

**CLARITY AND BALANCE: APPELLATE REVIEW
OF HARMLESS ERROR, FUNDAMENTAL
ERROR, AND PROSECUTORIAL MISCONDUCT
AFTER *STATE V. PERRY***

CASE NOTE

TABLE OF CONTENTS

INTRODUCTION.....	86
I. PROSECUTORIAL MISCONDUCT IN IDAHO BEFORE <i>STATE V. PERRY</i>	88
A. Foundations of Idaho’s Prosecutorial Misconduct Doctrine	88
B. Development of Idaho’s Prosecutorial Misconduct Doctrine	89
1. The Introduction of Harmless Error and Fundamental Error	89
2. The Nature of the Prosecutorial Misconduct Event.....	91
3. The Timing of the Event of Prosecutorial Misconduct.....	91
II. TRIAL ERROR REVIEW LEADING UP TO <i>STATE V.</i> <i>PERRY</i>	92
A. Fundamental Error.....	92
B. Harmless Error	93
III. MAIN CASE: <i>STATE V. PERRY</i>	93
A. Factual and Procedural History.....	94
B. The Standards Articulated in <i>State v. Perry</i>	97
1. Simplifying Prosecutorial Misconduct Review.....	97
2. Errors Contemporaneously Objected to at Trial: Idaho’s Adoption of <i>Chapman</i> Harmless Error	97
i. Structural Defects and the Inapplicability of <i>Chapman</i> Harmless Error	99
3. Errors Not Contemporaneously Objected to at Trial: Idaho’s Three Prong Fundamental Error Analysis	100
4. The Elements of <i>State v. Perry</i> ’s Fundamental Error Analysis	102
i. Unwaived Constitutional Rights	102
ii. Clear and Obvious Error.....	104
iii. Did the Alleged Error Affect the Appellant’s Substantial Rights?.....	106
5. <i>State v. Perry</i> ’s Application of the Three-	

Prong Fundamental Error Framework	106
IV. MAXIMIZING <i>STATE V. PERRY</i> 'S CLARITY AND	
UNIFORMITY	107
A. Approaching <i>State v. Perry</i> 's Three-Prong Test	107
1. Fourteenth Amendment Due Process	
Determinations.....	108
2. Avoiding the Due Process Determination	
Through <i>Perry</i> 's Second Prong.....	108
3. Appellants Alleging Constitutional Violations	
Predicated on a Rule or Statute	112
B. Pragmatic Effects of <i>State v. Perry</i>	115
X. CONCLUSION	116
APPENDIX	118

Plain question and plain answer make the shortest road out of most perplexities.

—Mark Twain¹

INTRODUCTION

In 2010, the Idaho Supreme Court handed down *State v. Perry*, ushering in a new era of appellate trial error review in Idaho.² The defendant in *State v. Perry*, Joseph E. Perry, had been convicted on two counts of sexual battery of child in the Kootenai County District Court. Perry lost his intermediate appeal³ before appealing to the Idaho Supreme Court, which affirmed his conviction.⁴

On appeal, Perry argued that the Kootenai County prosecutor committed five separate acts of prosecutorial misconduct,⁵ only one of which Perry had objected to contemporaneously.⁶ The Idaho Supreme Court—in an effort to succinctly address Perry's claims of both contemporaneously objected to, and unobjected-to claims of prosecutorial misconduct—realized that Idaho's standards regarding harmless error, fun-

1. MARK TWAIN, LIFE ON THE MISSISSIPPI 232 (Harper & Bros. Publ'g 1901) (1874).

2. The court's original July 8, 2010 opinion, *State v. Perry*, 2010 WL 2681154 (2010), has been substituted twice. First, on July 23, 2010 as *State v. Perry*, 2010 WL 2880156 (2010), and again on December 7, 2010 as *State v. Perry*, 245 P.3d 961 (Idaho 2010). The first substitute opinion was issued to correct an error regarding the State's burden of proof under the *Chapman v. California* Harmless Error standard. 386 U.S. 18, 26 (1967). The second substitute opinion was issued to clarify *State v. Perry*'s retroactivity.

3. *State v. Perry*, 168 P.3d 49, 50 (Idaho Ct. App. 2007).

4. *State v. Perry*, 245 P.3d 961, 983 (Idaho 2010).

5. Additionally, Perry argued that the district court abused its discretion by excluding evidence he wished to introduce under Idaho Rule of Evidence 412, "Sex crime cases; relevance of victim's past behavior," and Idaho Rule of Evidence 613, "Prior statements of witnesses." *Perry*, 245 P.3d at 968. Although the Court ultimately found that the district acted within its discretion when it excluded Perry's evidence, this portion of the opinion is not what will make *State v. Perry* an influential case for Idaho appellate courts. Thus, it suffices to know that Perry's claim that the district court improperly excluded evidence failed.

6. *Perry*, 245 P.3d at 971.

damental error, and prosecutorial misconduct had become confusing and unmanageable.⁷ The court, dissatisfied with the current state of the law, overruled prior case law, incorporated new definitions, and outlined the standards regarding appellate review of trial errors with uniformity and clarity.⁸

In *Perry*, the court clarified three points of Idaho law. First, with respect to harmless error review, the court explicitly adopted the federal harmless error standard stated in *Chapman v. California*.⁹ Second, the court implemented a three-prong fundamental error test, premised on the *United States v. Olano* plain error framework, to establish reversible errors where no contemporaneous objection was made at trial.¹⁰ Third, the court decided that errors involving prosecutorial misconduct, which were historically analyzed under multiple convoluted standards, would be treated like all other trial errors on review.¹¹

Clarification on all three of these points of law will certainly prove helpful for Idaho practitioners. But the court's newly articulated fundamental error analysis will have a positive impact beyond merely clarifying a confused point of law for practitioners. The flexibility of the three-prong fundamental error framework, will promote judicial efficiency in Idaho's court system as well.

Part I of this note will detail the origins and progression of prosecutorial misconduct in Idaho's court system. This part will point out the confusion created by unclear standards of review developed over time, as well as the need for reform. Additionally, Part I will clarify the Idaho Supreme Court's standard of review for instances of alleged prosecutorial misconduct post-*State v. Perry*. Part II provides a synopsis of Idaho's appellate review of both fundamental error and harmless error leading up to *State v. Perry*. Part III will detail the facts and analysis of *State v. Perry*. Additionally, Part III will break down the clarified standards of appellate review that the Idaho Supreme Court articulated in *State v. Perry*.

Finally, Part IV will discuss the implications of *State v. Perry*'s three-prong fundamental error analysis for Idaho's appellate court system. Specifically, Part IV will illustrate how the Idaho Supreme Court intends lower courts to approach and apply the newly articulated three-prong fundamental error analysis.

7. *Id.* at 971–72.

8. *Id.* at 979.

9. *Id.* at 973.

10. *Id.* at 978.

11. *Id.* at 972.

I. PROSECUTORIAL MISCONDUCT IN IDAHO BEFORE *STATE V. PERRY*

Since the early 1900s Idaho's judicial system has recognized the importance of a fair judicial proceeding by placing a substantial burden on prosecutors to seek justice, while diligently adhering to pertinent rules of evidence and codes of professional conduct.

A. Foundations of Idaho's Prosecutorial Misconduct Doctrine

Generally speaking, prosecutorial misconduct occurs when a prosecutor improperly or illegally avoids a required disclosure or persuades the jury to wrongfully convict a defendant or to assess a defendant with an unjustified punishment.¹² In Idaho, the doctrine of prosecutorial misconduct was introduced just after the turn of the century.¹³ Justice Ailshie, in *State v. Irwin*, articulated Idaho's first prosecutorial misconduct standard:

It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. When he has submitted all the facts in the case to the jury he should be content, but he should never seek by any artifice to warp the minds of the jurors by inferences and insinuations.¹⁴

Thereafter, the Idaho Supreme Court relied on *State v. Irwin's* articulation of misconduct as the standard of review for subsequent claims of prosecutorial misconduct.¹⁵ The court's appellate analysis of prosecutorial misconduct around the turn of the century did not address whether the defendant did or did not contemporaneously object to the alleged instance of prosecutorial misconduct at trial.¹⁶

After *State v. Irwin*, the court began to refine and build on the prosecutorial misconduct standard. Subsequent cases added to and buttressed the doctrine, firmly entrenching it in Idaho's case law. For example, in *State v. McGinnis*, the court articulated the prejudicial threshold required to invoke *State v. Irwin*, holding that statements made by the prosecutor at trial must be damaging to the rights of the defendant so as to "materially prejudice intelligent and fair-minded ju-

12. BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

13. *State v. Irwin*, 71 P. 608 (Idaho 1903).

14. *Id.* at 611.

15. *E.g.*, *State v. Gruber*, 115 P. 1, 7 (1911) (stating that "[t]he rule announced [sic] by this court in *State v. Irwin* . . . states the law on prosecutorial misconduct] as we view it, and any case falling within the rule there announced should be dealt with in the same manner that that case was met")

16. *See id.*

rors against the accused.”¹⁷ Although appellate review of prosecutorial misconduct has become much more complex in the century since *State v. Irwin*, the fundamental standard articulated by the *Irwin* court, although procedurally vague, continues on as sound precedent in Idaho’s prosecutorial misconduct cases.¹⁸

B. Development of Idaho’s Prosecutorial Misconduct Doctrine

As prosecutorial misconduct developed in Idaho, new layers of complexity began to muddle and complicate the doctrine. The complexity presented problems for appellate judges applying the standards as well as for prosecutors trying to conform their conduct to the convoluted standards.

Complexity and confusion in the doctrine arose from three main sources: (1) The introduction of harmless error review, which created a distinction in appellate review between errors that were contemporaneously objected to at trial (reviewed under the harmless error analysis) and unobjected-to errors (reviewed under the fundamental error analysis); (2) Judicial review distinctions premised on the characteristics of the alleged event of prosecutorial misconduct (i.e., did the prosecutor’s conduct affect the trial in a general overarching manner, or was it a discrete isolated event); (3) Different standards of fundamental error appellate review for alleged instances of prosecutorial misconduct depending on the timing of the alleged misconduct (i.e., did the alleged error occur during the prosecutor’s closing argument or at any other point during the trial proceedings).

The following subparts illustrate all of the relevant factors courts of appeal and prosecutors had to consider before *State v. Perry* clarified appellate review of prosecutorial misconduct.

