's brief, pp.6-8.) Black first argues that Section 19-4901(b) "does not apply in this case for the simple reason he could not have raised the constitutional challenge on direct appeal." (Appellant's brief, p.6.) Black claims he could not have raised it because he "was never informed or advised that this statute was subject to a constitutional challenge in the trial court"; he therefore claims he was "not aware that he could have raised the constitutional challenge." (Appellant's brief, p.7.)

This fails to show error. Section 19-4901(b) does not precondition its effect on whether the defendant was *aware* of the potential claims that could have been raised on appeal; it simply bars those claims that "*could have* been raised on direct appeal." I.C. § 19-4901(b) (emphasis added). And Black *could* have raised his constitutional claim on direct appeal—or for that matter any claim on direct appeal—because he could have filed a notice of appeal. Instead, he chose not to raise any claim on direct appeal, because he never made a direct appeal. (R., p.148.) Black does not cite, nor is the state aware of, any authority showing there is an additional awareness component to this statutory bar.

Even granting the premise of Black's argument—that he was unaware he had a purportedly-viable constitutional claim due to counsel's failure to advise him—this issue is plainly more suited for an ineffective assistance of counsel claim. As Black frames the issue, he "was never informed or advised that this statute was subject to a constitutional

challenge in the trial court"; and as Black himself points out, this potentially presents a question of whether counsel "was ineffective for failing to advise." (See Appellant's brief, p.7.)

In any event, the purported failures of counsel do not change the plain language of Section 19-4901(b), which only asks whether a defendant could have raised an issue on direct appeal—not whether the petitioner was aware he could have. Because Black could have filed a direct appeal, but did not, the general rule barring his constitutional claim on post-conviction applies here.

Black additionally argues that "[b]ecause of the 'fundamental error' rule," his constitutional claim "was not waived pursuant to Idaho Code § 19-4901(a)(1) and (b), regardless of trial counsel's failure to raise the constitutionality issue at trial." (Appellant's brief, p.11.) This argument fails because fundamental error is a standard of appellate review, not collateral review. See State v. Briggs, 162 Idaho 736, 739 n.2, 404 P.3d 1287, 1290 n.2 (Ct. App. 2017) ("It must be remembered that fundamental error is simply a standard created and utilized by our appellate courts for appellate review. It is not a right of review."). Black cites no Idaho authority showing the post-conviction review of an unpreserved trial error claim via fundamental error, nor is the state aware of any such authority.

Moreover, the "fundamental error" cases cited by Black only affirm that trial errors cannot be raised for the first time on post-conviction. Black cites Hoffman v. State, 153 Idaho 898, 277 P.3d 1050 (Ct. App. 2012), and Mintun v. State, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007), for the proposition that trial errors may be raised for the first time on post-conviction as a sort of fundamental error. (Appellant's brief, pp.8-

11.) Black's conclusion does not follow from Hoffman, because the purportedly analogous claim there was an ineffective assistance of counsel claim. See Hoffman, 153 Idaho at 903-05, 277 P.3d at 1055-57. The preservation of an ineffective assistance claim necessarily has no bearing on the question here: whether Black's *merits* claim—not his ineffective assistance claim— survived his failure to preserve the claim on direct appeal.

Mintun likewise has no bearing on this issue. In Mintun, the petitioner brought an ineffective assistance claim and argued his appellate counsel was ineffective by not raising a trial error for the first time on appeal. 144 Idaho at 661, 168 P.3d at 46. Resolving this ineffective assistance claim required determining whether *appellate counsel* could have raised the trial error for the first time on appeal. Id. at 661-62, 168 P.3d at 46-47. And the Mintun Court determined appellate counsel could have brought the trial error claim—via the fundamental error standard—which meant that Mintun had a viable ineffective assistance claim in post-conviction. Id. at 662, 168 P.3d at 47. But none of this shows that Mintun could *also* have made the same trial error claim for the first time on post-conviction; and the Mintun Court never held that unpreserved trial errors can be raised for the first time on post-conviction. See id.

Others have attempted to read Mintun as expansively as Black does. See, e.g., Bias v. State, 159 Idaho 696, 703, 365 P.3d 1050, 1057 (Ct. App. 2015) ("In his petition, Bias did not present the district court with any evidence that the issue could not, in the exercise of due diligence, have been presented earlier. Instead, he now directs our attention to *Mintun v. State* … suggesting that our holding in that case precludes the district court's conclusion that the issue was waived.").

But the successive failure of those attempts left no confusion about Mintun's significance: the Court of Appeals has now twice explained that Mintun did not hold, "even tangentially," that an unpreserved trial error can be raised in a post-conviction proceeding. Bias, 159 Idaho at 703, 365 P.3d at 1057; Grove, 161 Idaho at 851, 392 P.3d at 29.

The Court of Appeals first made this plain in Bias:

> In *Mintun*, the petitioner challenged, through post-conviction proceedings, that his appellate counsel was ineffective for not raising certain issues on appeal. In affirming the district court's denial of that claim, we held that the proper way for a defendant to challenge an unpreserved trial error is to assert ineffective assistance of trial counsel in a post-conviction proceeding. *Mintun did not hold, even tangentially, that an unpreserved trial error itself can be raised in a post-conviction proceeding*. Thus, Mintun does not preclude the district court's conclusion that the issue of prosecutorial misconduct is waived. Because Bias presented no evidence as to why the issue could not have been presented on direct appeal, Bias has waived the issue. The district court properly dismissed the prosecutorial misconduct claim.

