5-5-2017

Parks v. State Appellant's Brief Dckt. 44291

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILAS BENJAMIN PARKS, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	No. 44291-2016 APPELLANT'S BRIEF

APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Latah
Latah County Case No. CV 2011-00968

Hon. Jeff M. Brudie, District Judge

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STATEMENT OF THE CASE

Nature of the Case

This is a post-conviction case. The driving force behind this controversy is defense counsel's failure to investigate a critical issue. In the underlying criminal case Silas B. Parks was charged with first-degree murder and arson. He was accused of killing his wife, Sarah Parks, and their unborn child and burning the dwelling in which the deaths occurred. More than once Mr. Parks told his appointed defense counsel that he could not remember the occurrence of his wife's death. Without investigating the cause of the death of Sarah Parks, defense counsel advised Mr. Parks to accept a plea bargain which resulted in the imposition of a 20- to 40-year prison sentence. Forensic evidence undercutting the State's theory of the case was readily available to defense counsel, had they undertaken a duly diligent investigation of the cause of death. Mr. Parks seeks to have the plea bargain rescinded and his guilty pleas set aside in the underlying criminal case.

Course of the Proceedings Below

The underlying criminal case to this post-conviction matter is *State v. Silas B. Parks*, Latah County Case No. CR 2009-03162. R., Vol. II, p. 251. As stated above, that murder/arson case was resolved via plea bargain. R., Vol. II, p. 251-3. The judgment of conviction was entered on 3 August 2010. R., Vol. II, p. 252. This post-conviction matter was initiated on 12 September

2011. R., Vol. I, p. 19. Various pre-trial motions were filed; none were dispositive as to all issues. *See* R., Vol. III, pp. 494-501 and R., Vol. IV, pp. 727-729. The District Court held an evidentiary hearing on 8 February 2016 and 9 February 2016. R., Vol. VI, pp. 1178-1183. Mr. Parks's petition for post-conviction relief was denied *in toto* on 29 April 2016. R., Vol. VI, pp. 1267-1274. Judgment was entered against Mr. Parks by the District Court on 18 July 2016. R., Vol. VI, p. 1302. This appeal followed. *See* R., Vol. VI, pp. 1279 and 1303.

Concise Statement of the Facts

Factual Basis for Charges in Underlying Criminal Case. On 24 June 2009 Sarah Parks, age twenty-eight, died in Moscow, Idaho. R., Vol. IV, pp. 802-803 and 812. She was the wife of Appellant Silas B. Parks, then age twenty-five. R., Vol. IV, pp. 802 and 820. Sarah Parks was pregnant at the time of her death. R., Vol. IV, p. 814. Her body and that of her unborn child were found in the apartment residence of Mr. and Ms. Parks. R., Vol. IV, p. 820. The residence was burned following the death of Sarah Parks; the fire caused damage to the dwelling structure and to the body of the deceased. R., Vol. IV, pp. 813 and 820. An investigation of the deaths and of the fire began immediately. R., Vol. IV, p. 820.

Forensic Investigation by State in Underlying Criminal Case. On 26 June 2009 forensic pathologist Jeffrey M. Reynolds, M.D., conducted an autopsy of the body of Sarah Parks. R., Vol. IV, p. 812. He was called in by the Latah County Coroner, who is neither a

physician nor a forensic pathologist. R., Vol. V, pp. 921-922, 924, 929, and 949-950. Dr. Reynolds concluded that Sarah Parks was deceased prior to the time her remains were burned by the fire in the residence. R., Vol. IV, p. 812-813. His conclusion as to the cause of death was "probable suffocation or strangulation." R., Vol. IV, p. 812.

Litigation of Underlying Criminal Case Prior to Plea Bargain. On 1 July 2009, one week after the death of his wife, Mr. Parks was charged by criminal complaint with two counts of murder in the first degree and one count of arson in the first degree. R., Vol. I, p. 87. Two attorneys were appointed to represent him. R., Vol. IV, p. 825; Tr., p. 291, L. 4 - p. 292, L. 14; and Tr., p. 328, LL. 6-19. Both attorneys participated in the defense of Mr. Parks at the preliminary hearing held on 25 September 2009. R., Vol. IV, pp. 824-825. At the conclusion of the preliminary hearing, the Magistrate Court bound over Mr. Parks on all three charges. R., Vol. V, p. 223, LL. 17-25.

The Magistrate Court admitted into evidence the affidavit of Dr. Reynolds stating that the cause of death was "probable suffocation or strangulation." R., Vol. V, pp. 109-110 and 117-118; R., Vol. IV, p. 829. Dr. Reynolds did not testify at the preliminary hearing. R., Vol. IV, pp. 824-827. In binding over Mr. Parks on the three felony charges, the Magistrate Court held, "[T]he physical evidence upon examination was consistent with death by suffocation or strangulation, particularly the petechial hemorrhaging in the lungs of uh both — both Ms. Parks and her — and her unborn child." R., Vol. V, p. 1045, LL. 4-8. The prosecutor had argued at the

close of the preliminary hearing, "[W]e know that she uh died by virtue of being strangled or suffocated." R., Vol. V, p. 1038, LL. 7-8. Defense counsel were well noticed as to the State's theory of the case, as well as to the forensic investigation upon which the State relied, and also of the impact of that evidence on a tribunal.

Absence of Forensic Investigation by Defense Counsel in Underlying Criminal Case.

Throughout the litigation of the underlying criminal case, the State's theory of the cause of death of Sarah Parks was unchallenged by the defense team; no expert opinion was obtained to review the findings of Dr. Reynolds. Tr., p. 359, LL. 15-17; p. 312, L. 24 - p. 313, L. 11; and p. 367, LL. 5-12. One of the lawyers ("Defense Counsel One") assigned to represent Mr. Parks determined upon reading the autopsy report of Dr. Reynolds that a defense expert in forensic pathology was necessary. Tr., p. 344, LL. 6-12. As between the two defense attorneys, Defense Counsel One undertook the job of finding a forensic pathologist for the defense of Mr. Parks. Tr., p. 310, L. 18 - p. 311, L. 7.