1. The Introduction of Harmless Error and Fundamental Error

Idaho courts, in the midst of the harmless error revolution, began to review prosecutorial misconduct claims under a harmless error standard of review. In *State v. Douglass*, the court upheld a verdict under the harmless error standard even though it found that the prosecutor had committed misconduct.¹⁹ The court in *Douglass* held that the prosecutor committed prosecutorial misconduct by imputing the use of foul language to the defendant and seeking “to create in the minds of

17. *State v. McGinnis*, 85 P. 1089, 1092 (Idaho 1906).

18. *See, e.g., State v. Severson*, 215 P.3d 414, 435 (Idaho 2009) (quoting *State v. Irwin*, 71 P. 608 (Idaho 1903)) (reiterating that prosecutors have a duty to ensure that defendants receive fair trials and must “guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.”)

19. *State v. Douglass*, 208 P. 236 (Idaho 1922).

the jurors the impression that appellant harbored such ill will toward [the victim].”²⁰ However, the court was willing to uphold the defendant’s conviction, in light of the misconduct, so long as “the evidence [was] so strong and convincing that the jury could not have reached any other verdict than that of guilty, taking into consideration all of the circumstances.”²¹

After *Douglass*, the court’s inquiry was not only whether the prosecutor committed misconduct but also whether the misconduct was harmless. The harmless error inquiry added a layer of complexity for courts hearing claims of prosecutorial misconduct. Moreover, it is crucial to remember that harmless error review only applies if the defendant contemporaneously objects to the alleged misconduct at trial.

Generally speaking, the defendant’s failure to contemporaneously object to an alleged instance of prosecutorial misconduct at trial forecloses his ability to raise the issue on appeal.²² However, as a means to ensure justice, Idaho appellate courts will review unobjected-to errors under the fundamental error standard. Idaho’s fundamental error doctrine arose in *State v. Haggard*.²³

In *Haggard*, the court found that the prosecutor’s cross-examination of Haggard regarding his failure to testify at the preliminary hearing deprived him of a fair trial and was a denial of due process.²⁴ Although the defendant’s counsel failed to object at trial to the prosecutor’s line of questioning, the court held that, where the unobjected-to error constitutes fundamental error, the defendant’s failure to object does not foreclose his ability to raise the issue on appeal.²⁵ Over time, the Idaho Supreme Court developed two separate standards of fundamental error analysis for prosecutorial misconduct. The first standard of review was for all errors not contemporaneously objected to during a prosecutor’s closing argument, and the second standard of review was used to assess the prosecutor’s misconduct during all other portions of the trial proceedings.²⁶

20. *Id.* at 239.

21. *Id.* In its articulation of the harmless error standard, the court in *State v. Douglass* relied on the following language from the Mississippi case *Hare v. State*: “If the purity of the verdict might have been affected, it must be set aside: if it could not have been affected, it will be sustained.” *Hare v. State*, 5 Miss. 187, 194 (1839); *Douglass*, 208 P. at 240.

22. *See Douglass*, 208 P. at 239.

23. *State v. Haggard*, 486 P.2d 260 (Idaho 1971).

24. *Id.* at 263.

25. *Id.* (stating that “[i]n case of fundamental error in a criminal case the Supreme Court may consider the same even though no objection had been made at time of trial”).

26. *State v. Perry*, 245 P.3d 961, 972 (Idaho 2010) (finding that “Idaho appellate courts apply two different definitions of fundamental error to claims of prosecutorial misconduct, one definition for misconduct allegedly committed during closing argument, and another for misconduct allegedly committed at any other time during the judicial proceedings”); *see also infra*. Part II.B.3.

2. The Nature of the Prosecutorial Misconduct Event

Adding another layer of complexity and confusion into the prosecutorial misconduct doctrine, the court in *State v. LePage* made a distinction between errors of prosecutorial misconduct that affect the trial in a general manner and those that pertain to a “discrete piece of evidence.”²⁷ In making this determination, the court pointed out that its typical inquiry in determining whether a general, overarching error was harmless was “whether tainted evidence has contributed to a guilty verdict.”²⁸ However, the court held that this standard did not illustrate the true function of the appellate court when reviewing the effect(s) of a discrete instance of prosecutorial misconduct. Rather, the court in *LePage* held the inquiry for the review of discrete evidence improperly presented to the tribunal was whether the “appellate court [is] convinced beyond a reasonable doubt that the same result would have been reached had the evidence been properly excluded.”²⁹

3. The Timing of the Event of Prosecutorial Misconduct

Before *State v. Perry*, Idaho had two different fundamental error standards depending on the timing of the misconduct. In the case of alleged prosecutorial misconduct committed during closing argument, the court would characterize the prosecutor’s misconduct as fundamental if his comments were “so egregious or inflammatory that any prejudice arising therefrom could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.”³⁰

However, where the alleged prosecutorial misconduct occurred during any other portion of the trial, the court would find that the prosecutorial misconduct constituted a fundamental error when it went “to the foundation or basis of a defendant’s rights or . . . to the foundation of the case or [took away] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.”³¹ This temporal variance in the court’s treatment of alleged misconduct under fundamental error review added another level of complexity and uncertainty to appellate review of prosecutorial misconduct.

The multitude of standards and variances in the courts treatment of prosecutorial misconduct before *State v. Perry* left practitioners unclear about which standard their actions would be reviewed under. Such

27. *State v. LePage*, 630 P.2d 674, 683 (Idaho 1981).

28. *Id.* (internal quotation marks omitted).

29. *Id.*

30. *State v. Ames*, 707 P.2d 484, 487 (Idaho Ct. App. 1985).

31. *State v. Christiansen*, 163 P.3d 1175, 1182 (Idaho 2007) (quoting *State v. Garcia*, 128 P.2d 459, 462 (N.M. 1942)).

obscurity was not fair to courtroom prosecutors and judges attempting to provide defendants with the “fair trial” that the Idaho Supreme Court has demanded since 1903 in *State v. Irwin*.

II. TRIAL ERROR REVIEW LEADING UP TO *STATE V. PERRY*

Just before the court’s decision in *State v. Perry*, the Idaho Supreme Court traced the contours of harmless error and fundamental error review in light of prosecutorial misconduct claims raised on appeal in *State v. Severson*.³²

In *Severson*, the State’s indictment charged Larry M. Severson with the murder of his wife.³³ The State, in its amended indictment, put forward two separate theories for the murder.³⁴ First, that Severson tricked his wife into overdosing and, second, that he suffocated her.³⁵ On appeal, Severson raised multiple prosecutorial misconduct claims regarding the “prosecutor’s lunch meeting with a witness who had yet to be cross-examined, late disclosure of evidence, ‘speaking objections,’ and various comments made during closing arguments.”³⁶ Importantly, none of Severson’s claims of prosecutorial misconduct were contemporaneously objected to at trial.³⁷

Addressing the appellant’s unobjected-to acts of prosecutorial misconduct, the *Severson* court went into great detail regarding appellate review of errors not contemporaneously objected to. The starting point in the analysis, the court stated, was determining if the defendant contemporaneously objected to the alleged instance of prosecutorial misconduct at trial.³⁸ Where the alleged instance of prosecutorial misconduct was not contemporaneously objected to, the *Severson* court stated that it would evaluate the appellants alleged error under the fundamental error standard.³⁹

A. Fundamental Error

The *Severson* court defined fundamental errors as those errors that go “to the foundation or basis of a defendant’s rights or . . . to the foundation of the case or take[s] from the defendant a right which [is] essential to his defense and which no court could or ought to permit him to waive.”⁴⁰ However, under the *Severson* standard, even where an in-

32. *State v. Severson*, 215 P.3d 414 (Idaho 2009).

33. *Id.* at 430.

34. *Id.* at 421.

35. *Id.*

36. *Id.* at 436.

37. *Id.*

38. *Id.* at 435.

39. *Id.* at 436.

40. *Id.* (quoting *State v. Bingham*, 776 P.2d 424, 423 (Idaho 1998)). The court formally adopted a definition of fundamental error in *State v. Smith*, finding that a fundamental error is one that “goes to the foundation or basis of a defendant’s rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense

stance of prosecutorial misconduct is found to be fundamental, the court will then subject the fundamental error to a harmless error review.⁴¹ Thus, before *State v. Perry*, for an unobjected-to error to warrant reversal on appeal it must be both fundamental, and not harmless.

B. Harmless Error

In addition to the unobjected-to instances of prosecutorial misconduct, *Severson* also raised issues that his counsel did contemporaneously object to at trial. Thus, the court also explored the standard of review for errors contemporaneously objected to at trial. *Severson* outlined a two-part inquiry to review whether errors contemporaneously objected to at trial would necessitate a reversal. First, the court will determine whether the prosecutor's conduct was in fact improper.⁴² If the court finds that the prosecutor's conduct was improper, the misconduct will create reversible error if it "prejudiced the defendant's right to a fair trial."⁴³ The burden of establishing the requisite prejudice falls directly on the defendant.⁴⁴ The court in *Severson* articulated the framework by which Idaho appellate courts were to review alleged prosecutorial misconduct whether contemporaneously objected to at trial or raised on appeal for the first time.

The court's definition of fundamental error leading up to, and articulated in, *State v. Severson* provided little certainty to practitioners. The language, although consistent with history, is ambiguous and allows much judicial discretion in determining fundamental error. Additionally, Idaho's historic definition of fundamental error, as articulated by *State v. Severson*, forces appellate courts to engage in difficult due process discussions even where the appellant is raising unmeritorious claims of error from the trial court.

III. MAIN CASE: STATE V. PERRY

Perry raised multiple issues on appeal. First, Perry alleged that the district court erred by excluding evidence that his daughter, on an earlier occasion, had made false statements regarding a sex crime. Second,

and which no court could or ought to permit him to waive." 491 P.2d 733, 739 n.13 (Idaho 1971) (quoting *State v. Garcia*, 128 P.2d 459, 462 (N.M. 1942)). The Idaho Supreme Court ultimately replaced this definition of fundamental error for two reasons. First, in Idaho, defendants are allowed to waive constitutional rights, so long as the defendant does so knowingly, voluntarily, and intelligently. *State v. Perry*, 2010 WL 4942182, at 16 (Idaho 2010). Second, because the New Mexico standard was found to be too vague and ambiguous for appellate courts to follow. *Id.*

41. *Severson*, 215 P.3d at 436.

42. *Id.*

43. *Id.* (quoting *State v. Romero-Garcia*, 75 P.3d 1209, 1212 (Idaho Ct. App. 2003)).

44. *Id.*

Perry alleged that the prosecutor, both during witness examination and closing arguments, committed prosecutorial misconduct. Lastly, Perry asserted that all of these errors, even if harmless individually, were fundamental when taken together under the cumulative error doctrine.

