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## Gould v. State Respondent's Brief Dckt. 39738

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BRANDON GOULD,	)	
	)	No. 39738
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2011-122
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

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

**ATTORNEY FOR  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Brandon Gould appeals from the judgment entered upon the district court's order dismissing his petition for post-conviction relief.

### Statement Of Facts And Course Of The Proceedings

Following allegations by Gould's seven-year-old daughter, A.G.<sup>1</sup>, that her father "always touches [her] in private places," and that he "licked [her] potty," a grand jury indicted Gould on one count of lewd conduct and one count of sexual abuse of a child under the age of 16. (#35797, CARES Interview Summary Report, attached to PSI; #35797 R., pp.16-17.<sup>2</sup>) A jury found Gould guilty of the lewd conduct charge but was unable to reach a unanimous verdict on the sexual abuse charge. (#35797 R., pp.87-88.) The court imposed a unified 10-year sentence with three years fixed. (#35797 R., pp.106-107.) On direct appeal, Gould raised a single claim: that his sentence is excessive. (R., p.133.) The Court of Appeals affirmed the judgment.

Gould filed a timely *pro se* petition for post-conviction relief in which he raised the following claims: (1) prosecutorial misconduct for withholding "newly

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<sup>1</sup> Gould has two daughters who share the same initials – A.G. (Tr., p.10, Ls.15-24.) For clarity, the victim in the lewd conduct case will be referred to as A.G.1 and Gould's other daughter will be referred to as A.G.2.

discovered exculpatory evidence” that A.G.1’s mother, Kristen, “had previously and falsely alleged sexual abuse on one of her children”; (2) ineffective assistance of trial counsel; and (3) ineffective assistance of appellate counsel. (R., pp.5-10.) Gould also filed a motion for the appointment of counsel, which the district court granted. (R., pp.160-162, 169.)

The state filed an answer and motion for summary dismissal after which Gould filed a motion to amend the petition and “stay” the proceedings in order to allow post-conviction counsel to “review a copy of the presentence investigation report, receive and review transcripts, and prepare an amended petition” “after a discussion of issues with appointed counsel.” (R., pp.177-180, 198-201, 204.) The court granted Gould’s motion and Gould subsequently filed an “Addendum to Petition for Post-Conviction Relief.” (R., pp.205, 210-212.) In the addendum, Gould raised additional allegations of ineffective assistance of trial and appellate counsel. (R., pp.210-212.) The state filed an answer and motion for summary dismissal with respect to the addendum. (R., pp.213-217.)

After Gould filed an “Objection to Motion to Dismiss,” the court entered an order concluding Gould was entitled to an evidentiary hearing on his ineffective assistance of trial and appellate counsel claims, but granting the state’s motion

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<sup>2</sup> Pursuant to Gould’s motion, the Idaho Supreme Court entered an order augmenting the record with “the Clerk’s Record and Reports Transcripts in Supreme Court Docket No. 35797-2012, *State v. Gould*.” (Order to Augment the Record and Suspend the Briefing Schedule, dated October 17, 2012.) Although not expressly noted, the order also appears to grant Gould’s request to augment the record with the transcript of the grand jury hearing and the presentence investigation report. (Id.)

for summary dismissal of the prosecutorial misconduct claim on the ground that it "could have been and should have been raised on appeal." (R., pp.226-234.)

Following an evidentiary hearing, the court made findings on the record and entered a written order dismissing Gould's petition. (Tr., pp.188, L.24 – p.194, L.22, p.195, L.18 – p.199, L.4; R., p.244.) In its order the court stated: "The Court listened to the evidence and testimony presented at the hearing and found all witnesses who testified to be credible. The Court finds neither Matthew Roker, Mr. Gould's trial attorney, nor Justin Curtis, Mr. Gould's appellate attorney, were deficient in their representation of Mr. Gould." (R., p.244.) Gould timely appealed. (R., pp.246-248.)



## ISSUES

Gould states the issues on appeal as:

1. Did the district court err in applying the incorrect standards of “negligence,” “professional malpractice,” and “making mistakes so fundamental that it was as though Mr. Gould had no counsel at all” to the question of whether trial and appellate counsel had rendered deficient performance?
2. Applying the proper standard, should post-conviction relief be granted because trial and appellate counsel were constitutionally ineffective?