Defense Counsel One first contacted forensic pathologist Dr. Donndelinger. Tr., p. 331, LL. 5-10. Dr. Donndelinger was not provided with any specific facts Mr. Parks's case. Tr., p. 366, LL. 12-18. At no time did Defense Counsel One obtain any opinions from Dr. Donndelinger. Tr., p. 366, LL. 19-21. Dr. Donndelinger's professional services no longer included providing testimony, and so Defense Counsel One did not want to hire him. Tr., p. 331, LL. 9-10. The other lawyer on the defense team ("Defense Counsel Two") never spoke with Dr.

Donndelinger. Tr., p. 310, LL. 18-22.

Defense Counsel One next contacted forensic pathologist Dr. Grey, who was described as a medical examiner for the State of Utah. Tr., p. 331, LL. 11-13. Dr. Grey was not provided with a copy of the autopsy report of the State's expert, Dr. Reynolds. Tr., p. 361, LL. 2-4. Dr. Grey was not told the content of the autopsy report. Tr., p. 366, L. 22 - p. 367, L. 4. Dr. Grey did not provide an opinion regarding Dr. Reynolds's autopsy report. Tr., p. 361, LL. 5-7. Defense Counsel Two never spoke with Dr. Grey. Tr., p. 311, LL. 3-7.

Defense Counsel One subsequently prepared a motion seeking permission to hire Dr. Grey to assist in the defense of Mr. Parks. Tr., p. 331, LL. 14-15. He never filed the motion. Tr., p. 331, LL. 15-16. Drs. Donndelinger and Grey were the only forensic pathologists contacted by defense counsel. Tr., p. 366, LL. 22-24. No forensic pathologist was hired. Tr., p. 367, LL. 9-10 and p. 312, L. 24 - p. 313, L. 1. No opinion by a forensic pathologist was obtained by the defense team. Tr., p. 367, LL. 11-12 and p. 313, LL. 9-10.

The Critical Need for a Defense Investigation of the Cause of Death. The State's murder/arson case against Mr. Parks was a circumstantial one. R., Vol. V, p. 1044, L. 15. No witness claimed to have seen Mr. Parks kill his wife. No witness claimed to have seen Mr. Parks set fire to the Parkses' home. The State advanced no motive to explain why Mr. Parks would have wanted to kill his wife. *See generally*, R., Vol. IV, p. 824 - Vol. V., p. 1048 (transcript of preliminary hearing). In the circumstantial case against Mr. Parks, the State's forensic

investigation showing that Sarah Parks died by suffocation or strangulation was found by the Magistrate Court at the preliminary hearing to be one of the "compelling" and "undisputed" facts weighing against Mr. Parks. R., Vol. V, p. 1044, L. 11 - p. 1045, L. 10.

Mr. Parks told his lawyers more than once that he did not recall the event of his wife's death. Tr., p. 130, LL. 1-6 and p. 144, LL. 14-22 (testimony of Mr. Parks); Tr., p. 306, L. 21 - p. 307, L. 8 (testimony of Defense Counsel Two), and Tr. p. 363, L. 14 - 20 (testimony of Defense Counsel One). Defense Counsel One determined his client's claim of not remembering to be "bullshit." Tr., p. 365, LL. 5-24. More than ten times Defense Counsel One communicated to Mr. Parks that Defense Counsel One disbelieved Mr. Parks's assertions as to a lack of memory of the event of his wife's death. Tr., p. 365, L. 25 - p. 366, L. 11. Before advising Mr. Parks to make the plea bargain (Tr., p. 133, LL. 10-11), neither defense attorney asked Mr. Parks if he had killed his wife. Tr., p. 149, L. 22 - p. 150, L. 2.

What a Duly Diligent Forensic Investigation by the Defense Would Have Revealed.

The conclusions and methods of the State's forensic pathologist, Dr. Reynolds, were ripe for attack by a defense expert. As a part of the post-conviction process, board certified forensic pathologist Jonathan L. Arden, M.D., was hired to review the autopsy report prepared by Dr. Reynolds. Tr., p. 30, LL. 8-23. Dr. Arden has extensive qualifications including multi-year appointments as First Deputy Chief Medical Examiner in New York City and Chief Medical Examiner in Washington, D.C. *See* Tr., p. 10, L. 2 - p. 22, L. 23. As a forensic pathologist, he has

testified under oath over 800 times, generally on behalf of government entities. Tr., p. 22, LL. 5-17.

In addition to reviewing the autopsy report made by Dr. Reynolds, Dr. Arden also reviewed related documents in the underlying criminal case prior to forming an opinion about the findings and conclusions made by Dr. Reynolds. Tr., p. 31, L. 11 - p. 33, L. 23. Regarding the conclusions made by Dr. Reynolds as to the cause of death of Sarah Parks, Dr. Arden determined the following:

- "[T]he use of the petechial hemorrhages as indication of asphyxiation is actually entirely misplaced in this case." Tr., p. 42, LL. 2-4.
- "[G]eneralizing the petechia [sic–petechial] hemorrhages to all forms of asphyxia is also a mistake. That's actually an outmoded concept that's been pretty much debunk[ed] . . . ." Tr., p. 45, LL. 4-6. "There's an outmoded concept that hypoxia or not having adequate oxygen during asphyxia was an alternative explanation for causing petechia [sic–petechial] hemorrhages which actually isn't true. And so, No. 1, ascribing petechia [sic–petechial] hemorrhages to all forms of asphyxia is inaccurate." Tr., p. 45, L. 23 - p. 46, L. 3.
- "The petechia [sic–petechial] hemorrhages in this case that he relied upon were in locations that you don't get them based on strangulation." Tr., p. 46, LL. 8-10.
- "You don't get petechia [sic–petechial] hemorrhages with smothering." Tr., p. 46,

LL. 12-13.

- Dr. Reynolds's conclusions based on the blistering of the skin of the decedent are outmoded in the field of forensic pathology by "at least decades." Tr., p. 82, L. 25 - p. 84, L. 3.
- There is no support in the field of forensic pathology for Dr. Reynolds's conclusion that the decedent suffered a respiratory arrest prior to a cardiac arrest. Tr., p. 68, LL. 4-18. In over thirty years of practice, Dr. Arden had never seen another forensic pathologist draw such a conclusion. *Id*.
- By concluding that the cause of death of Sarah Parks was probable suffocation or strangulation, Dr. Reynolds muddled two different kinds of asphyxia and also failed to state a conclusion to a reasonable degree of medical certainty. Tr., p. 48, L. 21 - p. 49, L. 8. "[S]trangulation and smothering or suffocation are two different things." Tr., p. 50, LL. 3-4.
- The decedent's internal neck structures, including the hyoid bone, (a) were preserved despite the fire, (b) were analyzed at the autopsy, (c) were photographed in part, and (d) were found to be intact. Had they <u>not</u> been intact, that finding would have supported a conclusion of death by strangulation. Tr., p. 56, L. 15 - p. 57, L. 25.
- In this case there is "no positive evidence for either" strangulation or smothering/

suffocation. Tr., p. 49, LL. 16-18. *See also* Tr. p. 63, L. 21 - p. 64, L. 3 and p. 65, LL. 13-19.