A. Factual and Procedural History

The Appellant in *State v. Perry*, Joseph E. Perry, is the father of two daughters, T.P and H.P.⁴⁵ Both of Perry's daughters resided fulltime with a foster family when the events leading to his arrest and ultimate conviction occurred.⁴⁶ Perry, in an effort to reunite and rebuild his relationships with his daughters, began to take T.P and H.P. into his home for overnight visitation periods.⁴⁷ After one of the overnight visits with Perry:

T.P. and H.P. revealed to their foster mother that Perry had occasionally invited one girl to sleep with him during these visits, and while the girl was lying in bed facing away from her father, Perry moved against her and rubbed his penis against the girl's back or buttocks in an up and down motion.⁴⁸

Subsequent to H.P. and T.P.'s allegations against their father, prosecutors in Kootenai County sought to prosecute Perry for lewd and lascivious conduct with a minor under Idaho Code section 18-1508.⁴⁹

Perry was convicted in the Kootenai County District Court on two counts of sexual battery of child under sixteen.⁵⁰ Kootenai County prosecutors charged Perry with four counts of lewd and lascivious conduct with a minor under sixteen, pursuant to Idaho Code section 18-1508.⁵¹ The jury returned a verdict of not guilty with respect to the lewd and lascivious conduct charges. However, the jury did find Perry guilty of two counts of battery under Idaho Code section 18-903, as well as two counts of sexual battery of a minor child under Idaho Code section 18-1508A.⁵²

45. *State v. Perry*, 245 P.3d 961, 966 (Idaho 2010).

46. *Id.*

47. *Id.*

48. *Id.*

49. The Kootenai County Prosecutor's Office charged Perry under Idaho Code section 18-1508. "Lewd conduct with a minor child under sixteen," which makes it a felony to "commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in Idaho Code section 18-1507 when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party."

50. *Perry*, 245 P.3d at 966.

51. *State v. Perry*, 168 P.3d 49, 50 (Idaho Ct. App. 2007).

52. *Id.* at 51.

Perry appealed his Kootenai County conviction to the Idaho Court of Appeals in 2007.⁵³ On appeal, Perry “contend[ed] that he should have been permitted to introduce the evidence that T.P. had made a false report of sexual abuse by H.P.”⁵⁴ He also “contend[ed] that the prosecutor engaged in misconduct when she elicited and commented upon testimony that vouched for the victims’ credibility.”⁵⁵ The Idaho Court of Appeals affirmed the decision of the jury from the district court.⁵⁶

Perry then appealed to the Idaho Supreme Court. In his appeal, Perry again alleged that the district court erred in excluding H.P.’s prior false sex-crime allegations.⁵⁷ In addition, Perry alleged that five discrete acts of prosecutorial misconduct had occurred during the trial, only one of which was contemporaneously objected to at trial.⁵⁸ In his appeal, Perry urged the court to find that each of the errors not followed by a contemporaneous objection constituted fundamental error and that none could be found harmless.⁵⁹ Alternatively, Perry claimed that even if the court found that none of the errors were fundamental error by themselves, when taken together under the cumulative error doctrine they constituted a reversible fundamental error.⁶⁰

The first three events of prosecutorial misconduct that Perry alleged all derived from the prosecutor’s attempts to vouch for the credibility of H.P. and T.P.’s allegations.⁶¹ First, the prosecutor asked the girls’ foster mother about their typical level of honesty; the foster mother answered that the girls were only dishonest about “immaterial things.”⁶² Second, the prosecutor asked the girls’ foster father on redirect if “he noticed any signs of dishonesty on the girls’ faces when they reported the allegations against Perry;” he responded that he had not.⁶³ Lastly, while questioning the investigating officer, the prosecutor asked the officer if he believed that the girls were speaking truthfully regarding Perry’s alleged conduct.⁶⁴ The officer responded that “he believed T.P. was being truthful; [but] he did not offer his opinion as to the truthfulness of H.P. as the court sustained defense counsel’s objection to this question.”⁶⁵ In sustaining defense counsel’s objection, the district judge found that the prosecutor’s line of questioning “seem[ed] to be a way of

53. *See id.*

54. *Id.*

55. *Id.* at 50.

56. *Id.* at 54.

57. *Perry*, 245 P.3d at 968.

58. *Id.* at 971.

59. *Id.*

60. *Id.* at 966.

61. *Id.* at 980–81.

62. *Id.* at 980.

63. *Id.*

64. *Id.*

65. *Id.* at 981.

trying to vouch for the witnesses' credibility" and found it inadmissible.⁶⁶ This was the only alleged act of prosecutorial misconduct that Perry's counsel contemporaneously objected to at trial.

Perry also claimed that the prosecutor committed prosecutorial misconduct through four statements she made during closing argument. First, the prosecutor said:

[The foster mother] told you that they are regular kids, no big issues, no problems as far as, you know, being excessively dishonest. They tell little untruths or they have about things that are small. But every child does that. You have to look, when you're reviewing the credibility of witness's testimony, at their credibility. If [the foster mother] had wanted you to believe that these two girls were absolute angels, she probably thinks that they are, but if she had wanted to bolster them in some way and say, well, they're—they never tell an untruth, that is what she would say. She would say, no, they're never untruthful. And that wouldn't be what we know to be true in the real world. That's not the way children are. No children are perfect. All children tell mistruths from time to time. These children tell mistruths about really incidental things, but minor things, not of any great accord. Writing on a wall, I don't think, would be considered a major lie.⁶⁷

Second, the prosecutor referenced and elaborated on the investigating officer's vouching testimony, stating:

[The investigating officer] told you that he has a lot of training and experience in interviewing both adults and children, what the differences are. Stress levels of girls or children are higher. He didn't detect any signs that he normally would see if he was thinking that something was—he didn't detect any signs of dishonesty in these girls either.⁶⁸

Third, in closing, the Kootenai County prosecutor said, "All three witnesses [the foster mother, the foster father, and the officer] that they [the girls] told this to individually believed them. All three."⁶⁹ Lastly, the prosecutor said, "There hasn't been any indication here of anything from these girls but honesty. If they had wanted to tell a lie, then why not just go all the way . . . Why not if you're going to lie."⁷⁰

With respect to all of Perry's allegations, the court found that each instance constituted misconduct, however none of them rose to the level of fundamental error.⁷¹ Additionally, the court found that the single

66. *Id.* at 983.

67. *Id.* at 981.

68. *Id.*

69. *Id.*

70. *Id.* at 981–82.

71. *Id.* at 983.

event of misconduct to which Perry's counsel contemporaneously objected to "was properly excluded by the trial judge and [did] not constitute error."⁷²

B. The Standards Articulated in *State v. Perry*

In an opinion authored by Vice-Chief Justice Roger Burdick, the court in *State v. Perry* clarified three main points of Idaho law. First, the court addressed the confusion that had worked its way into the prosecutorial misconduct doctrine since *State v. Irwin*. Second, the court clarified that Idaho appellate courts will review trial errors contemporaneously objected to under the harmless error standard. Third, the court laid out a three-pronged test to address trial errors not contemporaneously objected to at trial under the fundamental error doctrine. The court held that the clarified standards announced in *Perry* would be applied to all cases not on direct review by an appellate court.⁷³

1. Simplifying Prosecutorial Misconduct Review

Appellate review of prosecutorial misconduct before *State v. Perry* was nuanced and convoluted. The multitude of standards⁷⁴ the court employed forced practitioners to consider an unreasonable set of appellate standards during fast-paced trial proceedings. The *Perry* court acknowledged the complexity and confusion in the prosecutorial misconduct doctrine by unambiguously stating that all alleged incidents of prosecutorial misconduct will be reviewed under the same standard as all other trial errors.⁷⁵ Therefore, after *State v. Perry*, regardless of the timing of the misconduct or the nature of the misconduct, the prosecutor's alleged misconduct will be reviewed just as any other trial error on appeal.

2. Errors Contemporaneously Objected to at Trial: Idaho's Adoption of *Chapman* Harmless Error

On appeal, where a defendant raises issues that were contemporaneously objected to at trial the court will review the trial court's treat-

72. *Id.*

73. *Id.* at 980. The retroactivity issue was the primary reason that the court issued the second substitute opinion of *State v. Perry*. Initially the court held under *Danforth v. Minnesota*, 552 U.S. 264 (2008), that Perry's appellate review standard had no "retroactive application." *State v. Perry*, No. 34846, 2010 WL 2880156 (Idaho July 23, 2010). Feeling that the original opinion and the first substitute opinion's treatment of retroactivity was overly vague, the court re-issued the opinion with greater clarity.

74. *See supra* Parts I.B.1-3.

75. *Perry*, 245 P.3d at 972.

ment of the event under a harmless error analysis.⁷⁶ In *State v. Perry*, the court specifically adopted the *Chapman v. California* Harmless Error analysis as Idaho's standard of review for objected-to trial errors.⁷⁷ In *Chapman v. California*, the United States Supreme Court found that, although every state employed some harmless error test, not all were equally protective of the defendant's federal constitutional rights.⁷⁸ Sensing discrepancies in the standards among the states, the Court decided that it could not leave states the responsibility of protecting the federal constitutional rights of individuals.⁷⁹ Thus, the Court developed and extended to the states a harmless error analysis for all contemporaneously objected-to errors that implicate federal constitutional rights.⁸⁰

The Court held that for a constitutional error to be found harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."⁸¹ In *State v. Perry* the Idaho Supreme Court officially adopted the language of *Chapman*, however, Idaho adopted *Chapman* not only for errors implicating federally protected constitutional rights, but for all contemporaneously objected-to errors on review.⁸² Thus, the court adopted a higher level of protection than the United States Supreme Court has mandated for criminal defendants seeking appellate review.

The Idaho Supreme Court's final articulation of the harmless error analysis requires that the defendant first establish that the objected-to error was in fact a trial error.⁸³ If the defendant successfully establishes that an error occurred, the burden then shifts and the State must demonstrate that the error was "harmless beyond a reasonable doubt."⁸⁴ Thus, if a prosecutor's conduct is contemporaneously objected to at trial, the appellate courts will review the prosecutor's conduct under *Chapman* Harmless Error, whether the conduct implicated a federally protected constitutional right or merely manipulated a procedural rule of the trial court.

76. *Id.* at 973.

77. *Id.*

78. *Chapman v. California*, 386 U.S. 18, 23–24 (1967).

79. *Id.* at 21.

80. *See id.*

81. *Id.* at 24.