(Opening Brief of Appellant (“Appellant’s Brief”), p.33.)

The state rephrases the issue on appeal as:

Has Gould failed to show the district court applied the incorrect legal standard or otherwise erred in denying post-conviction relief?

## ARGUMENT

### Gould Has Failed To Show Error In The Denial Of His Petition For Post-Conviction Relief

#### A. Introduction

Following an evidentiary hearing on Gould's ineffective assistance of trial and appellate counsel claims, the district court denied relief, concluding Gould failed to meet his burden of proving deficient performance by either trial or appellate counsel.<sup>3</sup> (R., p.244; Tr., pp.189-199.) Gould contends the district court applied incorrect legal standards in reaching this conclusion and that application of the correct standard shows the district court erred in denying post-conviction relief. (Appellant's Brief, pp.33-41.) Review and application of the relevant legal standards and the evidence presented shows both of Gould's arguments fail.

#### B. Standard Of Review

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which her claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d

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<sup>3</sup> Having concluded that Gould failed to meet his burden of showing deficient performance, the district court declined to address the prejudice prong of the ineffective assistance of counsel standard. (Tr., p.193, Ls.8-14, p.194, Ls.14-22.)

964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. The District Court Applied The Correct Legal Standard

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has articulated the defendant's burden under Strickland as follows:

To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted).

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 131 S.Ct. at 787. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citations and quotations omitted). "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. Rather, "[c]ounsel's

errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.

In its oral ruling, the district court articulated the applicable Strickland standard, stating:

The standard that the court has to apply in making a decision regarding an allegation of ineffective assistance of counsel as a ground for relief is set forth, as the attorneys well know in the well known case of Strickland versus Washington. It’s a two-step analysis, and the first is to determine whether or not the trial attorney, and in this case not only the trial attorney but the appellate attorney, were ineffective in that they failed to provide competent legal counsel on behalf of their client.

(Tr., p.189, Ls.12-22.)

Although the court set forth the Strickland standard at the outset of its ruling, Gould nevertheless claims the court “applied a variety of standards to determine deficient performance including whether counsels’ errors were so fundamental that it was as if [Gould] did not have counsel. The court equated with [sic] this standard with negligence, professional negligence, and professional malpractice.” (Appellant’s Brief, p.34.) Gould does not provide any citation to the record in his argument section to indicate exactly which statements he takes issue with, presumably leaving the state and Court to ascertain that information from elsewhere in his brief. However, neither the state nor the Court should be required to sort through Gould’s brief and ascertain the parameters of his argument. See Idaho State Bar v. Clark, 153 Idaho 349, \_\_\_, 283 P.3d 96, 103 (2012) (“this Court will not search the record on appeal for unspecified error”); State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (It is well settled that a party waives an issue on appeal if either authority or argument is

lacking.); United States v. Dunkel, 927 F.2d 955, 956 (7<sup>th</sup> Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”).

Assuming Gould’s complaint is based on the quotations included in Section B, “Procedural History and Statement of Facts,” subsection 9, “Petition for Post Conviction Relief,” Gould quotes the following words and phrases used by the court in its oral ruling: “negligent,” “fell below the standard of practice and the standard of care for attorneys practicing their respective professions, trial attorney and appellate attorney, in this community during the relevant times,” “akin to making a mistake that was so fundamental that it was as though Mr. Gould had no attorney at all,” “professional malpractice,” and “professional negligence.” (Appellant’s Brief, pp.31-32.) Gould appears to argue that some of the court’s statements indicate the court applied the standard from United States v. Cronin, 466 U.S. 648 (1984), which, unlike Strickland, allows for a presumption of prejudice under certain circumstances. (Appellant’s Brief, p.34.) No reasonable reading of the court’s comments supports Gould’s claim that the court was erroneously applying the Cronin standard rather than Strickland. The court expressly noted the applicable Strickland standard and Gould’s interpretation of the court’s comments as applying some other standard is insufficient to show the court did not understand or apply Strickland.