159 Idaho at 703, 365 P.3d at 1057 (emphasis added).

After Bias there was Grove—a nostalgic sequel—where the Court of Appeals again found itself explaining that Mintun had not opened the door to raising unpreserved trial errors in post-conviction:

> In *Mintun v. State*, the petitioner challenged, through post-conviction proceedings, that his appellate counsel was ineffective for not raising certain issues on appeal. In affirming the district court's denial of that claim, *we held that the proper way for a defendant to challenge an unpreserved trial error is to assert ineffective assistance of trial counsel* in a post-conviction proceeding. *The Court of Appeals has not held, "even tangentially, that an unpreserved trial error itself can be raised in a post-conviction proceeding."….*
>
> Grove's potential remedy is not in raising a claim of constitutional violation in post-conviction proceedings; he already utilized that opportunity on direct appeal. Rather, Grove's potential remedy is in

> demonstrating that the forfeitures of claims of errors in the trial court were the result of ineffective assistance of counsel, which will be addressed later in this opinion.

161 Idaho at 851, 392 P.3d at 29 (internal citations omitted, emphasis added).

Black's attempted reboot of this argument is therefore just the latest installment of an unsuccessful trilogy. It fails. Idaho's appellate courts have repeatedly addressed this question and repeatedly affirmed that Mintun does not allow unpreserved trial errors to be raised as fundamental error on post-conviction.

Claims of error in the underlying proceeding cannot be raised for the first time in post-conviction. I.C. § 19-4901(b). Black fails to show the exception to this rule applies here. Because Black did not raise his claim of constitutional error on direct appeal, the district court correctly dismissed this claim.[2]

II.
Black Fails To Show The District Court Erred By Dismissing His Claim Of Ineffective Assistance Of Counsel, Because He Fails To Show That Idaho's Trafficking Statute Is Unconstitutional

A. Introduction

The district court dismissed Black's claim of ineffective assistance of counsel based on trial counsel's failure to file a motion challenging the constitutionality of Idaho's trafficking statute. (R., pp.153-55.) Black contends this was an error, arguing that such a motion would have prevailed on the merits, on a variety of interrelated

[2] Alternatively, if this Court concludes that Black can raise his constitutional claim for the first time in post-conviction, that claim fails on the merits, as discussed in section II herein.

grounds, and trial counsel therefore performed deficiently by not filing it. (Appellant's brief, pp.11-29.)

This argument fails. Black has failed to show that Idaho's trafficking statute is unconstitutional, and as such, has necessarily failed to show that trial counsel gave ineffective assistance by not challenging the statute's constitutionality.

B. Standard Of Review

Summary dismissal is appropriate where the post-conviction petitioner's evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). On review of a summary dismissal of a post-conviction petition, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Id. at 523, 164 P.3d at 803. "A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions." Id. Accordingly, if alleged facts, even if assumed true, would not entitle the petitioner to relief, the trial court may dismiss the petition without hearing. Id. Allegations are insufficient for the granting of relief when "(1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

Where the constitutionality of a statute is challenged the appellate court reviews it *de novo*. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of

constitutionality. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. Black Has Not Shown The District Court Erred By Concluding It Was Reasonable, And Therefore Not Deficient Performance, For Trial Counsel Not To Challenge The Constitutionality Of The Trafficking Statute

A criminal defendant has a constitutional right to counsel and to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that counsel was ineffective, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-96; State v. Elison, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). A court's "scrutiny of counsel's performance must be highly deferential" on review; therefore, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Accordingly, counsel's tactical and strategic decisions "will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation." Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Trial counsel's decision not to file a motion will accordingly be reviewed for reasonableness "given the prevailing legal standards at the time of the trial." Wurdemann v. State, 161 Idaho 713, 721, 390 P.3d 439, 447 (2017) (citing State v. Abdullah, 158 Idaho 386, 481, 348 P.3d 1, 96 (2015)). When a defendant claims counsel was deficient

for "failure to file or pursue certain motions, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the Strickland test." State v. Hairston, 133 Idaho 496, 512, 988 P.2d 1170, 1186 (1999). If such a motion would have been meritless and denied, "counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced" by counsel not pursuing it. See Huck v. State, 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct. App. 1993).

Here, the district court correctly found that Black's freestanding constitutional challenge was better raised as claim of ineffective assistance, because "the proper way for a defendant to challenge an unpreserved trial error is to assert ineffective assistance of trial counsel in a post-conviction proceeding." (R., p.153 (citing Grove, 161 Idaho at 851, 392 P.3d at 29).) Turning to the question of whether "trial counsel rendered ineffective assistance by failing to challenge [I.C. § 37-2732B's] constitutionality," the district court concluded that Black's trial counsel did not give ineffective assistance, because there was no deficient performance. (R., pp.153-55.)