- The cause of death in this case should have been stated as "undetermined" because of the absence of evidence on which to make a conclusion. Tr., p. 75, LL. 11-15. *See also* Tr. p. 74, L. 16 - p. 76, L. 9.

In addition to the above, as to the methodology of the autopsy conducted by Dr. Reynolds, Dr. Arden concluded the following:

- Dr. Reynolds failed to document photographically the findings described in his autopsy report. This type of photographic documentation is a required procedure for a forensic autopsy. Tr., p. 39, LL. 5-11. This failure extends to the petechial hemorrhages upon which Dr. Reynolds relied. Tr., p. 39, LL. 12-21.
- Dr. Reynolds formed his conclusions prior to having all of the evidence before him. Tr., p. 39, L. 22 - p. 40, L. 2. Specifically, Dr. Reynolds did not wait for the results of the toxicological examination of the decedent's blood before making his conclusions about the cause of death. Tr., p. 81, LL. 13-21. This was "highly inappropriate practice." Tr., p. 82, LL. 1-2.
- Dr. Reynolds failed to weigh any of the decedent's organs, a standard procedure in any forensic autopsy. Tr., p. 34, L. 24 - p. 35, L. 4.

Dr. Arden testified at the post-conviction evidentiary hearing before the District Court on

8 February 2016. Tr., p. 5. His testimony was not rebutted at the evidentiary hearing by any physician or forensic pathologist. *Id*. At the evidentiary hearing Dr. Arden pointed out additional flaws in the autopsy report prepared by Dr. Reynolds, but the above list is sufficient to demonstrate what defense counsel could have learned about potential avenues for defending Silas Parks had they investigated the cause of the death of his wife.

The Plea Bargain. Having never obtained an expert opinion to verify or challenge the State's version of the primary victim's cause of death, defense counsel nonetheless advised Mr. Parks to make a plea bargain. Tr., p. 133, LL. 10-11. This recommendation occurred during the course of a mediation. Tr., p. 133, L. 20 - p. 133, L. 11. The mediation occurred on the same day as the change of plea hearing. *See generally* Tr., pp. 134-135. The 30 March 2010 plea bargain exposed Mr. Parks to a 40-year prison sentence. R., Vol. V, pp. 1065-1068 and Vol. VI, p. 1080. The plea bargain was made approximately six weeks before the 10 May 2010 jury trial was scheduled to begin. *See* R., Vol. VI, p. 1090. The bargain was that the State reduced the two counts of first-degree murder to two counts of voluntary manslaughter, and that the sentences for the deaths would run concurrently. R., Vol. V, pp. 1065-1068. The first-degree arson charge was not reduced, nor was its sentence constrained. *Id*.

Absence of Allocution. Prior to accepting Mr. Parks's guilty pleas at the change of plea hearing, the District Court did not require Mr. Parks to make an allocution explaining the acts he performed which constituted criminal conduct. R., Vol. VI, p. 1082, L. 2 - p. 1083, L. 11. Prior

to the change of plea hearing Defense Counsel Two told Mr. Parks that he would "get it so that I wouldn't have to say any details at that date." Tr., p. 134, LL. 21 - 25. The prosecutor and defense counsel appear to have made a deliberate plan to ask the District Court not to require an allocution as a part of accepting the guilty pleas. R., Vol. VI, p. 1082, LL. 11-19. Instead, at the change of plea hearing the prosecutor told the District Court that in the future "Mr. Parks will allocute as to the details." R., Vol. VI, p. 1082, L. 13. The District Court questioned each defense counsel individually as to whether the defense would stipulate to the existence of a factual basis for the guilty pleas. R., Vol. VI, p. 1083, LL. 7-9. "Yes, Your Honor" were the identical replies from Mr. Parks's attorneys. R., Vol. VI, p. 1083, LL. 10-11.

Pressures Perceived by Mr. Parks. Having made the plea bargain under which he could receive a 40-year prison term, Mr. Parks felt pressured to manufacture a "memory" of the event of his wife's death. "My lawyers strongly suggested that I take the deal." Tr., p. 133, LL. 10-11. Mr. Parks further testified at the evidentiary hearing, ". . . I really didn't believe that I caused Sarah's death. And then I felt pressured to do a plea bargain because I was going to be convicted no matter what, and then I felt pressured to add to my story to make it more in line with Dr. Reynolds' [sic—Reynolds's] report." Tr., p. 137, LL. 1-6.

As stated above, Mr. Parks told his lawyers more than once that he did not recall the event of his wife's death. Tr., p. 130, LL. 1-6 and p. 144, LL. 14-22 (testimony of Mr. Parks); Tr., p. 306, L. 21 - p. 307, L. 8 (testimony of Defense Counsel Two), and Tr. p. 363, L. 14 - 20

(testimony of Defense Counsel One). Mr. Parks testified at the post-conviction evidentiary hearing that he did not at the time of his underlying criminal case have any recollection of the death of his wife. Tr., p. 130, LL. 1-3. Mr. Parks also testified at the post-conviction evidentiary hearing that he does not now have any recollection of the death of his wife. Tr., p. 130, LL. 4-6. As stated above, more than ten times Defense Counsel One communicated to Mr. Parks that Defense Counsel One did not believe Mr. Parks. Tr., p. 365, L. 25 - p. 366, L. 11.