82. *Perry*, 245 P.3d at 973–74. *State v. Perry's* extension of *Chapman* Harmless Error to non-constitutional errors on appeal is, for the most part, merely a clarification of the previous standard. The court, prior to *State v. Perry*, had been employing a nearly synonymous standard. *See State v. Thompson*, 977 P.2d 890, 898 (Idaho 1999) (addressing the trial court's denial of a motion to strike, "[a]n error may be deemed harmless if it does not affect a substantial right of the accused. [Idaho Criminal Rule] 52. The determination of whether a substantial right has been affected hinges on whether it appears from the record that the error contributed to the verdict. An error is harmless if, and only if, the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error.").

83. *Perry*, 245 P.3d at 974.

84. *Id.*

The court's treatment of contemporaneously objected-to error after *State v. Perry* is essentially identical. Although *Perry* affirmatively adopted *Chapman* Harmless Error as the standard for objected-to trial errors, this will have little effect on Idaho's treatment of contemporaneously objected to errors in both procedure and substance.

i. Structural Defects and the Inapplicability of
Chapman Harmless Error

Prior to *Chapman v. California*, where a trial error implicated a constitutional right, no application of the harmless error doctrine was required.⁸⁵ *Chapman* made this general proposition obsolete by finding that even errors implicating constitutional rights can be harmless. As the Court made clear, however, *Chapman* Harmless Error review, is not limitless.⁸⁶ Since *Chapman*, the Court has created two categories of constitutional errors, those constituting "trial errors," which are subject to harmless error review, and those that constitute "structural defects," which cannot be reviewed under *Chapman* Harmless Error.⁸⁷ Structural defects affect the framework of the trial process as a whole rather than simply an error in the process.⁸⁸ Thus, where a structural defect has occurred at trial an automatic reversal is required. The United States Supreme Court has found the following defects to constitute structural defects:

1. The denial of counsel;⁸⁹
2. Having a case heard by a judge who is not impartial;⁹⁰
3. The prosecution of a defendant that implicates double jeopardy;⁹¹
4. A constitutionally deficient reasonable doubt instruction;⁹²
5. Purposeful discrimination in the selection of grand jury members;⁹³
6. Denying the defendant the right to represent himself;⁹⁴
7. When a magistrate lacking jurisdiction conducts trial proceedings;⁹⁵

85. *Chapman*, 386 U.S. at 42 (Stewart, J., concurring).

86. *Id.* at 23 ("[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . .").

87. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

88. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

89. *Penson v. Ohio*, 488 U.S. 75, 88–89 (1988).

90. *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967).

91. *Price v. Georgia*, 398 U.S. 323, 331 (1970).

92. *Sullivan v. Louisiana*, 508 U.S. 275, 283 (1993).

93. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

94. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

95. *Gomez v. United States*, 490 U.S. 858, 876 (1989).

8. Where a juror is excluded due to his beliefs about capital punishment;⁹⁶
9. When constitutional error already required a showing of prejudice;⁹⁷
10. The denial of the right to a public trial;⁹⁸ and,
11. The denial of the right to a speedy trial.⁹⁹

Although the court in *State v. Perry* discussed at length the effects of structural errors on harmless error analysis, because structural errors are generally rooted in the trial framework itself, it is difficult to imagine an instance where a prosecutor's misconduct would rise to the level of a structural defect. Thus, the structural defects caveat to the *Chapman* Harmless Error analysis has little bearing on claims of prosecutorial misconduct.

3. Errors Not Contemporaneously Objected to at Trial: Idaho's Three Prong Fundamental Error Analysis

State v. Perry reiterated that Idaho appellate courts, generally speaking, will not consider issues on appeal that were not preserved at trial by a contemporaneous objection.¹⁰⁰ According to the court, society's interest in the finality of judgments requires such a rule.¹⁰¹ In addition to the need for finality, the court articulated three distinct reasons for promoting contemporaneous objections. First, trial courts are in the best position to deal with and correct any error.¹⁰² Second, the trial judge is more familiar with the atmosphere of the courtroom, including the facts and issues before the court, and can make a more informed determination of the impact of the alleged error.¹⁰³ Third, requiring contemporaneous objections promotes integrity and sound arguments from the defendant and his counsel at trial.¹⁰⁴

State courts are not required by the United States Constitution or the United States Supreme Court's interpretation of the Constitution to entertain issues raised for the first time on appeal. However, such a rigid, uncompromising rule would not be in harmony with the United States court systems' desire to promote justice.¹⁰⁵ Recognizing that fundamental justice does, at times, require appellate courts to entertain issues raised for the first time on appeal, the *Perry* court laid out a three part fundamental error test that defendants must satisfy in order for

96. *Gray v. Mississippi*, 481 U.S. 648, 667 (1987).

97. *Kyles v. Whitley*, 514 U.S. 419, 435–36 (1995).

98. *Waller v. Georgia*, 467 U.S. 39, 50 n.9 (1984).

99. *Strunk v. United States*, 412 U.S. 434, 438–39 (1973).

100. *State v. Perry*, 245 P.3d 961, 976 (Idaho 2010).

101. *Id.* at 977.

102. *Id.* at 976.

103. *Id.* at 977.

104. *Id.* at 976.

105. *Hormel v. Helvering*, 312 U.S. 552, 559 (1941) (finding that “[o]rderly rules of procedure do not require sacrifice of the rules of fundamental justice”).

the Idaho appellate courts to review an alleged trial error that was not contemporaneously objected to.

In structuring Idaho's fundamental error analysis the court relied heavily on the federal plain error standard articulated in *United States v. Olano*.¹⁰⁶ In *Olano* the United States Supreme Court laid out three requirements that an appellant must satisfy to establish the existence of plain error.¹⁰⁷ The framework for finding a plain error from *Olano* first, requires that an error exists.¹⁰⁸ Second, the error must be plain.¹⁰⁹ Third, the plain error must have affected the appellant's substantial rights.¹¹⁰

Idaho's adoption of the *Olano* framework was essentially identical, with only minor variances. Under *Perry*, to establish the existence of a fundamental error on appeal, a criminal defendant must demonstrate that:

1. One or more of the his unwaived constitutional rights were violated;
2. The error was clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and,
3. The error affected his substantial rights, meaning, in most instances, that it must have affected the outcome of the trial proceedings.¹¹¹

Where the appellant can satisfy *each* prong of the *State v. Perry* three-prong fundamental error analysis, the appellate court will vacate

106. *Perry*, 245 P.3d at 978; *United States v. Olano*, 507 U.S. 725 (1993).

107. Where the federal court system uses "plain error" to identify unobjected-to errors eligible for appellate review, the Idaho court system uses the term "fundamental error."

108. "Error" is a "[d]eviation from a legal rule . . . unless a right has been waived." 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 856 (3d ed. 2011). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 734 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

109. An error that is plain is clear or obvious. *Olano*, 507 U.S. at 725.

110. *Id.* Generally, to affect substantial rights, "the error must have been prejudicial and it must have affected the outcome of the district-court proceedings." WRIGHT ET AL., *supra* note 109, § 856 (internal citations omitted).

111. *Perry*, 245 P.3d at 978 (internal footnotes omitted). In adopting the three-prong framework to determine the existence of a fundamental error, the court explicitly overruled its prior fundamental error standard, articulated in *State v. Smith*. Under *Smith* an error was fundamental when it went "to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law." 491 P.2d 733, 739 n.13 (Idaho 1971) (quoting *New Mexico v. Garcia*, 128 P.2d 459, 462 (N.M. 1942)).

the judgment that was entered against the defendant and remand the case.

State v. Perry's three-prong framework for establishing the existence of a fundamental error will prove to be a valuable standard of review for Idaho's appellate courts. It provides a solid and well-articulated framework that both prosecutors and defense counsel can rely on. Fundamental error, at its core, revolves around questions of due process; prior to the *Perry* three-prong test, Idaho appellate courts found fundamental error if there was "sufficiently egregious" conduct at the trial court level.¹¹² The previous standard was broad, amorphous, and very susceptible to unpredictable outcomes due to its heavy reliance on judicial discretion.

4. The Elements of *State v. Perry*'s Fundamental Error Analysis

The court's three-prong fundamental error analysis marks a much-needed departure from the previous ambiguous fundamental error standard(s) of review for non-contemporaneously objected-to trial errors. The following subsections provide an in depth look at each of the three prongs of the fundamental error standard of review articulated in *State v. Perry*.

i. Unwaived Constitutional Rights

Historically, Idaho courts have not engaged in fundamental error review unless the error implicated one of the defendant's constitutional rights.¹¹³ *State v. Perry* kept this line of demarcation alive.¹¹⁴ In addition to limiting fundamental error review to alleged constitutional deprivations, the *Perry* court also limited the application of fundamental error review to Fourteenth Amendment due process violation claims.¹¹⁵ Thus, the thrust of *Perry*'s first prong is to limit the availability of fundamental error review to errors that resulted in a deprivation of the defendant's constitutional right to due process of law.

Although unlikely, appellate courts should not forget that the Idaho court system allows defendants to waive rights of constitutional magnitude.¹¹⁶ Because our judicial system allows for constitutional rights to be waived, where a defendant waives a right, he cannot later

112. *E.g.*, *State v. Severson*, 215 P.3d 414 (Idaho 2009).

113. *State v. Kirkwood*, 726 P.2d 735, 738 (Idaho 1986) (quoting *State v. Kelly*, 678 P.2d 60, 69 (Idaho Ct. App. 1984) ("[W]here . . . the asserted error relates not to infringement upon a constitutional right, but to violation of a rule or statute, we hold that the 'fundamental error' doctrine is not invoked.")).

114. *Perry*, 245 P.3d at 978.

115. *Id.* at 976 ("[W]hen an error has not been properly preserved for appeal through objection at trial, the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial.>").

116. *Kirkwood*, 726 P.2d at 738 ("[E]ven 'fundamental rights' may be waived . . .") (relying on *State v. Myers*, 545 P.2d 538, 543 (Wash. 1976) (en banc)).

complain that the violation of the waived right constituted error so long as the waiver was given knowingly, intelligently, and voluntarily.¹¹⁷

A great deal of prosecutorial conduct is considered improper. But just because a certain act was improper does not mean that it was severe enough to constitute a denial of the defendant's constitutional right to due process of law. The lines between acceptable conduct, improper conduct, and misconduct resulting in a due process deprivation is not always clear. Nevertheless, appellate courts, including Idaho appellate courts, consistently find the following conduct improper for a prosecutor to engage in, thus making them eligible for fundamental error review if found to be severe enough to constitute a due process violation:

1. Expressing personal opinions about the credibility of a defense witness;¹¹⁸
2. Making unfair or improper remarks regarding the defendant¹¹⁹ or defense counsel;¹²⁰
3. Commenting on the defendant's silence or failure to testify;¹²¹
4. Referencing the defendant's previous bad acts or convictions;¹²²
5. Vouching for the credibility of a witness;¹²³

117. *Id.* at 739.