Without directly addressing the merits of Black's constitutional claims, the district court noted "the dearth of evidence, that, at the time of trial, it was a prevailing practice among defense attorneys to challenge section 37-2732B on constitutional grounds." (R., p.154.) The court noted it had "presided over numerous trafficking cases during the past several years, without ever seeing any such challenge," other than Black's. (R., p.154.) The district court found this unsurprising, insofar as some of Black's constitutional challenges were "highly similar" to challenges already rejected by Idaho's appellate courts. (R., p.154 (citing State v. Pena-Reyes, 131 Idaho 656, 656-57, 962 P.2d 1040,

1040-41 (1998); State v. Puetz, 129 Idaho 842, 844, 934 P.2d 15, 17 (1997); State v. Payan, 132 Idaho 614, 616-18, 977 P.2d 228, 230-32 (Ct. App. 1998); State v. Rogerson, 132 Idaho 53, 55-58, 966 P.2d 53, 55-58 (Ct. App. 1998)).) The district court found there was "no evidence that similarly situated defendants were pursuing these sorts of challenges," and that "[a]s such, there is no genuine dispute about the fact that it was reasonable, under the prevailing legal standards at the operative time, for trial counsel not to pursue these challenges." (R., p.154.)

On appeal, Black fails to show this conclusion was erroneous. Without challenging any of the district court's historical findings—that is, the court's account of the trafficking trials it presided over—Black attacks the logic of the court's analysis:

> Here, the District Court held no evidentiary hearing on the issue of whether trial counsel's failure to challenge the constitutionality of the *trafficking* statute was strategic or tactical. Instead, the District Court reasoned that since there is no evidence that similarly situated defendants were pursuing these sorts of challenges during the last few years before Black entered his guilty plea, it was reasonable for trial counsel not to pursue these challenges ….
>
> The District Court's analysis is circular. Since a constitutional challenge had not been brought before, trial counsel cannot be faulted now for not bringing such a challenge then. Taking the District Court's analysis to its logical extreme, no ineffective assistance claim, for failing to challenge constitutionality, could be found if such challenge had not been raised before.

(Appellant's brief, p.13.)

This critique is flawed. First, Black misinterprets the court's finding that similar challenges had not been brought "during the past several years" (R., p.154) as a broader conclusion that "a constitutional challenge *had not been brought before*" (Appellant's brief, p.13 (emphasis added)). This is incorrect—as the district court noted, many

strikingly similar challenges to the trafficking statute *had* been brought before. (R., p.154.) Those challenges failed. Pena-Reyes, 131 Idaho at 656-57, 962 P.2d at 1040-41 (holding the trafficking statute "does not violate Article 5, Section 13, of the Idaho Constitution"); Puetz, 129 Idaho at 844, 934 P.2d at 17 (holding the trafficking statute "fully complies with the requirement of art. V, § 13 of the Idaho Constitution that mandatory minimum sentences 'shall not be reduced'"); State v. Payan, 132 Idaho at 616-18, 977 P.2d at 230-32 (holding appellant "has failed to establish that his prosecution under I.C. § 37-2732B violated the Equal Protection Clause of the United States Constitution or the equal protection provision of the Idaho Constitution"); State v. Rogerson, 132 Idaho at 55-58, 966 P.2d at 55-58 (holding the trafficking statute does not violate separation of powers, does not violate due process, and does not violate the equal protection clause). As the court here saw it, the failure of those *prior* attempts in the 1990's was the "good reason" that "such challenges are rare nowadays." (R., p.154.) Moreover, the recent scarcity of similarly flawed attempts showed that it was reasonable for Black's trial counsel not to mount similar challenges, and good evidence that he did not perform deficiently. (See R., pp.154-55.) None of this shows, however, that the court's reasoning was circular.

Moreover, Black has not even shown that purportedly circular reasoning in this context would be erroneous. The Idaho Court of Appeals has previously held that trial counsel will not be held deficient "where counsel fails to argue a novel theory in an undeveloped area of law." Schoger v. State, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010). It is therefore plainly not ineffective assistance to hold counsel's performance to standards of *established* law—circular though this may seem.

Thus, to the extent constitutional challenges had been unsuccessfully raised before, it was not deficient performance for trial counsel not to raise similar constitutional challenges to the trafficking statute. Nor was it deficient performance for trial counsel to fail to argue "novel theor[ies] in an underdeveloped area of law." See Schoger, 148 Idaho at 630, 226 P.3d at 1277. In sum, Black has failed to show the district court erred by concluding "it was reasonable, under the prevailing legal standards at the operative time, for trial counsel not to pursue these challenges." (R., p.155.) Black has therefore failed to show deficient performance.

D. Alternatively, Black Has Failed To Overcome The Presumption That The Trafficking Statute Is Constitutional; He Therefore Fails To Show A Motion Would Have Succeeded On The Merits, And Fails To Show Ineffective Assistance

The district court decided Black's ineffective assistance claim on the deficient performance prong, as explained above. (R., pp.153-55.) The district court therefore did not fully examine the prejudice prong and did not expressly analyze Black's constitutional claims on the merits. (See R., p.155.) The district court did note, however, that Black's claim would have likely failed on the merits:

> Consequently, Black's nine challenges to section 37-2732B(a)(6)(B)'s constitutionality need not be analyzed on the merits. That said, the Court will observe that none of them strike the Court as at all likely to have succeeded. Although the Court doesn't disagree with Black that section 37-2732B punishes some defendants too harshly, it doesn't appear to be constitutionally infirm, at least not on any of Black's theories.

(R., p.155.)

While the district court's decision did not reach the merits of Black's various constitutional claims, Black alleges the district court incorrectly concluded that Black's

constitutional claims were unlikely to have succeeded. (Appellant's brief, pp.14-19.) Should this Court reach the merits of Black's constitutional claims, Black has failed to overcome the "strong presumption of constitutionality," which he must do in order to show the trafficking statute is unconstitutional. See Korsen, 138 Idaho at 711, 69 P.3d at 131. Black's various constitutional challenges all fail on the merits, as explained below.