Defense Counsel One admitted to the following:

- "I want my client to admit it. When Silas said he couldn't recall anything, I told him that Judge Brudie comes from the same cut of cloth as I do." Tr., p. 364, LL. 12-15. *See also* Tr., p. 143, LL. 8-22 (describing counsel's frequent statements that he and the judge had worked together as lawyers in the past).
- Defense Counsel One "absolutely" told Mr. Parks "over and over and over that an admission could be the difference between a long sentence and a short sentence." Tr., p. 364, LL. 17-20.
- He told this to Mr. Parks at the mediation, before Mr. Parks completed the presentence questionnaire, and before the sentencing hearing. Tr., p. 364, L. 21 - 365, L. 4.

The Hazy Recollection. The Idaho Department of Correction presentence investigator did not receive Mr. Parks's original responses written in the presentence questionnaire. Mr. Parks

completed a first draft of his responses to the presentence questionnaire and met with his attorneys to discuss his answers. Tr., p. 141, L. 16 - p. 143, L. 4. He was told that "there had to be something more." Tr., p. 142, LL. 15-18. Mr. Parks explained his reaction as follows: "At that point when they were telling me there had to be more there, must be more, I was — I was sobbing, I was telling them I don't know. They insisted and I — I eventually gave them what I thought they wanted to hear." Tr., p. 144, LL. 18-22.

When Mr. Parks gave his attorneys what he thought they wanted to hear, he made a statement regarding having his hands on his wife's throat. As will be explained next, at the evidentiary hearing the statement was described by Mr. Parks as "vague images" and by Defense Counsel Two as a "hazy recollection."

Mr. Parks said he had "some vague images of my hands wrapped around her throat" even though he did not actually have such a memory. Tr., p. 144, L. 23 - p. 145, L. 11. After making that statement, Mr. Parks was given another presentence questionnaire which he then completed. Tr., p. 145, LL. 12-19. On this second version of his response to the presentence questionnaire, to describe the event of his wife's death, Mr. Parks wrote, "What happened next, I'm not fully sure. I have a couple of vague images though I don't know if they are real or if my mind is just trying to fill in the gaps with what I have been told." Tr., p. 146, LL. 5-14.

At the post-conviction evidentiary hearing, neither Defense Counsel One nor Defense Counsel Two rebutted Mr. Parks's testimony that his first version of the presentence

questionnaire was rejected and that he submitted his second draft to the Idaho Department of Correction. *See generally* Tr., pp. 290-373.[1]

What Mr. Parks described as "vague images" Defense Counsel Two described as a "hazy recollection." Tr., p. 307, LL. 9-24. The testimony at the evidentiary hearing was sharply contradictory as to when the "hazy recollection" statement was made by Mr. Parks. As set forth immediately above, Mr. Parks testified that the statement was made after the mediation but before his presentence questionnaire was given to the Idaho Department of Correction. Defense Counsel Two testified that the statement was made prior to the mediation. Tr., p. 308, LL. 9-16. Defense Counsel Two took notes at the meeting during which the "hazy recollection" statement was made; however, the attorney neglected to date his notes, and so the notes are not dispositive. Tr., p. 307, L. 25 - p. 308, L. 8.

In rebuttal testimony at the evidentiary hearing, Mr. Parks related the other events recorded those attorney notes to specific occurrences which took place after the change of plea hearing, thereby solidifying his recollection that the "hazy recollection" statement was made after the mediation. Tr., p. 381, L. 10 - p. 385, L. 15.

Whether the "hazy recollection" statement was made before or after the day of the mediation and plea bargain is the primary factual dispute in this case. The overwhelming majority of the facts of this case are undisputed, as the above references to the record and

[1] The referenced pages contain the testimony of both counsel at the evidentiary hearing.

transcript demonstrate. In its findings of fact and conclusions of law filed on 29 April 2016, the District Court did not make a specific finding resolving this factual dispute. *See* R., Vol. VI, pp. 1267-1274. For the reasons set forth in the argument below, the resolution of this factual dispute is not necessary because a vague statement made under the circumstances of this case is insufficient to relieve defense counsel of the duty to duly investigate.

Prejudice Caused to Mr. Parks by the Failure to Investigate. Mr. Parks believed he had no reasonable alternative to making the plea bargain. Tr., p. 137, LL. 2-4. He did not know from personal knowledge how his wife had died, and he was aware that Dr. Reynolds had concluded that Sarah Parks had died by either strangulation or suffocation. Tr., p. 129, LL. 13-25. Mr. Parks did not believe he had caused his wife's death, and he would not have made the plea bargain had he known that a forensic investigation by his appointed counsel would have revealed facts and conclusions such as those explained by Dr. Arden. Tr., p. 136, L. 21 - p. 138, L. 8.

At sentencing the District Court imposed fixed concurrent 15-year sentences on the two counts of voluntary manslaughter. R., Vol. VI, pp. 1145-1148. The sentence on the arson count is 5 year fixed and 20 years indeterminate. *Id*. As as result of the plea bargain, Mr. Parks is serving a net sentence of 20 to 40 years in the custody of the Idaho Department of Correction. *Id*.

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ISSUES PRESENTED ON APPEAL

A. Does defense counsels' representation fall below constitutional standards mandating that the defendant's guilty pleas and plea bargain be set aside when (1) the cause of death in a first-degree murder prosecution is not obvious and is dependent upon scientific evaluation, (2) the accused person is unwilling or unable to explain the cause of death to his lawyers, (3) defense counsel fail to investigate the cause of death and allow the prosecution's forensic investigation to go unchallenged, (4) defense counsel advise the client to accept a plea bargain which results in the imposition of a 20- to 40-year prison sentence, (5) the District Court accepts that plea bargain without requiring the defendant to allocute to facts which support the guilty pleas, and (6) scientific evidence rebutting the prosecution's theory of the cause of death was readily available had an investigation by defense counsel occurred?

B. Do the newly presented material facts not previously presented and heard require vacatur of the convictions and/or sentences in the interest of justice pursuant to I.C. § 19-4901(a)(4)?

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ARGUMENT

A.

The Rule 11 plea agreement should be rescinded, and the Petitioner's guilty pleas should be withdrawn, based upon ineffective assistance of counsel prior to and during plea negotiations because of the failure by counsel to adequately investigate the cause of the primary victim's death.

1.

Standard of review of District Court's decision. In a review of a decision denying post-conviction relief following an evidentiary hearing, an "appellate court will not disturb the lower court's factual findings unless the factual findings are clearly erroneous." *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (citation omitted); *see also* Idaho Rule of Civil Procedure 52(a)(7)[2]. An appellate court "exercises free review of the district court's application of the relevant law to the facts." *Dunlap*, 141 Idaho at 56, 106 P.3d at 382 (citation omitted). This case presents a question of law, not fact.

2.

Standard of law regarding ineffective assistance of counsel. The applicable standard of law in this matter is well known and often applied. Under *Strickland v. Washington*, 466 U.S.

[2] The rule states: "Setting aside findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."

668, 104 S.Ct. 2052 (1984), Mr. Parks bears the burden of meeting a two-prong test. First, Mr. Parks must show that his counsels' performance was so deficient that it resulted in Mr. Parks being denied the right to counsel guaranteed by the Sixth Amendment. *Id*. at 687, 2064. This prong is interpreted using an "objective standard of reasonableness." *Id*. at 688, 2064. Second, Mr. Parks must show prejudice resulting from the deficient performance of counsel. *Id*. at 687, 2064.

As to the first prong, deficient performance, the petitioner must overcome the "strong presumption that counsel's performance was within the wide range of reasonable professional assistance" and demonstrate that counsel's representation fell below an objective standard of reasonableness. *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App. 1990); *see also Strickland*, *supra.* "[T]actical or strategic decisions of trial counsel 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." *Matthews v. State*, 136 Idaho 46, 49, 28 P. 3d 387, 390 (Ct.App. 2001) (emphasis added), citing *Howard v. State*, 126 Idaho 231, 233, 880 P. 2d 261, 263 (Ct.App. 1994).

In evaluating the second prong of the *Strickland* test, i.e., prejudice, the quantum of prejudice which must be proven is that the prejudice was so serious as to deprive the petitioner of a fair trial, in other words, "a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The petitioner must show a "reasonable probability" that but for the deficient

performance of counsel, "the result of the proceeding would have been different." *Id*. at 694, 2068. This "prejudice" requirement focuses on whether counsel's ineffective performance impacted the outcome of the case. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71 (1985); *see also Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct.App. 1992).

It should be noted, however, that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland* at 693, 2068. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694, 2068. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694, 2068.

The *Strickland* test imposes a significant burden for any post-conviction petitioner to meet, but it is a burden that is satisfied by the unusual facts of this case.

3.

The *Strickland* test applies to the plea bargain process. "The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him." *Estrada v. State*, 143 Idaho 558, 562, 194 P.3d 833, 837 (2006), citing

United States v. Wade, 388 U.S. 218, 224, 87 S.Ct. 1926, 1931 (1967) and *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981). "It is well settled that the right to the effective assistance of counsel applies to certain steps before trial." *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1405 (2012) (emphasis added).

> Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. *See Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea).

Frye, 132 S.Ct. at 1405. "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *Id*. at 1405, citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985) (emphasis added).

3(a).

A guilty plea by the accused does not supersede errors by defense counsel in failing to provide the effective assistance the Sixth Amendment requires. "Although *Strickland v. Washington* typically has been applied to claims of ineffective assistance occurring at trial or sentencing, its standards are equally applicable to ineffective assistance claims arising out of the plea process." *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct.App. 1992) (citation omitted). A knowing and voluntary guilty plea does not supersede errors by defense counsel. *Frye,* 132 S.Ct. at 1406. A post-conviction petitioner under *Strickland* may challenge "the course

of legal representation that preceded it [the guilty plea] with respect to other potential pleas and plea offers." *Id.* at 1406. Even if at "the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea . . . nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered." *Id.* at 1406, citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010).

The rationale for this extension of *Strickland* is that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye,* 132 S.Ct. at 1407.

> "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it <u>is</u> the criminal justice system."

Id. at 1407, quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992) (emphasis in original). "In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S.Ct. at 1486.

3(b).

Under *Hill*, the "prejudice" prong of the Strickland test focuses on whether ineffective assistance of counsel affected the outcome of the plea bargain process. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366 (1985) citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); and *Machibroda v. United States*, 368 U.S. 487, 493 (1962). In *Hill* the petitioner "signed a written 'plea statement' indicating that he understood the charges against him and the consequences of pleading guilty, that his plea had not been induced 'by any force, threat, or promise' apart from the plea agreement itself, that he realized that the trial judge was not bound by the plea agreement and retained the sole 'power of sentence,' and that he had discussed the plea agreement with his attorney and was satisfied with his attorney's advice." *Hill,* 474 U.S. at 54. Further, the last two lines of the "plea statement," above the petitioner's signature, read: "I am aware of everything in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged." *Id*. at 54. Hill also appeared before the trial judge at an allocution hearing and described the events giving rise to the offense charged. *Id*. at 54.

Hill was convicted and sentenced based on his guilty pleas, but he later attacked his conviction in post-conviction proceedings based upon ineffective assistance of counsel prior to

the admission of guilt. *Id*. The United States Supreme Court held that the *Strickland* standard must be applied in analyzing an ineffective assistance claim arising out of the plea process: "Although our decision in *Strickland v. Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective assistance claims arising out of the plea process." *Hill*, 474 U.S. at 57. "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58.

Under the *Hill* holding, in the context of challenges to guilty pleas, the first part of the *Strickland* test remains focused on "the standard of attorney competence." *Id*. at 58. "The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 58 (emphasis added).

This type of showing is not the only method of demonstrating the prejudice of ineffective assistance in the plea bargain context. "*Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations." *Frye*, 132 S.Ct. at 1409. It is, though, the type of showing which is relevant to the

case at bar because Mr. Parks would not have pleaded guilty, and would have insisted on going to trial, but for his counsels' errors.

4.

In the present case, trial-level counsel's performance was deficient because counsel failed to hire a forensic pathologist to investigate and challenge the conclusions of the prosecution's pathologist, thus satisfying the first prong of *Strickland*.

4(a).

Failure to investigate a substantial issue in a case constitutes deficient performance. The failure to investigate is not a reasonable trial strategy. *See Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) and *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999). *See also Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006); *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 2541 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463 (2005) (failure to investigate material relied upon by prosecution was unreasonable); and *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 1514 (2000) (unreasonable failure to conduct thorough investigation).

Not only is a failure to investigate not a reasonable trial strategy, it is well settled that a failure to investigate a substantial issue in a case constitutes ineffective assistance of counsel.