118. *State v. Priest*, 909 P.2d 624, 632 (Idaho Ct. App. 1995) ("It is improper for a prosecutor to express a personal belief or opinion as to the truth or falsity of any testimony or evidence or as to the guilt of the defendant."); *see also* *United States v. Velarde-Gomez*, 224 F.3d 1062, 1073 (9th Cir. 2000).

119. *United States v. Schuler*, 813 F.2d 978, 980–81 (9th Cir. 1987) (prosecutor's comment on defendant's laughter during testimony was improper because comment put defendant's character at issue and impugned defendant's Fifth Amendment right not to testify).

120. *State v. Sheahan*, 77 P.3d 956, 969 (Idaho 2003) (finding that "it is misconduct for the prosecution to make personal attacks on defense counsel in closing argument"); *State v. Baruth*, 691 P.2d 1266, 1272 (Idaho Ct. App. 1984) ("A prosecutor has every legitimate right to point out weaknesses in a defendant's case, but this can be done in many ways without attacking the defendant's counsel."); *United States v. Rodriguez*, 159 F.3d 439, 451 (9th Cir. 1998) (statement that defense counsel "from the start had been trying to deceive the jury and had told the jury what was 'flat out untrue'" constituted misconduct).

121. *State v. Cobell*, 223 P.3d 291, 296 (Idaho Ct. App. 2009) (finding that a prosecutor's reference to a defendant's silence can constitute misconduct); *Williams v. Borg*, 139 F.3d 737, 744 (9th Cir. 1998) (finding that the prosecutor's statement during closing that the defendant's testimony was stricken from record so jury could not treat it as defense evidence was not improper because defendant had in fact testified and then refused to answer prosecutor's questions during cross-examination).

122. *State v. Shepherd*, 855 P.2d 891, 894 (Idaho Ct. App. 1993) (stating that "[t]he introduction of other crimes, wrongs or bad acts is forbidden to show propensity or guilt of the crime charged"); *United States v. Sanchez*, 176 F.3d 1214, 1223 (9th Cir. 1999) (prosecution's reference to defendant's "reputation for being one of the largest drug dealers on the reservation" was improper because it assumed facts not in evidence and therefore could only have been an attempt to use prior bad acts to cast doubt on defendant's testimony).

6. Appealing to the juror's community consciousness¹²⁴
7. Making comments designed to appeal to, or inflame the passions of the jurors;¹²⁵
8. Referring to evidence not admitted or presented at trial;¹²⁶
9. Misrepresenting the burden of proof or elements of a crime;¹²⁷ and,
10. Presenting false or misleading testimony.¹²⁸

Thus, appellate courts analyzing the first prong of *Perry's* fundamental error test regarding an alleged instance of prosecutorial misconduct must find that the prosecutor engaged in one of the foregoing acts and, as a result, the defendant was deprived of his Fourteenth Amendment due process rights.

ii. Clear and Obvious Error

The second prong of the *State v. Perry* fundamental error analysis requires that the error the defendant asserts is "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision."¹²⁹ This prong of the *State v. Perry* analysis is the most pragmatic and will allow appellate courts the most room to maneuver without having to engage in an analysis of the appellant's due process arguments.

The second prong has two main components, the first being that the record itself supports the alleged error without the need to stretch the language of the record. The second component acts as a limit on the first by requiring the appellate court to probe the record for any indication that the clear or obvious error went intentionally unobjected to as

123. *Priest*, 909 P.2d at 632 ("It is improper for a prosecutor to express a personal belief or opinion as to the truth or falsity of any testimony or evidence or as to the guilt of the defendant."); *United States v. Kerr*, 981 F.2d 1050, 1052–53 (9th Cir. 1992) (prosecutor's vouching for credibility of four government witnesses was improper).

124. *State v. Timmons*, 178 P.3d 644, 654 (Idaho Ct. App. 2007). Although the prosecutor's conduct was not found to be misconduct, the court alluded that if the prosecutor had urged "the jury to send a message to the community-at-large based on the harm suffered" due to the defendant's actions, misconduct could result. *Id.*

125. *State v. Reynolds*, 816 P.2d 1002, 1007 (Idaho Ct. App. 1991) ("[T]he prosecutor is not permitted to refer to the jurors or their families, hypothesizing the commission of the crime at issue against them; *See Vess, Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L & CRIMINOLOGY 23, 50 n. (1973). Nor is it proper for the prosecutor to suggest that the defendant is likely to commit future crimes unless convicted. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct.App.1984).").

126. *State v. Adams*, 67 P.3d 103, 110 (Idaho Ct. App. 2003) (concluding that the prosecutor's conduct was not improper, but acknowledging that references by a prosecutor to excluded evidence would result in prosecutorial misconduct).

127. *State v. Robinett*, No. 28564, 2004 WL 32949 (Idaho Ct. App. 2004) (holding the prosecutor's strict liability argument was improper because it lead the jury to believe that the State did not need to prove any causal relationship).

128. *State v. Ortiz*, 218 P.3d 17, 21 (Idaho Ct. App. 2009) ("A prosecutor may not, however, misrepresent or mischaracterize the evidence.").

129. *State v. Perry*, 245 P.3d 961, 978 (Idaho 2010).

part of a tactical decision by the defendant with the hopes of using the error as grounds for reversal on appeal. It was this second component of prong two that lead the court in *State v. Perry* to disregard Perry's claims of prosecutorial misconduct during the prosecutor's questioning of witnesses.¹³⁰

The "clear or obvious" standard creates a high burden that defendants must overcome to establish the existence of a fundamental error. However, this seems appropriate considering that Idaho's appellate courts generally will not address alleged errors that were not objected to at trial.¹³¹

Using *State v. Perry*'s three-prong fundamental error analysis, the Court in *State v. Longest* illustrated a factual scenario where the trial record did not establish the existence of a clear or obvious error.¹³² The appellant in *Longest* asserted that the State's prosecutors breached the terms of his plea agreement.¹³³ Longest did not contemporaneously object to the State's alleged breach at trial.¹³⁴ The issue on appeal was whether the error was fundamental.¹³⁵ The court, relying on the first component of the second prong, found that the error Longest complained

130. *Id.* at 981 ("Here there were multiple instances of the prosecutor eliciting improper vouching testimony from witnesses, but defense counsel chose to object only once. Where defense counsel objected the Court sustained that objection, and harm was avoided. It appears to be a reasonable possibility, under the facts of this case, that defense counsel's failure to object to the prosecutor's improper conduct in both eliciting vouching testimony and later referencing that testimony during closing was a strategic decision.").

131. The *Perry* court recognized the burden it was putting on defendants to establish fundamental error. However, the court pointed out that, where the appropriate circumstances exist, the *Perry* fundamental error analysis does not bar defendants from filing for post conviction relief. *Id.* at 979 n.7. Idaho has adopted the Uniform Post Conviction Relief Act codified at sections 19-4901 through 19-4911 in the Idaho Code. Applications for post conviction relief must be filed with the clerk of the district court that convicted the applicant, and must be filed "one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." IDAHO CODE ANN. § 19-4902 (2011). The Idaho Supreme court has long recognized ineffective assistance of counsel as a proper justification for granting post conviction relief. *State v. Yakovac*, 180 P.3d 476, 482 (2008). "To warrant reversal on grounds of ineffective assistance of counsel, a criminal defendant must first show that counsel's performance was objectively deficient and, second, that the deficiency prejudiced the defendant's case." *McKay v. State*, 225 P.3d 700, 703 (Idaho 2010). Defense counsel's failure to object to obvious errors at trial prima facie satisfies the first prong of Idaho's post conviction relief standard. *Id.* However, defendants may not raise the issue of ineffective assistance of counsel on appeal and additionally reserve the claim for post conviction relief—they must make a choice. *State v. Yakovac*, 180 P.3d 476, 482 (quoting *Parrott v. State*, 787 P.2d 258, 260 (Idaho 1990)). In sum, post conviction relief will provide a remedy for defendants prejudiced by their defense counsel's failure to object at trial.

132. *State v. Longest*, 241 P.3d 955, 956 (Idaho 2010).

133. *Id.* at 957.

134. *Id.*

135. *Id.*

of was not “clear or obvious.”¹³⁶ The court came to this conclusion because the record did not indicate anywhere that the State was bound to the terms of the plea, making it impossible to breach, and resulting in no possible error.¹³⁷ The Idaho Supreme Court relied entirely on the second prong when it affirmed Longest’s conviction. Thus, as *Longest* demonstrates, the “clear or obvious” prong provides a means for a pragmatic assessment of the defendant’s claims and allows for efficient judicial determinations.

iii. Did the Alleged Error Affect the Appellant’s Substantial Rights?

Once an appellant establishes the existence of a clear or obvious error, not tainted by tactical motives, which rises to the level of an unwaived constitutional violation, the third prong requires a showing that the “error affected the outcome of the trial.”¹³⁸ This is simply a harmless error standard. But in the fundamental error context, the appellant not only has the burden of establishing the existence of an error, but also carries the burden of proving that there is a “reasonable possibility that the error affected the outcome of the trial.”¹³⁹

Shifting the burden this way will likely have the effect of promoting timely, warranted objections, and preventing tactical silence. Together, these effects will produce a better record, allowing appellate courts to appropriately evaluate the course of the trial proceedings and any conduct that might have legitimately prejudiced the defendant. These are all benefits that parties who truly seek justice will laud.

5. *State v. Perry*’s Application of the Three-Prong
Fundamental Error Framework

The court in *State v. Perry* found that the prosecutor committed misconduct by eliciting vouching testimony from the foster father, foster mother, and investigating officer Teneyck.¹⁴⁰ However, the question then remained whether the error was fundamental. The court found that the prosecutor’s elicitation of vouching testimony was not fundamental error based on the second prong the fundamental error framework, specifically the portion dealing with a party’s failure to object as a tactical strategy.¹⁴¹ Because Perry’s counsel only objected to one of the prosecutor’s three instances of impermissibly eliciting vouching testimony,¹⁴² the court found there “to be a reasonable possibility” that Perry’s failure to object was a tactical decision.¹⁴³

136. *Id.*

137. *Id.*

138. *State v. Perry*, 245 P.3d 961, 978 (Idaho 2010).

139. *Id.*

140. *Id.* at 981.

141. *Id.*

142. *Id.* at 967.

143. *Id.* at 981.

Therefore, Perry's claim that the prosecutor's elicitation of vouching testimony was fundamental error failed the second prong of the fundamental error framework. In dealing with Perry's claim that the prosecutor's reference to the improper vouching testimony at closing, the court merely stated that the prosecutor's statements in closing, although they constituted misconduct, did not clearly violate any of Perry's unwaived constitutional rights.¹⁴⁴ The court was very conclusory in its treatment of Perry's final claim of misconduct; it provided nearly no analysis as to why there was no clear violation of Perry's constitutional rights. Perhaps this is an indication of how the Idaho Supreme Court intends the *Perry* framework to be applied going forward as a means to enforce the court's general rule that only errors preserved by an objection at trial are reviewable.

IV. MAXIMIZING *STATE V. PERRY*'S CLARITY AND UNIFORMITY

Idaho appellate courts needed a watershed case to retool and clarify trial error analysis. At a minimum, *State v. Perry* will be helpful for its distillation of a century of convoluted case law. If applied correctly, however, *Perry*'s conjunctive three-prong fundamental error analysis will provide appellate courts with a flexible standard of review to swiftly dispose of unmeritorious appeals. To maximize *Perry*'s flexibility, courts and litigants addressing fundamental error must recognize the conjunctive nature of the framework, and not feel constrained to approach and address each prong in the order articulated by the Idaho Supreme Court.

A. Approaching *State v. Perry*'s Three-Prong Test

There is no doubt that *State v. Perry* will quickly become one of the most cited cases in the Idaho Court of Appeals' opinions. The case will be a helpful tool for the court of appeals to expeditiously reach conclusions that are sound, comprehensive, and fair. *Perry*'s fundamental error framework, however, can be applied in a manner that will make it even more expeditious and allow Idaho's appellate courts to reach sound conclusions, while minimizing arbitrariness by restraining judicial discretion.

The first prong of *Perry*'s three-prong fundamental error test requires that the defendant show that one or more of his unwaived constitutional rights were violated.¹⁴⁵ However, the *Perry* court stated that the "appellate court's authority to remedy [unobjected-to] error is strictly circumscribed to cases where the error results in the defendant being

144. *Id.*

145. *Id.* at 977.

deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal.”¹⁴⁶ Thus, the inquiry with respect to the first prong is always whether an error that allegedly occurred had the effect of depriving the defendant of his or her Fourteenth Amendment due process rights.

1. Fourteenth Amendment Due Process Determinations

Applied to the setting of a criminal proceeding, the Due Process Clause of the Fourteenth Amendment requires that the procedures employed to determine the guilt or innocence of a defendant align with the “fundamental ideas of fair play and justice.”¹⁴⁷ Our system of justice employs the adversarial trial system for the “solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.”¹⁴⁸ Thus, due process is essentially a set of procedures designed to ascertain the truth, in a fair manner, consistent with the ideals of fair play. Due process requires that criminal proceedings reach a correct outcome and that the correct outcome be reached through the use of fair and proper procedures.¹⁴⁹

No one doubts the central and fundamental importance of a defendant’s right to due process of law. However, no courts or scholars have ever been able to definitively determine the point at which a defendant’s right to due process is infringed upon.¹⁵⁰ Indeed, “[f]or all its consequence, ‘due process’ has never been, and perhaps can never be, precisely defined.”¹⁵¹ Many courts, including Idaho’s court system, often reference “fundamental fairness” as being synonymous with “due process,” but this analogy does little to truly shed light on the gray areas and contours that due process of law creates and protects.¹⁵² Because due process determinations are wrought with difficult judgment calls buttressed only by judicial discretion, making fundamental error determinations based on due process violations should be avoided whenever possible.

2. Avoiding the Due Process Determination Through *Perry*’s Second Prong

With the second prong of its analysis, the *Perry* court gave Idaho appellate courts a means to avoid the often difficult question of whether an unobjected-to error constituted a deprivation of the defendant’s due process rights. Although the case lays out the “unwaived constitutional

146. *Id.* at 976.

147. *In re Oliver*, 333 U.S. 257, 282 (1948).

148. *Estes v. State of Tex.*, 381 U.S. 532, 540 (1965).

149. Michael T. Fisher, Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process Than the Bottom Line, 88 COLUM. L. REV. 1298, 1300 (1988).

150. *Id.*

151. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24 (1981) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

152. *Id.*

right” prong first, it never suggests that courts must probe and apply the due process analysis at the outset.

Perry’s three-prong framework is conjunctive, requiring the defendant to prove each prong in order to establish a fundamental error. Since the test is conjunctive and every factor is required, Idaho’s appellate courts would be wise to proceed through the three-prong fundamental error analysis beginning with the second prong.

The flexibility that the second prong gives to appellate courts can be illustrated by comparing the Idaho Court of Appeals’ decision in *State v. Perry*¹⁵³ with the subsequent Supreme Court decision.¹⁵⁴ Comparing each court’s analysis of whether the prosecutor committed a fundamental error illustrates how the Supreme Court intended the second prong to operate.

The court of appeals’ decision demonstrates the precise problems that plagued fundamental error review before the *Perry* framework. In its analysis, the court found that the prosecutor’s elicitation of vouching testimony constituted misconduct.¹⁵⁵ However, when the court of appeals applied its fundamental error standard of review, it could not articulate one clearly.

First, the court of appeals defined “fundamental error” as an error that “goes to the foundation or basis of a defendant’s rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.”¹⁵⁶ However, the court of appeals recognized that other definitions of “fundamental error” existed, including “an error that goes to the foundation or basis of a defendant’s rights”¹⁵⁷ as well as an “error which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process.”¹⁵⁸ The court of appeals never articulated which standard it was applying, but stated that the error was “not so egregious as to rise to the level of fundamental error.”¹⁵⁹ The standards that the court of appeals relied on were ambiguous and indefinable.

In contrast, the Idaho Supreme Court’s analysis of the same issue, after it articulated the new standard, illustrates the advantages of the new framework. First, like the court of appeals, the supreme court de-

153. *State v. Perry*, 168 P.3d 49 (Idaho Ct. App 2007).

154. *State v. Perry*, 245 P.3d 961 (2010).

155. *Perry*, 168 P.3d at 52–54.

156. *Id.* at 53 (quoting *State v. Christiansen*, 163 P.3d 1175 (Idaho 2007)).

157. *Id.* (quoting *State v. Christiansen*, 163 P.3d 1175 (Idaho 2007) (quoting *State v. Kenner*, 826 P.2d 1306, 1309 (Idaho 1992))).

158. *Id.* (quoting *State v. Christiansen*, 163 P.3d 1175 (Idaho 2007) (quoting *State v. Mauro*, 824 P.2d 109, 111 (Idaho 1991))).

159. *Id.*

terminated that the prosecutor committed misconduct.¹⁶⁰ After this determination, however, the supreme court did not proceed to analyze the error in light of the defendant's due process rights. Rather, under the second prong of the framework, it held that Perry's failure to object was a tactical decision.¹⁶¹ Thus, Perry's claims failed under the second prong and could not constitute fundamental error.¹⁶²

The Idaho Supreme Court's preference for ruling on alleged fundamental errors solely based on the second prong of the *Perry* fundamental error framework continued in *State v. Longest*.¹⁶³ In *Longest*—the first case after *Perry* to invoke its fundamental error framework—the court shed additional light on how it intended appellate courts to apply the framework, focusing its initial inquiry on the second prong.

The appellant in *Longest* asserted that the State's failure to comply with his plea agreement constituted a fundamental error. Longest was charged with failure to register as a sex offender in violation of Idaho Code section 18-8309, and he pled guilty pursuant to a plea agreement with the State.¹⁶⁴ The plea agreement provided that the State would recommend a sentence of three years fixed, plus seven years indeterminate, for a total of ten possible years of detention, with probation, capped with 180 days in jail.¹⁶⁵ The court rejected the plea agreement and sentenced Longest to a ten-year term of imprisonment, with five years fixed, but retained jurisdiction in the matter for 180 days.¹⁶⁶

After the 180-day period of confinement pending sentence had passed, Longest went before the court again. The district judge, noting Longest's poor rider report, relinquished jurisdiction and imposed the previous sentence.¹⁶⁷ The opinion, authored by Justice Jim Jones, wasted no time introducing *State v. Perry* as supplying the appropriate standard of review to guide the court's decision. Justice Jones articulated each of the three prongs, but instead of proceeding through them as the court in *Perry* articulated them, he began with the second prong, recognizing that "Longest [was] unable to make a showing of clear or obvious error."¹⁶⁸ The court in *Longest* illustrated the flexibility that *Perry*'s three-prong framework has and also provided the lower appellate courts with an example of how that framework can and should be used to expeditiously resolve potentially thorny appeals.

160. *State v. Perry*, 245 P.3d 961, 981 (Idaho 2010).

161. *Id.* at 982.

162. *Id.*

163. *State v. Longest*, 241 P.3d 955 (Idaho 2010).

164. *Id.* at 956.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* Longest did not establish a clear or obvious error because he did not present any authority to support "the proposition that a plea agreement requiring the State to recommend probation for an indefinite term remains binding a [subsequent] retained jurisdiction hearing." *Id.* at 957.

The Idaho Court of Appeals has cited *Perry* nineteen times on direct appeal since it was issued to resolve claims of fundamental error.¹⁶⁹ The court of appeals' first two citations of *Perry* came in *State v. Felder*¹⁷⁰ and *State v. Truman*.¹⁷¹ In these cases, the court of appeals likely arrived at the right conclusion, but not in a way that maximized the flexibility of *State v. Perry*'s conjunctive framework.

First, in *State v. Felder*, the appellant claimed fundamental error from four separate instances of unobjected-to alleged prosecutorial misconduct.¹⁷² The court in *Felder* laid out the *State v. Perry* framework verbatim, asserting that errors not contemporaneously objected to must survive the three-prong fundamental error analysis.¹⁷³ However, this was the last time the court mentioned the framework.

Comprehensively addressing each of *Felder*'s prosecutorial misconduct claims, the court concluded that, in each instance, no misconduct had occurred.¹⁷⁴ The court seemed content with this resolution, never arriving at the appropriate conclusion that *Felder*'s prosecutorial misconduct claims failed the second prong of *Perry* because, since no errors were found, no plain or obvious error existed, and therefore, there could be no fundamental error.