1. "Arbitrary and Irrational"

Black claims Idaho's trafficking statute is unconstitutionally "arbitrary and irrational," because "the *trafficking* statute is aimed at the 'large scale' drug dealer, which Appellant was clearly not." (Appellant's brief, p.19 (emphasis in original).)

This claim fails, first, because it is unsupported by legal authority. Parties are required to support their arguments on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Black does not cite any legal authority in his discussion of his "arbitrary and irrational" subclaim, other than a citation to the statute itself, and a note that this claim was *not* raised in State v. Rogerson and State v. Payan. (See Appellant's brief, pp.19-20.) To the extent Black does not cite any legal authority that supports his argument that the trafficking statute is unconstitutional because it is arbitrary and irrational, he has failed to support this claim on appeal.

Black has also failed to support his argument with a sufficient factual record. Black cites to the PSI in the underlying criminal case as support for his claims that "Appellant had virtually no assets or income," and was, "for all intents and purposes, a drug addict doing no more than sustaining his drug habit—[Black] was using drugs to

keep from getting sick at the rate of **four or five grams per day**." (Appellant's brief, p.19 (emphasis in original).)

However, the PSI is not part of this record on appeal, as it was never made part of the record in the post-conviction proceeding below. (See generally, R.) Below, the state moved that the post-conviction court take judicial notice of the PSI. (R., p.76.) The court never ruled on that motion, and it appears the court never stated that it was taking judicial notice of the PSI. (See generally R., pp.76-168.) Motions that are not ruled on during the underlying proceedings are presumed denied. State v. Wolfe, 158 Idaho 55, 61, 343 P.3d 497, 503 (2015) ("Furthermore, we have held that where a district court fails to rule on a motion, we presume the district court denied the motion.").

Accordingly, the record below did not include the PSI, and the record on appeal does not include the PSI. (R., p.166 (where the district court clerk certified that "[t]here were no exhibits offered for identification or admitted into evidence during the course of this action").) It is the appellant's burden on appeal to prepare a record on appeal that supports his or her claims. See, e.g., Esquivel v. State, 149 Idaho 255, 259 n.3, 233 P.3d 186, 190 n.3 (Ct. App. 2010) ("The post-conviction record on appeal does not automatically include the record of the underlying criminal case…. Exhibits, as well as transcripts of the pre-trial proceedings, the trial, and sentencing hearing in the criminal case, even if previously prepared as a result of a direct appeal or otherwise, are not before the trial court in the post-conviction proceeding and do not become part of the record on appeal unless presented to the trial court as exhibits, or unless the trial court takes judicial notice of such records from the criminal case. Although the district court may have reviewed portions of the record from the underlying criminal action on its own initiative,

if the petitioner does not include such material in the record on appeal from the denial of post-conviction relief, the appellate court will not consider it.") (internal citations omitted).

Thus, insofar as Black's "arbitrary and irrational" argument depends on facts not in the record on appeal, it fails for lack of factual support.

To the extent Black has sufficiently supported his claim with legal authority and a factual record, the state interprets this claim as either 1) a claim that the statute is void-for-vagueness, either on its face or as applied to him, due to its purported arbitrariness; and/or 2) a more general claim that the statute is unconstitutional due to its purportedly irrational effect of punishing mere possessors of drugs as opposed to "'large scale' drug dealers." (Or as Black puts it, the "stark contrast between what was intended by the Idaho Legislature" and the effect of the statute.) (Appellant's brief, p.1.) Both of these claims fail.

Black has not shown that the statute is void for vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." State v. Knutsen, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Id. (quoting Kolender, 461 U.S. at 358).

As a constitutional matter "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Accordingly, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." Skilling v. United States, 561 U.S. 358, 412 (2010) (citing Kolender, 461 U.S. at 357). But the doctrine also grants statutes a "strong presumption" of validity and the court must, if possible, "construe, not condemn" them. See id. at 402-403 (internal quotes and citations omitted). Even if a statute's "outermost boundaries" are "imprecise" that fact has little relevance where "appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see also Skilling, 561 U.S. at 412 (citing Broadrick).

Applying the foregoing standards, the Idaho trafficking statute is not void for vagueness, either on its face or as applied to Black. Nothing could be clearer than what the statute criminalizes: possession of "seven (7) grams or more, but less than twenty-eight (28) grams" of heroin. I.C. § 37-2732B(a)(6)(B). Black possessed approximately 26 grams of heroin (Appellant's brief, p.3; see R., p.40), placing him within the crystal clear boundaries of the trafficking statute. Possession-based trafficking does not have an intent element, or a "large scale" distribution element, or any of the other things Black claims should be read into the statute. (Compare Appellant's brief, pp.19-20 with I.C. § 37-2732B(a)(6)(B).) Because the statute defines trafficking precisely, and as an

arithmetical matter could not be clearer, the statute is not void for vagueness, either on its face or as applied to Black.

Second, if Black is making a more generalized claim that the statute is unconstitutional because its effect is "arbitrary and irrational" given "what was intended by the Idaho Legislature," this claim fails. (See Appellant's brief, pp.1, 19.) Statutory interpretation "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted)). This Court has "consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." Id. (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)). Moreover, per Verska, this plain meaning controls even if this Court concludes it is patently absurd or would produce absurd results if construed as written. 151 Idaho at 896, 265 P.3d at 509.