> Although there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and '[j]udicial scrutiny of counsel's performance must be highly deferential,' *Strickland*, 466 U.S. at 689,

> 104 S.Ct. at 2055, counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.

Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (emphasis in original). In *Sanders* the Ninth Circuit relied in part upon a prior holding by another circuit court of appeals, stating:

> Other Circuits agree that the failure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that '[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made.'

Sanders at 1457, citing *U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (emphasis and editorial comment in original).

Moreover, a failure to investigate may impact all other decisions made in a case. *See Murphy v. State*, 143 Idaho 139, 146, 139 P.3d 741, 748 (Ct. App. 2006). The duty to investigate requires the defense to explore all avenues leading to facts relevant to the merits of the case. *Id*.

The scope of the investigation required depends upon the facts of the case known to defense counsel. "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527 (2003). "Even assuming [trial court counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation

automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* at 527, citing *Strickland*.

The reliability of trial counsel's strategic decisions may be undercut by inadequate investigation. "When counsel's trial strategy decisions are made upon the basis of inadequate preparation, ignorance of the applicable law, or other shortcomings capable of objective evaluation, the defendant may very well have been denied effective assistance of counsel." *Baldwin v. State*, 145 Idaho 148, 154, 177 P.3d 362, 368 (2008), quoting *Aragon v. State*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) (internal quotation marks omitted). A similar holding was made by the Eighth Circuit Court of Appeals in a 1993 ineffective assistance case. "Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (citation omitted).

Deference to trial counsel's strategic choices is diminished by inadequate investigation. "Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities." *Id*. (emphasis added). "We allow lawyers considerable discretion to make strategic decisions about what to investigate, but only after those lawyers 'have gathered sufficient evidence upon which to base their tactical choices.'" *Duncan v. Ornoski,* 528 F.3d 1222, 1235 (9th Cir. 2008) citing *Jennings v. Woodford*, 290 F.3d 1006, 1014

(9th Cir. 2002) (emphasis in original).

4(b).

Reasonable investigation may include the duty to hire and consult experts. "The American Bar Association (ABA) standards reflect prevailing norms of practice and are guides in determining the nature and extent of the duty to investigate. . . ." *Murphy v. State*, 143 Idaho 139, 146, 139 P.3d 741, 748 (Ct.App. 2006), citing ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, § 4-4.1 (3d ed. 1993) and *Mitchell v. State*, 132 Idaho 274, 971 P.2d 727 (1998). "Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." *Frye*, 132 S.Ct. at 1408 (referencing ABA Standards for Criminal Justice).

The codified standards of the American Bar Association appear in the publication ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Third Edition (1993). Defense Standard 4-4.1, which is entitled, "Duty to Investigate" includes that,

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Id. (emphasis added). The following are excerpts from the commentary included by the American Bar Association immediately after Standard 4-4.1[3]:

- Facts form the basis of effective representation. Effective representation consists of much more than the advocate's courtroom function per se.
- The resources of scientific laboratories may be required to evaluate certain kinds of evidence: analyses of fingerprints or handwriting, clothing, hair, or blood samples, or ballistics tests may be necessary. Neglect of any of these steps may preclude the presentation of an effective defense.
- The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.

Id. at pp. 181-183 (emphasis added).

In *Foster v. Lockhart*, *supra*, ineffective assistance was found where counsel failed to investigate a possible impotency defense to a rape charge. The central failure by counsel was the failure to hire an expert. The Eighth Circuit Court of Appeals held,

> The attorney's decision not to investigate an impotency defense further was unreasonable because the attorney lacked a reasonable basis for that decision. The attorney's investigation consisted of one telephone call to an unidentified urologist, who merely told the attorney an impotent person can produce and emit sperm. The attorney did not ask the urologist whether an impotent person could commit a rape in only a few minutes, or explain the situation in any way. If the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story, and witnesses who could confirm the medical evidence.

[3] The front matter of the publication states, "The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the ABA House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards."

9 F.3d at 726.

The critical role of expert assistance and testimony in certain cases was elucidated by the Ninth Circuit Court of Appeals in *Duncan, supra*:

> Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance. *See Caro v. Woodford*, 280 F.3d 1247, 1254-56 (9th Cir. 2002) (holding that counsel was deficient for failing to consult an expert and present expert testimony about the physiological effect of toxic chemical exposure on defendant's brain); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding deficient performance when counsel failed to hire an expert to rebut the prosecution's expert testimony about physical evidence linking defendant to the crime scene when the defense theory was that defendant was not at the crime scene), remand order modified by stipulation, 268 F.3d 485 (7th Cir. 2001) (vacated at request of parties when settlement was reached); *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986) (holding that counsel's failure to depose the State's expert, and more important, failure to consult with an expert in order to contradict key evidence of the "most crucial aspect of the trial" was deficient), *aff'd Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987) (per curiam).

528 F.3d at 1235 (emphasis added). The *Duncan* court found ineffective assistance because trial counsel's "failure to consult a serologist when there existed potentially exonerating blood evidence, and his subsequent failure to have Duncan's blood tested and present the results of those tests at trial were unreasonable under prevailing professional norms." *Id*. at 1235. "Additionally, the central role that the potentially exculpatory blood evidence could have played in Duncan's defense increased [counsel's] duty to seek the assistance of an expert." *Id*. at 1236.

In *Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct.App. 2006), "Murphy's counsel

knew the forensic pathologist's opinion would be at the very heart" of the state's case. *Id*. at 147. Shortly before Murphy's trial, the prosecution's expert changed his opinion about the manner of the victim's death from 'indeterminate' to 'homicide' but Murphy's trial counsel did not request a continuance or "obtain a forensic pathologist to aid the defense." *Id*. at 144. In finding the first prong of the *Strickland* test satisfied, the Court held, "Under our standard for adequate performance, Murphy's trial counsel rendered deficient service when he failed to ask for a continuance to consult with a pathologist after it became clear that the state's expert would change his manner-of-death opinion from indeterminate to homicide." *Id*. at 147 (citation omitted). The Court reasoned that the prosecution expert's "opinion at trial was not without weakness" and that "[c]onsultation with another pathologist may have enabled Murphy's counsel to present a contrary expert opinion or to more effectively cross-examine Dr. Patterson regarding his changed expert testimony." *Id*. at 147.

In *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) (on remand from United States Supreme Court), ineffective assistance of counsel was found where trial counsel hired an arson expert witness of limited experience, failed to hire another expert when the first selected defense expert witness could not rebut the state's arson experts, and at trial "did not introduce any competing scientific evidence to rebut the State's findings." 498 F.3d at 348. "[W]e can discern no strategic reason why counsel would have so readily ceded this terrain to the prosecution." *Id*. at 363 (emphasis added). "The point is not that [trial counsel] had a duty to shop around for

another expert who would refute the conclusions of DuBois [the relatively unqualified expert witness] and the State's experts. The point is that [trial counsel] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion." *Id*. at 363.

4(c).

The failure to investigate in Mr. Parks's underlying criminal case involved a critical issue of which defense counsel had adequate notice. At the preliminary hearing in the underlying criminal case, the presiding judge stated, "[T]he physical evidence upon examination was consistent with death by suffocation or strangulation, particularly the petechial hemorrhaging in the lungs of both Ms. Parks and her unborn child." This statement not only put trial-level defense counsel on notice of the critical nature of the forensic evidence, but also highlights the impact of the failure to investigate on the outcome of this case. At the evidentiary hearing Dr. Arden clearly explained the rebuttal evidence which would have been available to defense counsel had they investigated.

More importantly, Dr. Arden explained in great detail at the evidentiary hearing that, contrary to the assertions of Dr. Reynolds, the undocumented petechial hemorrhaging which made a substantial impression on the presiding judge at the preliminary hearing does not in fact prove death by strangulation or suffocation. This evidence would have impacted not only the

subjective views of Mr. Parks, but also the bargaining power of both sides at the plea negotiation during the mediation.

This Court need not weigh line by line the testimony of Dr. Arden against the assertions of Dr. Reynolds. The evidence adduced from Dr. Arden at the evidentiary hearing is more than sufficient to demonstrate that Dr. Reynold's conclusions were subject to vigorous challenge had defense counsel undertaken the lawfully required investigation of the facts of the case. *Strickland* only requires Mr. Parks to show "a probability sufficient to undermine confidence in the outcome." *Id*. at 694. The above analysis demonstrates that no court should have confidence in the outcome of the plea bargain in this case.

4(d).

In the present case, the first prong of the *Strickland* test is satisfied because trial-level counsel failed to hire or consult a forensic pathologist. Like *Richey*, counsel in this case allowed the prosecution's expert witness to paint the only picture of the alleged crime. Like *Richey*, counsel in this case stood idly by while the prosecution used science to its advantage before the court when that scientific evidence could have and should have been refuted by one or more defense experts. Mr. Richey's ineffective counsel did, at least, hire an arson expert, whereas counsel in this case failed to hire or otherwise obtain any opinion from any expert in forensic pathology.

The failure to obtain any expert opinion at all on a critical issue makes this case even more compelling than *Richey*. In making its holding of ineffective assistance of counsel on remand from the United States Supreme Court, the Sixth Circuit Court of Appeals opined: "True, Richey's counsel retained DuBois [the relatively unqualified expert witness] to review the State's arson evidence, so this case does not exemplify that most egregious type, wherein lawyers altogether fail to hire an expert." *Id*. at 362 (emphasis added).

The case at bar is exactly what the Sixth Circuit Court of Appeals held exemplifies "the most egregious type" of ineffective assistance because trial counsel altogether failed to hire an expert in forensic pathology. Counsels' failure fell below the ABA Standards discussed above, and the failure is similar to those discussed in the *Duncan*, *Foster*, *Murphy*, and *Richey* cases above. The facts of this case are evocative of those in *Murphy*, *supra*, although the reversal by the Court of Appeal in *Murphy* involved a summary dismissal of a post-conviction petition, not an adverse result after an evidentiary hearing. *Murphy*, 143 Idaho at 149, 139 P.3d at 751. The reasoning of *Murphy*, however, as to the standard for effective assistance of counsel is well applicable to this case. Accordingly, the first step of the *Strickland* analysis is satisfied in this case.

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5.

The ineffective assistance of counsel prejudiced Mr. Parks, mandating the rescission of his plea bargain and the withdrawal of his guilty pleas. The prejudice to Mr. Parks in the plea bargain context was severe, and the second prong of the *Strickland* test is satisfied. Most importantly, Mr. Parks did not believe he had caused his wife's death, and he would not have made the plea bargain had he known that a forensic investigation by his appointed counsel would have revealed facts and conclusions such as those explained by Dr. Arden. Tr., p. 136, L. 21 - p. 138, L. 8.

Prior to making his plea bargain, Mr. Parks had access to only one source of expert testimony on the issue of the cause of his wife's death. That testimony came in the form of an affidavit by the State's expert, Dr. Reynolds, who opined, "Cause of death: Probable suffocation or strangulation." As Mr. Parks explained to his counsel before and after entering a plea, he could not remember the occurrence of his wife's death.

Thus, Mr. Parks entered into plea negotiations six weeks before his trial under the reasonable belief that the only scientific evidence a jury would hear about the cause of his wife's death was that he had probably strangled her or had probably suffocated her. As set forth in detail above in the factual summary, a defense expert in forensic pathology such as Dr. Arden could have persuasively undercut the prosecution's suffocation-or-strangulation theory. A defense expert could also have revealed the flaws in Dr. Reynolds's methodology and conclusions,

thereby further raising doubt as to the validity of the State's theory.

Because the prosecution would have been unable to produce at trial any witness who claimed to have seen Mr. Parks kill his wife or set the fire, the importance of the expert testimony was magnified. It was the prosecution's burden to prove that Mr. Parks killed his wife with a criminal *mens rea*, not Mr. Parks's burden to prove his innocence. If doubt were cast on the suffocation-or-strangulation theory, because of the heavy burden of proof borne by the State, it would have benefitted Mr. Parks not only at trial, if one occurred, but also during the plea bargaining process. Thus, the performance of defense counsel was both deficient and prejudicial as set forth in *Strickland*, and Mr. Parks's plea bargain should be rescinded and his guilty pleas set aside.

B.

The newly presented material facts not previously presented and heard require vacatur of the convictions and/or sentences in the interest of justice pursuant to I.C. § 19-4901(a)(4).