The second case, *State v. Truman*, rather than misapplying the *Perry* framework like *Felder*, used unfortunate language when setting out the standard of review, casting the *Perry* fundamental error standard not as a three-prong conjunctive test as it was intended, but as a two part test:

[W]here an error has occurred at trial and was not followed by a contemporaneous objection, such error shall only be reviewed where the defendant demonstrates to an appellate court that one of his unwaived constitutional rights was plainly violated. If

169. *State v. Herrera*, Nos. 34193, 34818, 37619, 2011 WL 4953946 (Idaho Ct. App. Oct., 19, 2011); *State v. Betancourt*, 262 P.3d 278 (Idaho Ct. App. 2011); *State v. Rollins*, No. 37688, 2011 WL 2803621 (Idaho Ct. App. July 19, 2011); *State v. Norton*, 254 P.3d 77 (Idaho Ct. App. 2011); *State v. Jackson*, 256 P.3d 784 (Idaho Ct. App. 2011); *State v. Sutton*, 254 P.3d 62 (Idaho Ct. App. 2011); *State v. Grove*, 259 P.3d 629 (Idaho Ct. App. 2011); *State v. Corbus* 256 P.3d 776 (Idaho Ct. App. 2011); *State v. Pentico*, No. 37834, 2011 WL 4914705 (Idaho Ct. App. Oct. 17, 2011); *State v. Pullin*, Nos. 37155, 37156, 2011 WL 2410075 (Idaho Ct. App. June 16, 2011); *State v. Peppcorn*, Nos. 37314, 373315, 2011 WL 1366779 (Idaho Ct. App., April 12, 2011); *State v. Reid*, 253 P.3d 754 (Idaho Ct. App. 2011); *State v. Gomez*, No. 36545, 2011 WL 1085989 (Idaho Ct. App. Mar. 25, 2011); *State v. Truman*, 249 P.3d 1169 (Idaho Ct. App. 2010); *State v. Jones*, No. 36841, 2011 WL 4011738 (Idaho Ct. App. Sept. 12, 2011); *State v. Keyes*, 248 P.3d 1278 (Idaho Ct. App. 2011); *State v. Mosqueda*, 252 P.3d 563 (Idaho Ct. App. 2010); *State v. Felder*, 245 P.3d 1021 (Idaho Ct. App. 2010).

170. *Felder*, 245 P.3d 1021.

171. *Truman*, 249 P.3d 1169.

172. *Felder*, 245 P.3d at 1023.

173. *Id.*

174. *Id.* at 1023–27.

the defendant meets this burden then an appellate court shall review the error under the harmless error test, with the defendant bearing the burden of proving there is a reasonable possibility that the error affected the outcome of the trial.¹⁷⁵

This language does a disservice to the three-prong fundamental error framework by failing to set out each prong for separate evaluation and analysis. This summary of the three-part framework does not embody the true framework outlined in *Perry* and should be discarded by Idaho's appellate courts reviewing claims of fundamental error.

When the Idaho Supreme Court crafted Idaho's fundamental error framework, it carefully assessed each of the *United States v. Olano* factors, indicating that each prong serves an important purpose.¹⁷⁶ The second prong in particular is designed to deal with meritless claims, allowing appellate courts to dispose of frivolous claims expeditiously without engaging in the discretionary process of determining whether a due process violation occurred. The Idaho Supreme Court's decision in *State v. Longest* makes this preference clear. After all, fundamental error review is not constitutionally required and, as a matter of principle, appellate courts generally will not—and should not—hear matters on appeal that are not preserved in the trial record. Although the Idaho Court of Appeals has yet to employ *Perry*'s second prong to quickly dispose of an unmeritorious appeal, it has developed a streamlined analysis for applying *Perry*'s first prong where an error is clear and obvious on the record.

3. Appellants Alleging Constitutional Violations Predicated on a Rule or Statute

As both *State v. Perry* and *State v. Longest* made clear, *Perry*'s second prong is the most expeditious way for appellate courts to dispose of unmeritorious claims. However, in many cases, it is undeniable that an error is in fact clear and obvious on the record. In such cases, a second-prong analysis will not aid the court unless the record also indicates that the appellant failed to object for a tactical reason. Where a clear or obvious error is present, appellate courts must then turn to the first prong of the *Perry* framework. In a line of recent cases involving appellants who allege fundamental errors predicated on some statutory or rule-based abnormality, the Idaho Court of Appeals has latched onto a rule announced in *State v. Kirkwood*, and kept alive in *State v. Perry*. This rule states that “where . . . the asserted error relates not to in-

175. *Truman*, 249 P.3d at 1179 (quoting *State v. Perry*, 245 P.3d 961, 978 (Idaho 2010)). This language, although found in the *Perry* opinion itself, gives short change to the *Perry* three-prong fundamental error review and diminishes the implicit flexibility illustrated by Justice Jones' opinion in *State v. Longest*.

176. *Supra* Part III.B.3.

fringement upon a constitutional right, but to violation of a rule or statute . . . the ‘fundamental error’ doctrine is not invoked.”¹⁷⁷

Employing this general rule that a violation of a statute or a rule, without an additional showing that the violation constituted a due process infringement, allows appellate courts applying the *Perry* framework to summarily dispose of cases alleging errors that do not implicate the appellant’s due process rights. The first case in this line came when the court of appeals decided *State v. Norton* on July 7, 2011.¹⁷⁸ In *Norton*, the defendant was convicted of arson in the first degree, conspiracy to commit arson in the first degree, and insurance fraud.¹⁷⁹ In her appeal, Norton raised eight separate issues. Five of those issues were errors she did not object to at trial, but asserted on appeal that they were fundamental errors.¹⁸⁰ Specifically, Norton alleged:

[That the State] failed to provide notice of its intent to introduce other acts evidence pursuant to Idaho Rule of Evidence 404(b); that the State introduced large amounts of other acts evidence in violation of the Idaho Rules of Evidence; that the State introduced an interrogation transcript into evidence in violation of the Idaho Rules of Evidence; that the admission of a police officer’s testimony regarding truthfulness violated her right to a fair trial; and that the prosecutor committed misconduct by introducing inadmissible evidence and by making improper opening and closing arguments.¹⁸¹

The court’s treatment of Norton’s Rule 404(b) issues best illustrates how the first prong can be employed in a streamlined fashion. Norton alleged twenty-eight separate instances of 404(b) violations.¹⁸² Based on these violations, Norton contended that her right to a fair trial had been denied and that the introduction of the character evidence, without notice, constituted prosecutorial misconduct.¹⁸³

In analyzing whether the errors Norton alleged constituted fundamental error, the court pointed out that “the requirements set forth in I.R.E. 404(b), regarding admissibility and notice, are not of constitutional import. Rather, they are required by a rule of evidence.”¹⁸⁴ The court in *Norton* was not convinced that the Rule 404(b) errors the appellant raised amounted to a due process violation. The court was clear that it

177. *State v. Perry*, 245 P.3d 961, 978 (Idaho 2010) (quoting *State v. Kirkwood*, 726 P.2d 735, 737–38 (Idaho 1986)).

178. *State v. Norton*, 254 P.3d 77 (Idaho Ct. App. 2011).

179. *Id.* at 82.

180. *Id.*

181. *Id.*

182. *Id.* at 83.

183. *Id.*

184. *Id.*

would not “entertain *attempts to characterize* alleged evidentiary errors, to which no objection was made at trial, as a due process violation of the right to a fair trial in a fair tribunal.”¹⁸⁵ Essentially, *Norton* stands for the proposition that veiled attempts to characterize errors based on the violation of a rule or statute will not get appellants past the first prong of the *Perry* framework. *Norton* also indicates that the court of appeals does not believe that it is the court’s job to articulate a reason why the violation of a rule or a statute could rise to the level of a constitutional violation. Applying those principles, the court of appeals affirmed Norton’s conviction.¹⁸⁶

Likewise, in *State v. Jackson*, the appellant appealed his conviction for lewd conduct with a minor based on the prosecutor’s violation of a pre-trial order precluding the State from mentioning a news broadcast indicating additional related crimes.¹⁸⁷ Jackson did not object to the prosecutor’s reference to the newscast at trial.¹⁸⁸ Recognizing the applicability of the *Perry* fundamental error framework, the court quickly set out the test and began analyzing the factors in order. The court recognized that if “the asserted error relates not to infringement upon a constitutional right, but to violation of a rule or statute . . . the ‘fundamental error’ doctrine is not invoked.”¹⁸⁹ Importantly, then, the court characterized the errors that the appellant alleged as errors predicated on violations of Idaho Rule of Evidence 404(b).¹⁹⁰ Noting the *Perry* court’s intention to limit the circumstances that warrant fundamental error review, the court in *Jackson* concluded that a holding allowing a violation of an evidentiary rule to constitute a due process violation would “virtually eviscerate the first prong of the *Perry* standard.”¹⁹¹ Because the appellant failed to articulate why such a violation amounted to a due process infringement, the first prong of *Perry* could not be satisfied.¹⁹²

Although the court of appeals artfully employed the first prong in *Jackson*, it is likely that the second prong would have dealt with Jackson’s claims more expeditiously. Even though a clear and obvious error did occur on the record in *Jackson*, it seems obvious that Jackson’s failure to object at trial was a tactical decision. Jackson filed a motion in limine prior to trial seeking to exclude any reference to the newscast at issue.¹⁹³ After a hearing on the motion, the judge reserved his ruling until the presentation of evidence.¹⁹⁴ However, on the morning of the trial,

185. *Id.* at 83–84 (emphasis added).

186. *Id.* at 96.

187. *State v. Jackson*, 256 P.3d 784, 786 (Idaho Ct. App. 2011).

188. *Id.*

189. *Id.* at 787 (quoting *State v. Perry*, 245 P.3d 961, 978 (Idaho 2010)).

190. *Id.* at 788.

191. *Id.* at 787–88.

192. *Id.* at 788.

193. *Id.* at 786–87.

194. *Id.* at 787.

the prosecutor requested a ruling to inform his open statements.¹⁹⁵ The judge held that the “prosecutor could make his point and avoid prejudice to Jackson by eliciting from the victim that ‘there was a law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that.’”¹⁹⁶ Immediately thereafter, the prosecutor, in his opening statement blatantly mentioned the newscast—Jackson failed to object.¹⁹⁷ This failure to object came after briefing the issue in a pre-trial motion in limine, arguing the motion in limine, and arguing the motion moments before trial. These facts seem to indicate an obvious tactical decision not to object with the hope of obtaining a reversal on appeal. The second component of the second prong of the *Perry* framework applies directly to these circumstances.

B. Pragmatic Effects of *State v. Perry*

Beyond its benefits for appellate judges, *State v. Perry* will be beneficial to the court system as a whole by promoting fair play and efficient resolution of meritless appeals. The benefits to the judicial system will derive not only from the clarity of the court’s language, but also from the significant and clear burden that the three-prong fundamental error standard of review imposes on defendants appealing with meritless claims. Given the general rule that courts will not entertain claims of unobjected-to error, the fact that there is a significant burden on the appellant to establish a fundamental error seems not only appropriate but necessary to anchor the court’s general rule that errors must be followed by a timely objection for an appellate court to review it later.

The significant burden created by *Perry*’s three-prong test will result in a multitude of benefits. First, it should squelch any attempts defense counsel might make to avoid objecting for tactical purposes, hoping that the appellate court will remand in the event that the verdict does not fall in their client’s favor. Second, it will reinforce the court’s preference for contemporaneous objections to errors that occur at trial. The down stream effects of these benefits are many, mostly rooted in judicial efficiency. Promoting timely, relevant objections leads to justice being done appropriately in the trial court by allowing trial judges to correct any prejudicial harm that a defendant might suffer. If for some reason the trial court fails to appropriately handle the defense counsel’s objection, the fact that an objection has been made will not only preserve the error for appeal under *Chapman* Harmless Error, but it will

195. *Id.*

196. *Id.*

197. *Id.*

also provide the appellate court with a robust record and a solid account of the alleged error and its potentially prejudicial effects.¹⁹⁸

The robust record that *State v. Perry* encourages will allow the appellate court to do justice appropriately for the defendant. The creation of a comprehensive record will benefit the judicial system as a whole by upholding a defendant's right to appeal where there has truly been prejudice, while providing the appellate court with the information it needs to properly review the alleged error expeditiously and comprehensively. Defendants can't merely convince a court that their rights to due process were violated. After *Perry*, they must also illustrate that the error was plain or obvious, prove that they made no tactical omissions, and show that the error they are alleging was not harmless.

X. CONCLUSION

Prosecutorial misconduct and fundamental error review have a rich and complex history in Idaho. In *State v. Perry*, the Idaho Supreme Court distilled a century of precedent into clear workable standards. Prosecutors now know that any claim that they committed misconduct will be assessed identically to all other alleged trial errors.

The court's treatment of all trial errors takes two clear forms after *State v. Perry*. The first form pertains to errors that are contemporaneously objected to at trial; these errors will now be reviewed under the *Chapman* Harmless Error standard. The second form of error review is fundamental error review. Fundamental error review will be employed as the standard of review when an appellant claims that an error occurred at trial but he failed to contemporaneously object to it. To establish a fundamental error after *State v. Perry*, the appellant must satisfy each prong in the court's three-prong fundamental error framework.

198. Since 2001, the Idaho Court of Appeals has heard thirty-six cases where one of the appellant's main issues on appeal was the presence of prosecutorial misconduct in the trial court, which allegedly deprived the defendant of his fourteenth amendment right to due process. Of these thirty-six cases, only six involved contemporaneous objections. Of the six cases where the instance of prosecutorial misconduct was contemporaneously objected to, only three necessitated reversal. In all, errors involving prosecutorial misconduct provided five reversals. Considering that no objection to the prosecutor's conduct was made in twenty-nine of the thirty-six cases, twenty-nine of these appellants were claiming fundamental error. Two of the twenty-nine (6.8%) appellants alleging that the prosecutor's misconduct was fundamental error won a reversal. Appellants asserted eleven common grounds for prosecutorial misconduct: (1) expressing an opinion of guilt, (2) misrepresenting evidence, (3) misrepresenting the burden of proof, (4) appealing to the passions of the jurors, (5) referring to evidence not admitted in trial, (6) vouching for a witness, (7) discussing the defendant's prior crimes, (8) commenting on the defendant's silence, (9) allowing false testimony, (10) improperly eliciting testimony, and (11) disparaging the defendant and/or defendant's counsel. On average each defendant raising claims of prosecutorial misconduct asserted 1.53 bases of misconduct. The most common basis of alleged prosecutorial misconduct was appealing to the passions of the jurors: appellants claimed it in twelve of the fifty-six alleged events. Three appellants each alleged four separate events of prosecutorial misconduct—the highest number of bases alleged by any appellant. In all three of these cases, no objections to the misconduct were made at trial. *See* Appendix.

The court's fundamental error standard is one that respects the finality of judgments and recognizes the burdens that meritless appeals have on the judicial system. If used appropriately the *Perry* fundamental error framework provides Idaho's appellate courts with a flexible standard of review, which will allow them to sort out meritless claims where necessary, while still preserving the constitutional rights of defendants.

*Jeffrey W. Bower**

* J.D. Candidate, May 2012, University of Idaho College of Law. The author would like to thank Professor Alan F. Williams and Ada County Prosecutor Jan Bennetts for offering timely insight and advice, as well as the *Idaho Law Review* staff.

APPENDIX

Case Name	Cite	C O	E G	M E	M B P	A P J	R E N A	V W	D P C	D R S	A F T	I E T	D D C	#M T A
State v. Eldred	222 P.3d 1011	N	A	X	X	X								4
State v. Olson	64 P.3d 967	Y	A				X							1
State v. Perry	168 P.3d 49	N	A					X						1
State v. Erickson	227 P.3d 933	B	R		X				X	X				3
State v. Ortiz	218 P.3d 17	N	A	X										1
State v. Cobell	223 P.3d 291	N	A	X						X				2
State v. Wheeler	233 P.3d 1286	N	A					X			X			2
State v. Barnes	212 P.3d 1017	N	A									X		1
State v. Romero-Garcia	75 P.3d 1209	N	A			X				X				2

Table of Terms

CO – Contemporaneous Objection O – Outcome EG – Expression of Guilt MS – Misrepresenting Evidence
MBP – Misrepresenting Burden of Proof APJ – Appealing to the Passion of Jurors VW – Vouching for a Witness
RENA – Referring to Evidence Not Admitted DPC – Discussing Prior Crimes AFT – Allowing False Testimony
DRS – Defendant’s Refusal to Speak IET – Improperly Elicited Testimony DDC – Disparaged Defendant or Counsel
#MTA – Number of Misconduct Theories Alleged N – No Y – Yes B – Both A – Affirmed R – Reversed
R* – Reversed on Other Grounds

Case Name	Cite	C O	O A	E G	M E	M B P	A P J	R E N A	V W	D P C	D R S	A F T	I E T	D D C	# M T A
State. v. Grantham	198 P.3d 128	N	A										X		1
State v. Beebe	181 P.3d 496	Y	R		X		X				X				3
State v. Gross	189 P.3d 477	N	R				X		X						2
State v. Timmons	178 P.3d 644	N	A	X					X						2
State v. Sanchez	127 P.3d 212	N	A				X								1
State v. Phillips	156 P.3d 583	Y	R				X								1
State v. Troutman	231 P.3d 549	N	R		X	X	X								3
State v. Contreras- Gonzalez	190 P.3d 197	N	R*		X		X			X				X	4
State v. Coffin	191 P.3d 244	N	A			X									1

Table of Terms

CO – Contemporaneous Objection O – Outcome EG – Expression of Guilt MS – Misrepresenting Evidence
MBP – Misrepresenting Burden of Proof APJ – Appealing to the Passion of Jurors VW – Vouching for a Witness
RENA – Referring to Evidence Not Admitted DPC – Discussing Prior Crimes AFT – Allowing False Testimony
DRS – Defendant’s Refusal to Speak IET – Improperly Elicited Testimony DDC – Disparaged Defendant or Counsel
#MTA – Number of Misconduct Theories Alleged N – No Y – Yes B – Both A – Affirmed R – Reversed
R* – Reversed on Other Grounds

Case Name	Cite	C	O	E	M	MB	AP	RE	V	DP	DR	AF	IE	DD	#M
		O	A	G	E	P	J	NA	W	C	S	T	T	C	TA
State v. Kuhn	85 P.3d 1109	N	A											X	1
State v. Gutierrez	141 P.3d 1158	N	A											X	1
State v. Stefani	132 P.3d 455	Y	A								X				1
State v. Johnson	233 P.3d 190	N	R*		X										1
State v. Felder	2010 WL 5059662	N	A		X	X	X		X						4
State v. Corwin	216 P.3d 651	N	A						X						1
State v. Adams	216 P.3d 146	N	A				X								1
State v. Gamble	193 P.3d 878	Y	A			X									1
State v. Anderson	63 P.3d 485	N	A						X						1

Table of Terms

CO – Contemporaneous Objection O – Outcome EG – Expression of Guilt MS – Misrepresenting Evidence
MBP – Misrepresenting Burden of Proof APJ – Appealing to the Passion of Jurors VW – Vouching for a Witness
RENA – Referring to Evidence Not Admitted DPC – Discussing Prior Crimes AFT – Allowing False Testimony
DRS – Defendant’s Refusal to Speak IET – Improperly Elicited Testimony DDC – Disparaged Defendant or Counsel
#MTA – Number of Misconduct Theories Alleged N – No Y – Yes B – Both A – Affirmed R – Reversed
R* – Reversed on Other Grounds

CLARITY AND BALANCE: APPELLATE REVIEW OF HARMLESS ERROR, FUNDAMENTAL ERROR, AND PROSECUTORIAL MISCONDUCT AFTER STATE V. PERRY

Case Name	Cite	CO	O	EG	ME	MBP	APJ	RENA	VW	DP	DRS	AFT	IE	DDC	#MTA
State. v. Adams	67 P.3d 103	N	A					X							1
State v. Wolfrum	175 P.3d 206	N	A				X								1
State v. Dougherty	121 P.3d 416	Y	A				X								1
Cooke v. State	233 P.3d 164	N	A							X					1
State v. Hooper	2006 WL 2328233	N	R*				X								1
State v. Gerardo	205 P.3d 671	N	A		X										1
State v. Trumman	2010 WL 5113049	N	A					X							1
State v. Parmer	207 P.3d 186	N	A					X							1
Total = 36		N=29 Y=6 B=1	A=28 R=5 R*=3	2	9	6	13	4	7	3	5	7	2	3	55

Table of Terms

CO – Contemporaneous Objection O – Outcome EG – Expression of Guilt MS – Misrepresenting Evidence
 MBP – Misrepresenting Burden of Proof APJ – Appealing to the Passion of Jurors VW – Vouching for a Witness RENA – Referring to Evidence Not Admitted DPC – Discussing Prior Crimes AFT – Allowing False Testimony DRS – Defendant's Refusal to Speak IET – Improperly Elicited Testimony DDC – Disparaged Defendant or Counsel #MTA – Number of Misconduct Theories Alleged N – No Y – Yes B – Both A – Affirmed R – Reversed
 R* – Reversed on Other Grounds