The trafficking statute is unambiguous. It defines trafficking as, among other things, possession of "seven (7) grams or more, but less than twenty-eight (28) grams" of heroin. I.C. § 37-2732B(a)(6)(B). This Court plainly applies the legislature's clearly expressed decision defining trafficking as it is, not as Black wishes it was. And even if this leads to an "irrational" outcome in light of legislature's intended purpose, as Black claims, this Court must apply the law as plainly written. Because Black fails to show that

the effect of a statute would ever justify a construction that abandons its plain meaning, he fails to overcome the presumption that the trafficking statute is constitutional.

2. "Mere Possession"

Black argues, along similar lines, that the trafficking statute is unconstitutional because "[n]ot only does the general *trafficking* statute criminalize addiction, it elevates an addict's simple possession of illegal drugs to the crime of *trafficking* on the mere possession of specified quantities." (Appellant's brief, pp.20-21 (emphasis in original).) Black claims this violates due process—"[t]o treat him as a drug trafficker, without any indicia of intent to sell and distribute in a large-scale capacity, is a violation of 'due process[.'"]. (Appellant's brief, p.21.)

This claim fails because it is unsupported by legal authority. Black does not cite any legal authority in his discussion of his "mere possession" subclaim, other than to purport that this claim was not raised in State v. Rogerson and State v. Payan. (See Appellant's brief, p.20.) Because he does not cite any authority that supports his argument that the trafficking statute is unconstitutional because it criminalizes mere possession, he has failed to support this claim on appeal. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Furthermore, this claim *was* raised in Rogerson. There, the appellant argued the statute violated due process and was unconstitutional "because, under the terms of the statute, the State is not required to prove that a defendant had an intent to deliver a controlled substance in order for the defendant to be found guilty of trafficking in a controlled substance." 132 Idaho at 56, 966 P.2d at 56. The Rogerson Court found this

claim meritless because "[t]he Idaho legislature elected not to include an element of delivery or intent to deliver in the definition of the crime it called 'trafficking' in a controlled substance":

> Thus, it is for the legislature, not the defendant, to decide what the elements of a crime should be. Rogerson's argument that the trafficking statute should include an additional element does not demonstrate a due process violation.

Rogerson, 132 Idaho at 56, 966 P.2d at 56.

"*Stare decisis* requires that this Court follows controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Owens, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34 (2015) (citing State v. Grant, 154 Idaho 281, 287, 297 P.3d 244, 250 (2013)). Here, Black makes a due process claim on the same grounds rejected in Rogerson—that criminalizing "mere possession," without an intent to deliver, violates due process. (See Appellant's brief, pp.20-21.) Because the Rogerson Court rejected this argument, and because Black has not bothered to distinguish this case, much less show that Rogerson was wrongly decided, this claim should be rejected.

Even if Black's "mere possession" claim was not squarely rejected by Rogerson, this claim nevertheless fails on the merits. Black's essential complaint is about the contrast between the layperson's understanding of "trafficking" and the Idaho Code's definition of "trafficking." (See Appellant's brief, p.20.) Black's criticism ends up simply describing how the statute works: "it elevates an addict's simple possession of

illegal drugs to the crime of *trafficking* on the mere possession of specified quantities." (Appellant's brief, p.20 (emphasis added).)

Exactly right. The trafficking statute plainly defines trafficking as a matter of threshold possession, and "[l]egislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute." State v. Hartzell, 155 Idaho 107, 110, 305 P.3d 551, 554 (Ct. App. 2013). It is the legislature's prerogative to define crimes, and whether this definition of "trafficking" comports with a layperson's definition is beside the point. State v. Thiel, 158 Idaho 103, 110, 343 P.3d 1110, 1117 (2015) ("It was early held by this [C]ourt that *the power to define crimes and prescribe penalties belongs to the legislative department of government*; that the power to try offenders, and to enter judgment convicting and sentencing those found guilty, belongs to the judicial department; [and] that the power and prerogative of granting pardons, paroles or commutations belong to the executive department." (emphasis added)).

Lastly, Black takes issue with the numbers chosen by the legislature, arguing that by today's standards the amount of grams is insufficient to show trafficking:

> These threshold quantities are arbitrary—they may have been valid in 1997, but Appellant is a case in point of the dramatic increase of possession and use of opioids arising over the years to today's epidemic. To treat him as a drug trafficker, without any indicia of intent to sell and distribute in a large-scale capacity, is a violation of "due process[."]

(Appellant's brief, p.21.)

Whatever merit this may have as a policy critique, as a legal argument it fails. The thresholds that the legislature set for trafficking did not come with an expiration date, nor are the thresholds required to be audited each year to verify whether they are keeping up with public sentiment. See I.C. § 37-2732B(a)(6)(B). Should Idahoans decide the

trafficking threshold is outdated or anachronistic there is a democratic mechanism for updating it: legislative amendment.[3] Idaho Const. art. III, § 1.

Moreover, statutes do not become unconstitutional simply because the behavior they prohibit has purportedly become more widespread over time. A plainly marked speed limit of 10 miles an hour would not be unconstitutional simply because more people are now speeding through a particular street compared to when the limit was first enacted. Black cites no authority for the proposition that the trafficking threshold is unconstitutional because he and his experts opine that more people are possessing trafficking-threshold heroin in 2018 than in 1997. (See Appellant's brief, pp.19-20.)