Although the above analysis is sufficient to resolve this matter in favor of Mr. Parks on constitutional grounds rooted in the Sixth Amendment right to counsel, the reasoning set forth above applies with equal force in the context of Idaho Code § 19-4901(a)(4). It states, "Any person who has been convicted of, or sentenced for, a crime and who claims: . . . (4) [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the

conviction or sentence in the interest of justice . . . may institute, without paying a filing fee, a proceeding under this act to secure relief."

This sub-section of I.C. § 19-4901, part of the Uniform Post-Conviction Procedure Act[4], should be read in concert with the remaining sub-sections of the statute in order to interpret the meaning of sub-section (4). Idaho statutes must be interpreted in the following manner:

> Our objective when interpreting a statute is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the statute's plain language. This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings. When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction.

State v. Owens, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015) (emphasis added; internal quotation marks and citations omitted).

Looking to the plain language of I.C. § 19-4901, in addition to the grounds for post-conviction relief set forth in sub-section (4), the statute also provides grounds for relief in six other sub-sections, as follows:

> (1) "the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state";
>
> (2) "the [trial] court was without jurisdiction to impose sentence";
>
> (3) "the sentence exceeds the maximum authorized by law";
>
> (5) the petitioner's "sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is

[4] *See* I.C. § 19-4911.

otherwise unlawfully held in custody or other restraint";
(6) the petitioner is innocent (subject to other procedural restrictions); and
(7) when other established grounds for collateral attack lie.

See I.C. 19-4901(a). In order to give effect to the legislature's clearly expressed intent, sub-section (4) must be interpreted to have a meaning different from the extensive list of remedies provided in sub-sections (1) through (3) and (5) through (7).

Thus, the plain language of sub-section (4), i.e., "material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice", is a broad grant of authority from the legislature the judicial branch to ensure that justice is done in criminal proceedings in the State of Idaho. In this case, the material facts not previously presented and heard are the failure by the defense counsel to duly investigate, Dr. Arden's findings and conclusions demonstrating a bona fide defense, the unusual pressures placed on Mr. Parks by counsel, and the District Court's failure to require a factual admission from Mr. Parks at the change of plea hearing (at the joint request of the prosecution and the defense attorneys). No single fact carries the day for Mr. Parks. It is the sum of these factors which requires vacatur of the conviction in the interest of justice not merely for the benefit of Silas Parks, but for the benefit of all who are served by the indigent defense system in the State of Idaho as well as for the citizenry as a whole.

Allowing a conviction such as this one to stand would set a precedent with the potential

to substantially increase the probability of wrongly incarcerating innocent persons. If all of the factors in this case come together and are repeated in future cases, two important safeguards to citizens will be weakened. The first safeguard which will be affected is a lawyer's duty to provide effective representation in accordance with Sixth Amendment standards.

An equally important safeguard is a District Court's obligation to ensure that there exists a factual basis for guilty pleas in felony cases. In this case, had the District Court inquired of Mr. Parks as to the factual basis for the death of his wife, and had Mr. Parks responded by repeating his prior statements to his lawyers that he did not remember, it is a near certainty that the plea agreement would have been rejected. More troubling is that the prosecution and defense lawyers appear to have planned in advance of the change of plea hearing to avoid having Mr. Parks allocute to the specific facts which formed the basis of the alleged criminal conduct.

Allowing the lawyers in a case to stipulate to an unstated factual basis for the entry of a felony guilty plea is a dangerous procedure in any criminal case, as the case at bar clearly demonstrates. Such a stipulation does not enhance reliability of a guilty plea; it does the opposite. Such a stipulation does not inform a court or a victim as to what acts the defendant performed. These types of stipulations do, however, ease the processing of citizens through the criminal justice system because they save time for the lawyers and judges whom the public have entrusted with administering the justice system. It is a poor trade, and it is one which does not serve the public in any material way. The complexion of this entire multi-year case could have

been changed in a few minutes' time with the following question at the change of plea hearing held on 30 March 2010: "Mr. Parks, what did you do to commit the crimes to which you have just tendered pleas of guilty?"

To clarify, the basis for vacatur under I.C. § 19-4901(a)(4) is not merely the absence of allocution. Rather, this Court should hold that the basis for vacatur is the absence of allocution combined with the other factors detailed above. The public will be well served if District Courts throughout the State of Idaho are deterred from allowing lawyers to stipulate to unstated factual bases for felony pleas of guilty, as was done in this case. The legal process will become more transparent to both criminal defendants and to victims of crimes. The cost to judges and lawyers working on cases will be the addition of several minutes of on-record time per change-of-plea hearing. This is a small cost to bear in order to enhance public confidence in the integrity of the justice system in the State of Idaho.

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CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's final judgment dismissing the petition for post-conviction relief, hold that the Rule 11 plea agreement in State of Idaho v. Silas B. Parks, Latah County Case No. CR 2009-03162, must be rescinded and that the guilty pleas entered by the Petitioner in that matter pursuant to the plea agreement must be set aside, and remand this matter to the District Court for further proceedings consistent with those holdings.

DATED this 5th day of May 2017.

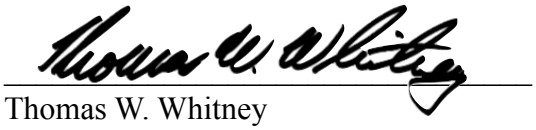
WHITNEY & WHITNEY, LLP

By: Thomas W. Whitney
Attorney for Appellant Silas B. Parks

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May 2017 a true and correct copy of the foregoing document was served on the following by the method indicated.

Mr. Lawrence G. Wasden Idaho Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[x] [ ] [ ] [x]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Email: ecf@ag.idaho.gov
Hon. Jeff Brudie, District Judge Nez Perce County Courthouse P.O. Box 896 Lewiston, Idaho 83501	[x] [ ] [ ] [x]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Email: jbrudie@co.nezperce.id.us
Mr. William W. Thompson, Jr. Latah County Prosecuting Attorney Latah County Courthouse P.O. Box 8068 Moscow, Idaho 83843	[x] [ ] [ ] [x]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Email: mvowels@latah.id.us, brudley@latah.id.us
Mr. Silas B. Parks IDOC #97043 Idaho Correctional Institution, Orofino, C1 381 W. Hospital Dr. Orofino, Idaho 83544	[x] [ ] [ ] [ ]	U.S. Mail, first class postage prepaid Hand delivery Facsimile Email



Thomas W. Whitney