Nor do the court’s comments about negligence and malpractice indicate, as Gould claims, that the court applied a “civil standard of negligence” rather than the Strickland standard the court specifically acknowledged governed its decision. (Appellant’s Brief, pp.34-35.) Indeed, the court’s comments related to

the standards of practice among attorneys were entirely consistent with Strickland and the manner in which it has been applied in other cases. As noted by the United States Supreme Court in Premo v. Moore, 131 S.Ct. 733 (2011), citing Strickland, “The question is whether an attorney’s representation amounted to incompetence under **prevailing professional norms**, not whether it deviated from best practices or most common custom.” (Emphasis added.) See also Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012) (“Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.”); Steele v. State, 153 Idaho 783, \_\_\_, 291 P.3d 466, 473 n.8 (Ct. App. 2012) (noting the petitioner’s failure to “present any evidence that his attorney’s conduct was objectively unreasonable under prevailing professional norms”).

Gould’s claim that the district court applied a “variety” of incorrect legal standards to his ineffective assistance of counsel claims is without merit.

D. Gould Has Failed To Show Error In The District Court’s Determination That He Failed To Prove Trial Counsel Was Deficient

In his petition and subsequent addendum, Gould alleged his trial attorney was ineffective for failing to (a) “obtain pertinent medical records on both of the children which may have had any mention of the Chief Complaint being Sexual Abuse” (R., p.8); (b) “obtain school attendance records on both of petitioner’s children during the time of the allegations being made against the petitioner” (R., p.8); (c) “conduct any investigation upon the Jury Pool prior to Trial” (R., p.8); (d) “object and challenge for cause upon selection of Juror No. 1 . . . , and Juror No.

28 . . . based upon their places of prior and/or current employment”; (e) “strike Juror No. 31, . . . , and Juror No. 28” (R., p.8); (f) “obtain application [sic] for Health and Welfare Benefits made by Kristen Gould on or about September 10, 2007” (R., p.210); and (g) “obtain medical records from Dr. Rand regarding a January 2008 visit by A.G.[1] and A.G.[2], minor children” (R., p.210). The court denied relief on all of Gould’s ineffective assistance of trial counsel claims after concluding Gould failed to establish counsel was deficient. (Tr., p.190, L.14 – p.193, L.14, p.195, L.18 – p.199, L.4.)

On appeal, Gould only challenges the denial of relief on his claims that trial counsel was ineffective in failing to obtain “[m]edical records showing a past history of sexual abuse allegations, especially the false sexual abuse allegation based on an injury nearly identical to the injury alleged in this case,” and failing to obtain records from Health and Welfare “showing that Kristen had applied for welfare benefits prior to the accusations against [him].” (Appellant’s Brief, pp.36-37.) Gould contends counsel’s failure to do so was “objectively unreasonable” in light of his defense theory at trial, which was that “Kristen was dishonest, was hypersensitive to issues concerning sexual abuse, controlled her children, was upset with [Gould], and elicited a false accusation from [A.G].” (Appellant’s Brief, p.36.) The district court correctly concluded Gould failed to establish counsel was constitutionally deficient in either regard.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly

assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. However, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005).

1. Medical Records

At the post-conviction evidentiary hearing, Gould introduced medical records from an emergency room visit A.G.2 had on March 16, 2004, approximately three years prior to the allegations by A.G.1. (Compare Exhibit 1 with #35797 R., pp.16-17 (Amended Indictment alleging Gould committed lewd conduct against A.G.1 on or about July 2007 and sexual abuse against A.G.1 on or about August 2007).) Although trial counsel was aware of the hospital visit and explored the nature of the visit at trial, Gould contends it was objectively unreasonable for counsel not to request the medical records from the hospital, claiming the records "were obviously an avenue leading to facts relevant to the merits of the case." (Appellant's Brief, p.36.) Gould, however, fails to explain why the Sixth Amendment compelled trial counsel to subpoena medical records in addition to presenting testimony from Gould's sister on this point. While counsel testified at the evidentiary hearing that it "would have been a good document to have when Kristen under oath said, 'I was not concerned about sexual abuse,'" counsel's conclusion that it would have been useful in light of Kristen's testimony does not mean he was deficient for failing to subpoena the



record in the first place. As counsel noted, he did not expect Kristen to deny that the purpose of the visit to the emergency room was due to a concern about sexual abuse and, in any event, counsel was able to present testimony through Gould's sister to impeach Kristen on that point. (Tr., p.163, L.18 – p.165, L.14.)

Counsel's testimony and the court's conclusion that counsel's performance was not deficient for failing to subpoena the records illustrates one of the guiding principles in applying Strickland – counsel's actions are to be evaluated at the time they were undertaken, not with twenty-twenty hindsight. See Richter, 131 S.Ct. at 790 ("After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."); State v. Manley, 142 Idaho 338, 345, 127 P.3d 954, 961 (2005) (citations and quotations omitted) ("In assessing the reasonableness of attorney performance, this Court has cautioned, judicial scrutiny must be highly deferential and every effort must 'be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Murphy v. State, 143 Idaho 139, 147, 139 P.3d 741, 749 (Ct. App. 2006) ("While trial counsel's candor is commendable, we assess his conduct by way of an objective review of reasonableness under prevailing professional norms so as to eliminate the distorting effects of hindsight.") Gould has failed to

establish error in the denial of relief on his claim that trial counsel was ineffective for failing to subpoena medical records related to A.G.2's 2004 emergency room visit.

## 2. Health And Welfare Records

At the evidentiary hearing, Gould introduced documents relating to Kristen's request for assistance through the Department of Health and Welfare. (Exhibits 2, 3.) Gould claims counsel was deficient in failing to obtain these records prior trial, again arguing the records "were an avenue leading to facts relevant to the merits of the case." (Appellant's Brief, p.37.) Gould's theory is that the records would have shown a "plan" by Kristen to falsely report abuse. (Appellant's Brief, pp.36-37.)

Trial counsel testified that he "knew" Kristen was "getting some benefits before trial," explaining it is "common" in these types of cases because "[a] lot of times the individual who has the children who are making the allegations don't have the resources anymore, so they have to get state assistance." (Tr., p.167, L.18 – p.168, L.1.) According to trial counsel, in all of his cases, "it's the norm that after the charges are filed or the allegations are made and the accused is separated from the family, . . . the state then tries to make sure that the other individual is aware of what is available as far as state assistance" and will "direct them towards Health & Welfare." (Tr., p.168, Ls.6-17.) Counsel admitted he did not obtain the records but also testified that he would not necessarily use such information at trial even if he had because he would "expect that the jury would say yeah, she is in a bad spot, and so she needs to get help from Health and

Welfare,” which could evoke sympathy from the jury. (Tr., p.168, L.24 – p.169, L.22.)

The district court correctly concluded counsel was not deficient in failing to obtain the records from the Department of Health and Welfare. As counsel indicated, he was aware Kristen engaged in the normal practice of obtaining assistance from Health and Welfare and saw no reason to subpoena the records. Gould failed to prove there was anything objectively unreasonable about counsel’s decision-making in this regard and any assertion that the records may have impeached Kristen on the timing of her request for assistance vis-à-vis A.G.1’s disclosure is speculative and premised on hindsight.

3. Even If Counsel Was Deficient For Failing To Obtain Records, Gould Failed To Establish Prejudice

Even if counsel was deficient in failing to obtain copies of the A.G.2’s emergency room records or the Health and Welfare records, Gould failed to prove he was prejudiced as a result since those records would not have materially advanced his defense that Kristen was a liar. More importantly, the records would not have established A.G.1 was lying about the abuse. As trial counsel noted, A.G.1’s testimony was “very harmful” and, although he tried to highlight some of the inconsistencies, he also “vividly remember[s] her testifying on the stand and trying to think of a way that [he] could break in, because the jury was certainly captivated, and she was very emotional as she was testifying to the alleged acts.” (Tr., p.161, Ls.15-24.) Gould’s belief that there is a reasonable probability that a continued character assassination on A.G.1’s

mother would have resulted in a different outcome is not well-founded. Thus, any deficiency by trial counsel in pursuing more evidence on that point did not result in prejudice.

E. Gould Has Failed To Show Error In The District Court's Determination That He Failed To Prove Appellate Counsel Was Deficient

In his petition and subsequent addendum, Gould alleged appellate counsel was ineffective for failing to raise the following claims on appeal: (a) the district court abused its discretion in failing to disqualify jurors 28 and 31 (R., p.9); (b) the district court abused its discretion in allowing certain testimony from Mydell Yeager (R, p.9); (c) the district court abused its discretion in denying Gould's motion for a new trial (R., p.9); (d) prosecutorial misconduct in closing argument (R., p.10); and (e) a violation of Brady v. Maryland, 837 U.S. 83 (1963), based on the state's failure to disclose "Health and Welfare and medical records to trial counsel" (R., p.211). As with trial counsel, the district court concluded Gould failed to prove appellate counsel was deficient. (Tr., p.193, L.15 – p.194, L.16.) Gould has failed to establish this conclusion was erroneous.

The two-prong Strickland test for ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel, a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho

274, 276, 971 P.2d 727, 730 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)).

Gould asserts appellate counsel was ineffective because the only issue he raised, which was that Gould's sentence is excessive, "was weak" and there were "stronger issues" that could have been raised. (Appellant's Brief, pp.37-38.) The standard is not, however, whether Gould thinks there were "stronger" issues; the standard is whether counsel was deficient in his decision regarding what issues to raise and whether Gould would have prevailed on those issues. In any event, Gould presented almost no evidence at the evidentiary hearing to support his claims of ineffective assistance of appellate counsel.

As the petitioner, Gould bore the same burden of proof imposed upon a civil plaintiff. Paradis v. State, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986); Esquivel v. State, 149 Idaho 255, 258 n.3, 233 P.3d 186, 189 n.3 (Ct. App. 2010). If Gould believed appellate counsel was ineffective for failing to raise a claim on appeal regarding the denial of his motion for a new trial, it was incumbent upon him to present evidence to the district court demonstrating why

counsel's failure to do so resulted in constitutionally ineffective assistance. Gould's only "evidence" on this point was his testimony that he thought the excessive sentence issue was "silly" and when he asked appellate counsel about other issues, appellate counsel said those issues were better-suited to post-conviction. (Tr., p.51, L.5 – p.53, L.19.)

The state, on the other hand, called appellate counsel as a witness and he testified that he reviewed the entire record and determined there were no viable issues to raise on appeal other than the sentencing issue, which is always an "arguable" claim. (See generally Tr., pp.105-130.) Gould disagrees and contends appellate counsel should have appealed "[t]he issue of prosecutorial misconduct as established and preserved through the mistrial and new trial motions" and the "issue of error in ruling on the IRE 403 motion."<sup>4</sup> (Appellant's Brief, p.38.) When specifically asked about his decision not to challenge the denial of Gould's motion for a new trial, which encompassed the misconduct allegation and the Rule 403 issue, appellate counsel testified he did not challenge the court's ruling because he "found no error." (Tr., p.125, Ls.6-15.) Gould presented no evidence to support a finding that appellate counsel's decision not to raise the issue was based on ignorance of the law or lack of preparation or that he would have prevailed had the issue been raised. That current appellate counsel thinks the issue was worthy of consideration by an

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<sup>4</sup> The "misconduct" and "IRE 403" issues were both encompassed within Gould's motion for a new trial. (#35797 R., pp.89-91.) Although Gould's brief is not entirely clear, it appears the only ineffective assistance of appellate counsel claim he is pursuing on appeal relates to appellate counsel's failure to appeal the denial of his motion for a new trial. (Appellant's Brief, pp.38-41.)

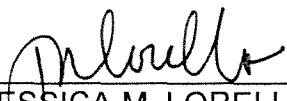
appellate court and has set forth the argument she would have raised does is not evidence and does not excuse Gould's failure to prove his claim before the district court. Moreover, that current appellate counsel would have made a different tactical decision does not mean counsel on direct appeal was objectively unreasonable in deciding which issues to raise. See Richter, 131 S.Ct. at 788 ("Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to only one technique or approach.") (citation and quotations omitted); Cullen v. Pinholster, 131 S.Ct. 1388 (2011) (quoting Strickland, supra) ("The Court acknowledged that '[t]here are countless ways to provide effective assistance in any given case,' and that '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'").

Gould has failed to show error in the dismissal of his ineffective assistance of appellate counsel claim.

#### CONCLUSION

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


DATED this 20th day of February 2013.

  
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JESSICA M. LORELLO  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of February 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE  
Nevin, Benjamin, McKay & Bartlett  
303 W. Bannock  
Boise, Idaho 83701

  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

JML/pm