Black's due process claim was rejected in Rogerson and should be rejected here. Black fails to show that the trafficking statute's criminalization of mere possession of drugs, in any amount, is unconstitutional.

3. "Union Between Act and Intent"

Black next claims the trafficking statute is unconstitutional because Idaho Code § 18-114 provides that "[i]n every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence," and that "[t]he general

[3] Indeed, as recently as this year, there was proposed legislation with bipartisan support that would have changed the trafficking statute along the lines Black advocates for, removing the mandatory minimum sentencing provision. 2018 ID H.B. 581. This bill ultimately failed. See http://www.spokesman.com/blogs/boise/2018/mar/29/otter-says-he-favored-bill-ease-some-mandatory-minimum-drug-sentences-bill-passed-house-died-without-vote-senate, last accessed August 15, 2018. In any event, whatever policy merits this proposed amendment had is a decision that should be made by Idahoans, through their legislature. Those political merits have no bearing on the constitutionality of the current statute.

trafficking statute eliminates the element of intent and thus violates this Code provision." (Appellant's brief, pp.21-22 (emphasis in original).)

This claim fails on several grounds. This claim fails, first, because it is unsupported by legal authority. Black does not cite to any authority that holds as a *constitutional* matter the trafficking statute was required to include an intent element. (See Appellant's brief, pp.21-22.) Nor does he cite authority for the proposition that a state statute would be unconstitutional because it contradicted another state statute. (See Appellant's brief, pp.21-22.) Because he fails to support this constitutional claim with any authority, it has been waived. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Even assuming, *arguendo*, that a state statute would be unconstitutional by contravening another state statute, this claim fails on its state-law merits, because Black fails to show that the trafficking statute violates I.C. § 18-114 due to its lack of an intent element. The Idaho Supreme Court has already clarified that "'the intent required by I.C. § 18-114'" is a reference to *general* intent, not specific intent; in other words, it refers not to "'the intent to commit a crime, but is merely the intent to knowingly perform' the prohibited act." State v. Goggin, 157 Idaho 1, 7, 333 P.3d 112, 118 (2014); see also State v. Fox, 124 Idaho 924, 926, 866 P.2d 181, 183 (1993). Because section 18-114 "only requires a general intent," a drug charge that "does not expressly require any mental element" only requires "the knowledge that one is in possession of the substance." See Goggin, 157 Idaho at 7, 333 P.3d at 118. Thus, even if this purported error had a

constitutional dimension, Black fails to show the trafficking statute violates I.C. § 18-114 by not requiring an intent element.[4]

4. "Lack of Definition"

Black retreads familiar ground here, arguing that "the general *trafficking* statute does not define the term *trafficking*, other than the possession of threshold quantities of the illegal drug involved." (Appellant's brief, pp.22-23 (emphasis in original).)

This argument is self-refuting. The trafficking statute does not "lack a definition," as the second clause of Black's own summary shows: "the general *trafficking* statute does not define the term *trafficking*, other than the possession of threshold quantities of the illegal drug involved." (Appellant's brief, pp.22-23 (emphasis in original).) That is exactly the point: the trafficking statute does not define the crime in terms of "proof of indicia of sales" or large-scale "delivery or distribution," or any of the other elements Black wishes were in play—it defines trafficking as possession of a threshold quantity of illegal drugs. See I.C. § 37-2732B(a)(6)(A). Black may not like this definition, but that does not mean the statute lacks a definition—nor does it show the legislature's chosen definition is unconstitutional. See Rogerson, 132 Idaho at 56, 966 P.2d at 56.

Black asks: "Would the ordinary heroin addict understand that possession of two grams would render him or her a drug *trafficker*? The answer is no – this small quantity equated to a daily habit for Appellant." (Appellant's brief, p.23 (emphasis in original).)

[4] And were this Court to accept Black's argument that by omitting an intent element, a criminal statute automatically violates I.C. § 18-114, somehow creating a constitutional violation, a large swath of the Idaho Code would be rendered unconstitutional.

The state is unaware of any authority holding that the trafficking statute needs to be read through the eyes of the "ordinary heroin addict" to pass constitutional muster. Black cites no authority holding that legislation must survive such a hyper-subjective standard, and to the extent he proposes this as a new standard, its problems are immediately apparent. One would not ask, for example, what the "ordinary speeder," with a daily habit of driving over the speed limit, would think about a given speed limit, in order to assess whether such a limit was constitutional.

The constitutional question is whether "ordinary people can *understand what conduct is prohibited*" by the trafficking statute. Knutsen, 158 Idaho at 202, 345 P.3d at 992 (emphasis added). And they can, because the trafficking statute plainly tells them: possession of "seven (7) grams or more, but less than twenty-eight (28) grams" of heroin is trafficking. I.C. § 37-2732B(a)(6)(B). While Black may think this definition is unwise, he fails to show it is unconstitutional.

5. "Irrational Classification," and "Equal Protection" (Parts 1 and 2)

Black's next three claims appear to agglomerate an equal protection claim. (Appellant's brief, pp.24-26.) The first claim argues the trafficking statute contains an irrational classification and is unconstitutional because "there is no rational basis to create different quantities, and corresponding different penalties, for the illegal drugs set forth in the general *trafficking* statute." (Appellant's brief, p.24 (emphasis in original).) The next claim alleges the statute violates equal protection because, purportedly, "[h]ad Appellant carried the same illegal drugs into a treatment facility, sanctioned by the State of Idaho, for the purpose of seeking treatment, he would not have been prosecuted." (Appellant's

brief, p.25.) The final equal protection claim briefly contends that "the general *trafficking* statute eliminates the ability of the sentencing court to consider mental illness" and as such it "creates two classes of person without a rational basis." (Appellant's brief, p.26.)

This set of claims fails on the merits, because it is highly similar to the failed challenge that was raised in Rogerson. There, the appellant argued that the trafficking statute "violates the Equal Protection Clause of the Fourteenth Amendment because it imposes harsher sentences than does I.C. § 37-2732, which also prescribes penalties for controlled substance offenses." Rogerson, 132 Idaho at 56, 966 P.2d at 56. The Court disagreed:

> The legislature may rationally and legitimately determine that possession, manufacture, or delivery of larger quantities of controlled substances creates greater harm and a greater threat to society, and therefore warrants a sentence of greater deterrent and punishment value, than does similar activity with a lesser quantity of drugs. As we observed in *State v. Ybarra*, "tremendous waste, hurt, and tragedy" exist in our society as a result of drug trafficking and drug abuse. The legislature's decision to increase the level of punishment for crimes involving larger amounts of controlled substances is rationally related to the State's legitimate interest in curbing large-scale possession, manufacturing, and distribution of controlled substances. Therefore, the statutes in question do not violate the Equal Protection Clause.

Rogerson, 132 Idaho at 57, 966 P.2d at 57 (internal citations omitted).

Rogerson controls here. Black fails to distinguish his equal protection claims, and fails to show that Rogerson would not apply here. Black therefore fails to show that the statutes violate the Equal Protection Clause.

6. "Cruel and Unusual"

Black's penultimate claim is that the trafficking statute is unconstitutional because his sentence was "grossly out of proportion to the severity of the crime," because

"Appellant was not a *trafficker* of drugs in the sense of sales, delivery or distribution for the purpose of a business enterprise." (Appellant's brief, p.26 (emphasis in original).)

This claim fails. First, the facts about Black's drugs sales are not in the record on appeal, because the PSI was not part of the factual record below. (See generally, R.) Black's experts' recitations of what they read in the PSI are hearsay. State v. Scovell, 136 Idaho 587, 593, 38 P.3d 625, 631 (Ct. App. 2001) ("We conclude that although Rule 703 authorizes the admission of expert opinions that are based upon hearsay or other inadmissible information, (if the information is of a type reasonably relied upon by experts in the field), the rule does not provide that the hearsay information itself is automatically, independently admissible in evidence."). Moreover, Black's counsel's argument below indicates that Black *was* selling drugs—though the argument presented was that Black only dabbled in low-level sales, sufficient to sustain his own habit:

> [Defense Counsel]: It's undisputed in a factual setting he was not a trafficker.
>
> THE COURT: I suppose that depends what you mean by trafficker. The presentence investigation does include information in which Mr. Black admitted to law enforcement officers that he sells to support his habit, to support his habit, not to be rich.
>
> [Defense Counsel]: That's all part of addiction, and that's explained in the declarations. That's what these addicts do. They sell a little bit to sustain their own habit.
>
> THE COURT: Sure.

(2/23/16 Tr., p.25, Ls.8-21.)

In any event, even granting Black's factual claim, *arguendo*, that he was not selling drugs for the "purpose of a business enterprise," and granting the accuracy of the information in the PSI (whatever that may be), this claim fails on the merits. The

Rogerson Court identified a two-step process to determine whether a particular sentence was cruel and unusual punishment prohibited by the Eighth Amendment. First, appellate courts must "make a threshold comparison of the crime committed and the sentence imposed to determine whether the sentence leads to an inference of gross disproportionality." Rogerson, 132 Idaho at 57, 966 at 57 (citing State v. Brown, 121 Idaho 385, 394, 825 P.2d 482, 491 (1992)). In Rogerson the Court concluded, based on the "large quantities of marijuana and methamphetamine" involved, that "[t]he offenses are sufficiently serious that we cannot say that the sentences are out of proportion to the gravity of the offenses or such as to shock the conscience of reasonable people." 132 Idaho at 58, 966 P.2d at 58.

But because it disposed of the claim on this threshold question, the Rogerson Court never reached the second step of the analysis: "if an inference of such disproportionality is found, we must conduct a proportionality analysis comparing Rogerson's sentence to those imposed on other defendants *for similar offenses*." Id. (emphasis added, citing State v. Matteson, 123 Idaho 622, 626, 851 P.2d 336, 340 (1993)).

Based on those standards, Black's claims fails. Black does not show that the sentence here would "shock the conscience of reasonable people." (See Appellant's brief, pp.26-27.) The district court's own sober reflection on the sentence showed something more like mild indigestion than a shocked conscience. (2/23/16 Tr., p.30, Ls.14-23 ("Would he have gone to prison for some period of time? That may well have happened. That's probably likely. But ten years fixed, I don't think that would have happened, and I think a lot of judges would rather not have their hands tied by mandatory minimum

sentences. I think they do produce results that the sentencing judge might subjectively consider to be unjust or unwise or unfair or whatever adjective you want to use in any number of cases.").)

And even if Black had met the threshold of showing conscience-shocking punishment, he fails to address the second step in the analysis. Black spends his time comparing the sentence imposed here to other offenses that are not at all similar to drug trafficking: manslaughter, murder, and sexual abuse of children. (See Appellant's brief, pp.26-27.) This apples-to-oranges comparison fails to address the constitutional standard articulated in Rogerson—how the trafficking sentence imposed here compares "to those imposed on other defendants *for similar offenses*." 132 Idaho at 58, 966 P.2d at 58 (emphasis added). Because Black offers no argument on this question—much less does he show that this sentence was out of step with the typical trafficking sentence—he fails to show the sentence imposed was cruel and unusual. (See Appellant's brief, pp.26-27.)

7. "Inherent Power of the Courts"

Black concludes by asking this Court to find the statute unconstitutional as a matter of exercising its "inherent power," as set forth in State v. McCoy, 94 Idaho 236, 486 P.2d 246 (1971) superseded by constitutional amendment, Idaho Const. art. V, § 13. (Appellant's brief, pp.27-28.) Black argues that "Idaho courts have never ruled on the question as to whether these laws might improperly invade the province of the courts—the **inherent** power of the judiciary as articulated in *McCoy*." (Appellant's brief, p.28 (emphasis in original).) Black claims that, based on the judiciary's inherent power over

sentencing set forth in *McCoy*, "these fixed sentencing provisions must be unconstitutional." (Appellant's brief, p.28.)

It is difficult to discern what "inherent power" Black refers to. And it is even more difficult to imagine what remaining relevance McCoy has to the constitutionality of fixed sentencing provisions. Because McCoy, as Black acknowledges, was superseded by constitutional amendment—an amendment specifically granting the legislature the power to fix sentences, and divesting the judiciary's power to reduce those sentences. That amendment, enacted in response to McCoy, states as follows:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution, provided, *however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.*

Idaho Const. art. V, §13 (emphasis added).

Idaho's appellate courts, weighing in on this exact issue, have acknowledged that this constitutional amendment superseded any contradictory language in McCoy:

> [Defendant's] reliance on *State v. McCoy* is also misguided. Garcia–Pineda argues *McCoy* stands for the principle that the judiciary has an inherent power under the common law to suspend the whole or part of a defendant's sentence. The decision in *McCoy* predated the amendment to Article V, Section 13 of the Idaho Constitution, which states, in relevant part: "any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced." Therefore, the *McCoy* decision, and its reliance on the common law, is inapplicable to the current case.

State v. Garcia-Pineda, 154 Idaho 482, 485, 299 P.3d 794, 797 (Ct. App. 2013) (internal citations omitted, footnote omitted); see also Thiel, 158 Idaho at 111, 343 P.3d at 1118 ("In response to the Court's holding in *McCoy*, the legislature proposed and the people adopted an amendment to Article V, Section 13 of the Idaho Constitution. Idaho Const. art. V, § 13. This amendment granted the legislature the constitutional authority to enact mandatory minimum sentences. After the amendment to Article V, Section 13, it was no longer unconstitutional for the legislature to issue a mandatory minimum sentence infringing upon the judiciary's inherent, common law authority to exercise its discretion to suspend a sentence."); Pena-Reyes, 131 Idaho at 657, 962 P.2d at 1041; State v. Rogerson, 132 Idaho at 56, 966 P.2d at 56.

It is therefore entirely unclear what Black means when he says, based on McCoy and the judiciary's "inherent power over sentencing," that the "fixed sentencing provisions must be unconstitutional." (Appellant's brief, p.28.) To be clear: fixed sentencing is *written into* the Idaho Constitution and is by definition constitutional. Idaho Const. art. V, §13. Asking this Court to exercise its "inherent power" to jettison fixed sentencing therefore goes far beyond a request to override plainly written statutes, or even "to overturn prior caselaw precedent," as Black calls it. (See Appellant's brief, p.29.) It is, in effect, asking this Court to override plainly written Constitutional provisions. This Court cannot do so. Idaho Const. art. II, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."); Williams v. State

Legislature, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (1986) ("In construing the constitution, the primary object is to determine the intent of the framers."); Grice v. Clearwater Timber Co., 20 Idaho 70, 76-77, 117 P. 112, 114 (1911) ("The Constitution should receive a reasonable construction, and should be interpreted in such a way as to give it practical effect according to the intention of the body that framed it and the people who adopted it."); Adams v. Lansdon, 18 Idaho 483, 504, 110 P. 280, 287 (1910) (quoting Leonard v. Commonwealth, 112 Pa. 607, 4 A. 220, 225 (1886)) ("When laws are made by a popular government, that is to say, 'a government of the people, by the people, and for the people,' we may safely assume that words in a statute or a constitution are used in a sense in which the people who made the statute or constitution understood them.").

Idaho's trafficking statute is constitutional. Black and his experts do not like the statute's effect; other Idahoans may well share that view. Black and those who agree with him can change the statute through democratic means by convincing their fellow citizens that the statute is unwise or unworkable. But asking this Court to step in and defenestrate properly enacted legislation requires much more than "a passage of time and a better understanding of drug addiction" (see Appellant's brief, p.29)—it requires a showing that the statute is unconstitutional. Black has failed to make that showing, and failed to show the district court erred.

CONCLUSION

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

DATED this 21st day of August, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of August, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

JOHN C. LYNN
john@johnlynnlaw.com

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd