3-14-2013

Gould v. State Appellant's Reply Brief Dckt. 39738

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON GOULD, Petitioner/Appellant, vs. STATE OF IDAHO, Plaintiff-Respondent.	)	S.Ct. No. 39738 Ada County Case No. CV-PC-2011-122

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE RONALD J. WILPER
District Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

II. ARGUMENT IN REPLY

A. The District Court Erred in Applying a Variety of Incorrect Standards to Determine that Trial and Appellate Counsel Were Not Ineffective

As set out in Brandon's Opening Brief, the district court erred in applying a variety of standards other than the *Strickland*[1] standard of whether counsel's performance fell below an objective standard of reasonableness to the claim of ineffective assistance of counsel.

The state's first response to Brandon's argument on appeal is to assert that Brandon did not provide citation to the record to the statements of the district court which indicate that incorrect standards were applied. However, Brandon did in fact give this Court and the state citations to the record. Specifically, at pages 31-32 of Brandon's Opening Brief, he set out the factual history in support of the argument made at pages 33-35 of his brief. Brandon repeatedly quoted the district court with citations to the record: "failed to provide competent legal counsel," EH Tr. p. 189, ln. 12-22 (page 31 of Opening Brief); "negligent" and "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," EH Tr. p. 190, ln. 1-11 (page 31 of Opening Brief); "was negligent, was akin to making a mistake that was so fundamental that it was as though Mr. Gould had no attorney at all. And I don't find it to be the case," EH Tr. p. 191, ln. 4-10 (page 31 of Opening Brief); "professional malpractice," EH Tr. p. 191, ln. 11-15 (page 31 of Opening Brief); "constituted professional negligence and ineffective assistance of counsel," EH Tr. p. 192, ln. 1-5 (page 32 of Opening Brief); "negligent" EH p. 193, ln. 8-14 (page 32 of Opening Brief).

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[1] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

Brandon's argument is supported by references to the record.

The state's only substantive response to Brandon's argument that the district court erred in applying a variety of incorrect standards to determine the claim of ineffective assistance of counsel is to assert without further explanation (or citation to the record) that the court's references to the variety of standards as quoted in Brandon's brief do not indicate that the court actually applied those standards referenced by the court. Respondent's Brief at pages 8-9.

This response does not hold water. The state does not even attempt to explain why, if the district court was actually applying the *Strickland* standard, it referred to all these other standards.

The record speaks for itself. The district court's statements are fairly brief and are set out here in full with the district court's references to the standard of proof required to establish deficient performance highlighted:

> Well, I am prepared to rule on the case.
>
> I don't think that this case is a particularly close call. Let me just make a couple of comments that I think need to be in the record. I've carefully observed all of the witnesses who have been called to testify in this case and have considered the evidence that has been admitted in this – in the hearing today.
>
> I found that Mr. Roker was credible. I found that Mr. Curtis was credible. I found that Mr. Gould and his sister Ms. Paternoster were also credible.
>
> 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.**
>
> Mr. Roker, of course, is the trial counsel for Mr. Gould, and Mr. Curtis is the

appellate counsel for Mr. Gould.

What was absent in this trial was evidence that the – evidence even in the form of an expert opinion, for example, **that the performance of these attorneys, representing Mr. Gould, was negligent or that the services that they provided for Mr. Gould fell below the standard of practice and the standard of care for attorneys practicing in their respective professions, trial attorney and appellate attorney, in this community during the relevant times.**

It's clear that Mr. Gould and his family are disappointed by the decision of the jury. The jury found you, Mr. Gould, guilty beyond a reasonable doubt, and it was not caused by incompetent representation by Mr. Roker. It was the jury rejecting the theory of the case.

There was some testimony that certainly that if the 2004 chart note from the emergency room at St. Luke's had been discovered by Mr. Roker in his pretrial preparations, he believes, he testified and I believe credibly so, that he would have been able to make use of that, because it would have been consistent with his theory of the case that Kristen was lying and that Lisa was a more objective, more credible, more believable witness in regard to that particular 2004 St. Luke's emergency room visit.

That may be, and it may not be. But the question is, **whether or not Mr. Roker's failure to obtain that record in an attempt to impeach Kristen was negligent, was akin to making a mistake that was so fundamental that it was as though Mr. Gould had no attorney at all. And I don't find that to be the case.**

I heard - again I heard no testimony, I heard argument but no testimony to support such a claim, **that it constituted professional malpractice for a trial attorney to fail to get his hands on that record.**

The other records that were at issue here, for example, the Health & Welfare record that may have supported the theory of the defendant's case that Kristen had applied for some benefits at the Department of Health & Welfare perhaps the day before she made the disclosure, or earlier in the day at least before she made the disclosure, similarly is a – it may have done some good for the defense. It may not have done some good.

But what I didn't hear during this trial, during this hearing, was evidence that **failure to obtain that record in and of itself constituted professional**

negligence and ineffective assistance of counsel. [2]

Similarly, as Mr. Roker testified, even had he had that record and he would not have necessarily made an attempt to introduce that record during trial, because doing so might have had some unintended negative consequences as he testified to during the hearing day.

Similarly, the discovery post-trial by the defendant and his devoted sister who investigated this matter did find that there was an inconsistency between the school attendance record and the date of the CARES interview.

Again, Mr. Roker testified I think again credibly so, that even had he had that record that casts some doubt upon the date of the CARES interview, he made the strategic decision, and it's his province to make those strategic decisions, that he would not introduce it.

Similarly, the visit to Dr. Rand to take the girls in to possibly have them checked for STD's. For a similar reason, Mr. Roker determined that even had he been aware of that record and had that record, he may well not have introduced that record. Again, what I didn't see was evidence or testimony in this record to indicate that failure to introduce, to find and introduce those records themselves, constitute ineffective assistance of counsel.

Therefore, I do not find that Mr. Roker's performance as trial counsel was negligent, and therefore we don't get to the second question of the Strickland analysis, and that is whether or not deficient performance of an attorney was prejudicial in that it led to the conviction or contributed to the conviction.

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[2] Insofar as the court believed that an expert opinion on the local standard of performance and how counsel's actions/inactions fell below that standard is required to support a finding of deficient performance, the court was mistaken. *See, Davis v. State,* 116 Idaho 401, 407, 775 P.3d 1243, 1249 (Ct. App. 1989), noting that whether an attorney's performance is objectively reasonable is a question of law but is premised on the circumstances surrounding the actions/inactions. *See also, Richman v. State,* 138 Idaho 190, 59 P.3d 995 (Ct. App. 2002), where deficient performance was found apparently without expert testimony as to the local standard of practice and application of that standard to counsel's actions; *Gee v. State,* 117 Idaho 107, 111, 785 P.2d 671, 675 (Ct. App. 1990), stating that to prevail on a claim that counsel was ineffective in not filing a motion, the petitioner needed to show that the motion was not filed and corresponding prejudice - no reference to a need for expert testimony; *McKay v. State,* 148 Idaho 567, 571, 225 P.3d 700, 704 (2009), holding deficient performance was established by evidence of counsel's failure to object to jury instructions without any requirement that an expert testify as to the standard of practice or the application of that standard to the decision to not object to erroneous instructions.

Now, with respect to Mr. Curtis' appellate representation of you, Mr. Curtis, as I said, I found his testimony to be credible. He testified that he has been an appellate public defender in this state for a substantial number of years, and that he has handled a good many criminal convictions following jury trial.

He explained that he had read the entire record in the case. He did file the appellate brief prior to speaking to you, Mr. Gould, and he explained that by saying that sometimes in his practice that happens. And it isn't because necessarily he is too busy to speak to his clients, but rather it's because some clients are just less active in – active participants in their appellate case than others.

Mr. Gould I think has demonstrated that he is quite an active participant in this case from beginning to end. And so when Mr. Curtis testified that he spoke to Mr. Gould after sending Mr. Gould a copy of the appellant's brief, that he did take into account the things that Mr. Gould told him and in his professional judgment rejected the notion of filing an amended appellate brief.

Again, there's no evidence in this record that **failure to do so constituted deficient performance on the part of appellate counsel.**

And, again, therefore, **we don't get to the second prong of the Strickland v. Washington analysis which is whether or not there was any prejudice.** We just don't get past that first prong in this particular case and with respect to both trial counsel and appellate counsel.

I think I have commented on most everything the parties will need for anything – for any further action that either of the parties intend to take in the matter.

Is there anything from your perspective that I have forgotten to comment upon in making my ruling today, Ms. Jones?

. . .

And, Ms. Fisher?

. . .

All right. With that, then, the petition for post-conviction relief is hereby dismissed.

EH Tr. p. 188, ln. 14 - p. 195, ln. 10 (emphasis added).

While the district court did state that the controlling case is *Strickland v. Washington,* the court did not ever state that the standard required to show deficient performance is whether "counsel's performance fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. at 2064. Instead, the court referenced professional malpractice, negligence, and errors so fundamental it was an though Brandon did not have counsel. The state's argument that by naming *Strickland* and then referring to several standards, none of which came from *Strickland,* and not referencing an objective standard of reasonableness, the district court was actually applying the *Strickland* objective standard of reasonableness, simply does not work.

The state's argument is analogous to an argument that a man who swears he drives a Chevy, but who leaves the parking lot in a Subaru, is actually driving a Chevy. The man may think it's a Chevy and call it a Chevy, but it is a Subaru. The judge here may have thought he was applying *Strickland*, but he was not.

It is of note that the state has not disputed that if the district court failed to apply the proper standard that the order denying relief should be reversed. Appellant's Opening Brief at pages 33-35; Respondent's Brief at pages 6-9.

Based upon the record in the district court and the arguments in Brandon's Opening Brief and this brief, this Court should find that the district court failed to apply the proper standard to the question of deficient performance and reverse the order denying post-conviction relief.

B. Applying the Proper Standard of Objective Reasonableness, Post-Conviction Relief Should Be Granted

The order denying post-conviction relief should be reversed based upon the district court's error in applying an incorrect standard in denying post-conviction relief. However, in

addition, as set out in the Opening Brief at pages 35-37, this Court should find, upon a *de novo* review, that the petition should be granted and Brandon should be given a new trial. Trial counsel was deficient in failing to obtain and present at trial the medical records from Kristen's prior false accusation of sex abuse of A2 and in failing to obtain and present at trial the Health and Welfare records showing that Kristen applied for benefits before A allegedly made her accusations. This evidence would have demonstrated that Kristen lied to the jury when she testified that her marriage was stable, further demonstrated that she may have been looking for a means of leaving the marriage, a means fulfilled by A's alleged accusations, and finally demonstrated that per the state's expert's testimony, this was a case wherein a false accusation should be considered.

The state argues that counsel's failures were not deficient performance, noting that "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, 125 S.Ct. 2456, 2463 (2005), cited at page 11 of Respondent's Brief.

But this quote from *Rompilla* deserves to be put into context. In *Rompilla,* the Supreme Court held that, despite its previous recognition that the duty to investigate is not limitless, the failure of trial counsel to examine an easily obtained prior conviction file was deficient performance. As Justice O'Connor explained in her concurrence:

> Third, the attorneys' decision not to obtain Rompilla's prior conviction file was not the result of an informed tactical decision about how the lawyer's time would best be spent. . . . Rather, their failure to obtain the crucial file 'was the result of inattention, not reasoned strategic judgment.' *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527 (2003). As a result, their conduct fell below constitutionally

> required standards. See *id.*, at 533, 123 S.Ct. 2527 (' "[S]trategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation"' (quoting *Strickland,* 466 U.S., at 690-691, 104 S.Ct. 2052)).

545 U.S. at 395-96, 125 S.Ct. at 2470-71.

And, in the majority opinion in *Rompilla*, the Supreme Court rejected the argument that counsel's efforts to find mitigating evidence by other means excused them from looking at the easily available prior conviction file. 545 U.S. at 388, 125 S.Ct. at 2467.

As in *Rompilla,* the Supreme Court in *Wiggins* also found deficient performance in the failure to investigate. In *Wiggins,* counsel failed to investigate their client's background and present mitigating evidence of his unfortunate life history at capital sentencing proceedings. In finding deficient performance, the Supreme Court stated:

> . . . our principal concern in deciding whether [counsel] exercised 'reasonable professional judgmen[t],' [*Strickland*] at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.*"

539 U.S. at 522-23, 123 S.Ct. at 2536 (emphasis original). *See also, Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495 (2000), finding deficient performance when counsel's decision to not investigate was based upon an erroneous understanding of the law.

One factor *Rompilla* repeatedly noted was the easy availability of the information not reviewed by defense counsel. "The unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt." 539 U.S. at 389-90, 123 S.Ct. at 2467.

In this case, the medical record of the emergency room visit with A2 wherein the doctor concluded that Kristen's concerns of sexual abuse were unfounded was exceedingly easy to obtain - all that was needed was a request to the hospital. See http://www.hhs.gov/hipaafaq/personal/227 explaining that a parent is generally allowed access to medical records about his or her child except in circumstances not applicable in this case.

Further, as in *Rompilla,* counsel was aware that there was a great risk that Kristen would lie in court thus hamstringing the defense that she was hypersensitive to sexual abuse matters and prone to making false accusations. Both Brandon and Lisa had told counsel that Kristen was a habitual liar. EH Tr. p. 163, ln. 2 - p. 164, ln. 14.

Defense counsel's decision to rely upon Kristen to tell the truth at trial so as to allow him to prove his theory that she had a history of false accusations was unreasonable. The decision to not obtain the medical record was not an objectively reasonable decision. As in *Rompilla,* the failure to obtain the easily available record was deficient performance.

The state argues that there was no reason why counsel needed to present the medical records in addition to Lisa's testimony. Respondent's Brief at page 11. However, trial counsel himself noted that Lisa was such a strong advocate for Brandon that the jury might have discounted her testimony. EH Tr. p. 163, ln. 2 - p. 165, ln. 14. Given the ease of obtaining the record, it should have been obtained and presented so as to overcome any issues created with the jury by Lisa's strong support of her brother.

The state also argues that since counsel did not expect Kristen to deny that the trip to the emergency room was due to her belief that A2 had been abused, it was not objectively unreasonable for counsel to not obtain the medical record. Respondent's Brief at page 12.

However, in assessing attorney performance "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. at 527, 123 S.Ct. at 2538. *See also, Rompilla,* 545 U.S. at 390, 125 S.Ct. at 2467-68, holding that even when information from the defendant and his family indicates that no mitigating evidence will be found in a capital case, the attorney must nonetheless make reasonable efforts to obtain and review material the attorney knows that the prosecutor will probably rely upon as evidence of aggravation.

Counsel had been told that Kristen was a habitual liar. EH Tr. p. 163, ln. 21-24. Having been told that, a reasonable attorney would have not relied upon Kristen to tell the truth at trial, especially when that truth was that she had made a previously unfounded allegation of sex abuse against her daughter. Rather, he would have obtained the readily available medical record.

Likewise, the Health and Welfare Department records were easily obtainable and would have been highly probative of the defense theory that Kristen provoked a false accusation from A. As counsel testified at the evidentiary hearing, had he understood that Kristen had applied for benefits as a single mother with two children prior to the accusations, it would have been important to get and present the records. EH Tr. p. 155, ln. 19 - p. 156, ln. 6.

The question comes down to whether the decision not to investigate further by getting the records was reasonable at the time it was made. *Rompilla,* 545 U.S. at 395-96, 125 S.Ct. at 2470-71.

Consider what counsel knew or reasonably should have known:

1) The theory of the defense was that this was a false accusation;

2) Kristen had a history of lying about everything;

3) Kristen was getting Health and Welfare benefits before the trial began (EH Tr. p. 167, ln. 18-19);

4) The application for Health and Welfare benefits is several pages long, asks the applicant to provide information about many facets of his or her financial and personal life, and states that the signature on the application certifies that the information given is accurate subject to sanctions for providing false information. See the forms at http://healthandwelfare.idaho.gov;

5) Any false information on the form submitted by Kristen could likely be proven false by records and information in Brandon's possession.

Even if counsel did not know that Kristen had applied for benefits as a single mother before she elicited an accusation of sex abuse by Brandon from A, counsel did know that Kristen's lack of veracity was key to the defense and that an attested to form completed by her was likely to have contained demonstrable falsehoods. Thus, as part of a reasonable investigation, he should have obtained the Health and Welfare records. These records could be used in pre-trial negotiations to demonstrate to the state the credibility problems with one of its key witnesses and/or used at trial in cross-examination of Kristen. ER 608(b).

In this, Brandon's case is similar to *Rompilla*. In that case, as discussed above, the Supreme Court held that trial counsel was deficient in failing to review the case file from a prior conviction - because "it flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence . . ." 545 U.S. at 389, 125 S.Ct. 2467. By serendipity, the case file also contained a prison report which presented a picture of Rompilla's childhood, mental health, and intelligence very different from anything defense counsel had heard or seen from Rompilla or his family - a picture very important to mitigation.

545 U.S. at 390-91, 125 S.Ct. 2468.

The fact that the goldmine - the truly helpful evidence that would have come to light had counsel made reasonable investigations - was unexpected, but nonetheless contained in records that counsel should have been looking at anyway did not change the Supreme Court's analysis, much to the dismay of the dissenters. "The Court's theory of prejudice rests on serendipity." 545 U.S. at 405, 125 S.Ct. 2476 (Kennedy, J., dissenting).

In this case, based upon what he knew, counsel should have looked at the Health and Welfare records, even if he did not know that Kristen had applied for benefits before any accusations had been made. Had he looked at the records, he would have found out that Kristen had been planning something - a discovery that would have fatally undermined the prosecution's case.

The state has also argued that even if trial counsel provided deficient assistance, relief should be denied because the deficiency did not result in any prejudice to Brandon. The state rests this argument on its belief that A's testimony was harmful and that "a continued character assassination" on Kristen would not have altered the outcome of the trial. Respondent's Brief at pages 14-15.

The state's argument overlooks the fact that the jury obviously did not find A's testimony alone sufficient to prove Brandon guilty - the jury could not reach a verdict on the charge of sexual abuse. And, of course, the defense theory of the case was that Kristen had provoked a false accusation - evidence that Kristen had applied for Health and Welfare benefits as a single woman before the accusations were ever made and that she had a history of unfounded allegations was not simply a "character assassination." Rather, it was key to proving that the

allegations were false. Indeed, the state's own expert testified that false allegations most often happen when a divorce is involved. Trial Tr. p. 403, ln. 1-23. Here, obviously a divorce was involved - because Kristen was seeking benefits prior to the allegations indicating that she fully intended to severe her marriage. Had the jury known this, it is reasonably probable that the jury would not have convicted Brandon.

Likewise, as set out in Appellant's Opening Brief at pages 37-41, this Court should also find that the district court erred in denying relief on the basis of ineffective assistance of appellate counsel, reverse the order denying post-conviction relief, and remand with instructions to grant relief.

Appellant's Opening Brief sets out the standard for finding ineffective assistance of appellate counsel: when ignored issues are clearly stronger than those presented, the presumption of effective assistance of counsel will be overcome. *Mintun v. State,* 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007), *citing Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000). Appellant's Opening Brief at page 37.

The state does not explicitly deny that *Mintun* is the controlling case law - in fact, the state cites *Mintun* at page 15 of its brief. However, at page 16 of its brief, the state, without citation to authority, asserts that the standard is not whether Brandon thinks that there were "stronger" issues that should have been raised on appeal, but rather "whether counsel was deficient in his decision regarding what issues to raise and whether Gould would have prevailed on those issues." Respondent's Brief at page 16.

Reviewing *Mintun* is instructive. Mintun argued three instances of ineffective assistance of his appellate counsel: 1) appellate counsel was ineffective in failing to raise a confrontation

clause issue as a matter of fundamental error; 2) appellate counsel was ineffective in failing to challenge for the first time on appeal the constitutionality of I.C. § 18-1506(1)(b); and 3) appellate counsel was ineffective in failing to challenge the sufficiency of the evidence as to one of the counts of conviction. The Court of Appeals held that the district court did not err in denying Mintun's claims based on the failure to raise a fundamental error confrontation clause claim because "a rule allowing a post-conviction claim of ineffective assistance of appellate counsel for failing to raise an issue of fundamental error would be impractical, inefficient, and often disadvantageous to defendants." 144 Idaho at 662, 168 P.3d at 46. The Court held that the district court did not err in denying relief based on the failure to raise the issue of the constitutionality of the statute for the first time on appeal because the claim was not cognizable on direct appeal. 144 Idaho at 663, 168 P.3d at 47.

But, the Court did find error in the denial of the claim of ineffective assistance for failing to challenge the sufficiency of the evidence. The Court wrote:

> This is a claim of error that could have been raised on Mintun's appeal. Therefore, we must examine the merits of this argument to determine whether Mintun's appellate counsel was deficient for failing to raise the issue and if so, whether Mintun was prejudiced thereby.

Id.

The Court examined the merits of the sufficiency of the evidence claim and found that if the claim had been raised on appeal, the judgment of conviction on Count IV would have been reversed. The district court order denying relief was reversed and the conviction on Count IV was vacated. 144 Idaho at 49, 168 P.3d at 665.

In assessing Mintun's claims, the Court of Appeals did not look to whether an expert had

testified that appellate counsel made an unreasonable decision in failing to raise the contested issues on appeal or whether an expert had testified that had counsel raised these issues, Mintun would have obtained a different result in his direct appeal. Rather, the Court of Appeals assessed the record and the merits of the case for itself. 144 Idaho at 661-665, 168 P.3d at 45-49.

In this case, the state focuses its argument on the fact that Brandon did not present evidence other than the record from the trial court and the record from the direct appeal. From this, the state argues that Brandon did not carry his burden of proof. Respondent's Brief at pages 16-18. However, addressing this case in the same manner as the Court of Appeals addressed *Mintun,* the trial court and appellate court record is sufficient to establish ineffective assistance of appellate counsel. The court, whether it be the district court, or now this appellate court, may as it did in *Mintun,* review the record for itself and make a determination that an unraised appellate issue was meritorious and therefore the failure to raise it on appeal was ineffective assistance of counsel which merits post-conviction relief.

Brandon argued in the district court and now on appeal that appellate counsel was ineffective because he did not raise the issue that the district court erred in denying the new trial motion. See R 9-10 alleging that appellate counsel was ineffective in not raising the issues that the district court erred in denying the motion for a new trial based upon prosecutorial misconduct and the failure to limit the prosecution's inquiry into details of impeachment evidence introduced under IRE 403. See also EH Tr. p. 181, ln. 15-19, wherein post-conviction counsel argues that appellate counsel's belief that certain appellate issues are not meritorious is not determinative of whether appellate counsel was ineffective in failing to raise those issues. Rather, the district court should make its own assessment of the merit of the issues noted by the post-conviction

petitioner. Appellant's Opening Brief pages 38-41, setting out why failure to raise the issue that the district court erred in denying the motion for a new trial based upon prosecutorial misconduct and IRE 403 error was ineffective assistance of appellate counsel.

Interestingly, the state does not make an argument beyond its argument that relief should be denied because Brandon did not present evidence beyond the trial and appellate record. Respondent's Brief at pages 16-18. Importantly, the state does not dispute Brandon's argument that had appellate counsel raised the issue that the district court erred in denying the motion for a mistrial and the motion for a new trial on the basis of prosecutorial misconduct, that there is a reasonable probability that relief would have been granted on appeal. Nor does the state dispute Brandon's argument that had appellate counsel raised the issue that the district court erred in denying the new trial motion on the basis that the court had erred in its earlier IRE 403 ruling, there is a reasonable probability that relief would have been granted on appeal. Respondent's Brief at pages 15-18.

It is likely that the state did not dispute Brandon's argument because it is impossible to argue that this Court would have upheld a conviction which was obtained in a trial so tainted by prosecutorial misconduct as Brandon's was. At the trial, the defense moved for a mistrial on the basis that Ms. Fisher had presented evidence that she knew was not true. Defense counsel stated:

> . . . But my concern is that the state has presented evidence in their case in chief with a desire to present to the jury, through a witness [Kristen] that has testified, that the marriage was on solid ground, and the only issues related to finances and the defendant's drinking. But not only was there this issue of sexually explicit text message that the witness who testified believed was from a 14-year-old girl approximately within a two-week period of the time the allegation was made, the witness had gone into the defendant's computer and found a web finder that was to a homosexual web page.

> And the defendant had enrolled in that friend finder for a homosexual web page, and the witness had went in and seen that he was receiving e-mails from men in the Boise area who were wanting to meet up with the defendant.
>
> And the state knew of this, and yet the state presented to the jury a scenario where there was no problems in the marriage. And I cannot go into those things to show that this witness has lied in front of this jury, because by doing that, my concern is I end up unfairly prejudicing my client in a great manner.
>
> And the state put me in that position, and it's unfair. And I think the only way – I think it should be a mistrial because they presented evidence they knew was not true, and they knew I could not challenge it in front of the jury without unfairly prejudicing my client.

Trial Tr. p. 500, ln. 10 - p. 502, ln. 16.

In the alternative, counsel asked that if the court did not declare a mistrial that it instruct the jury that Kristen lied on the stand when she testified that the marriage was on solid ground and there were no issues other than finances and Brandon's drinking. Trial Tr. p. 501, ln. 18 - p. 502, ln. 9.

The prosecutor did not deny that she had presented a false picture of the marriage through Kristen's testimony. Rather, she argued:

> However, Kristen has been on the stand. He has a right to cross examination. I asked her: 'What were the problems in the marriage?' She said it was this and it was this.
>
> If Roker has a problem and he thinks that she is not being honest or that she should have to open it up or there are other problems, he had an opportunity to cross examine her, of which he sure knows how to do. And he could have said: 'Isn't it true that you found' – whatever, and he could have gone into it, and he elected not to.
>
> And so now he want to either have an instruction that says Kristen lied – the state absolutely objects of course. She didn't lie. We told her we weren't going into that for obvious reasons. There has been no 404(b) on this. The court would have certainly required the state to file a 404(b) on these types of activities, whether it was found on the text messaging, whether it was on this friend finder page.

Trial Tr. p. 505, ln. 15 - p. 506, ln. 9.

Ms. Fisher later represented that if the court was going to allow evidence that Kristen had lied because she testified that the marriage was on solid ground with only problems relating to finances and alcohol, she would put on a witness who would testify that Ms. Fisher told Kristen not to go into the issues about the text message and the gay friend finder service and her [Kristen's] discovery of them. Trial Tr. p. 514, ln. 14-21.

There is no precedent that the state could cite to support an argument that a conviction should be upheld when the prosecutor instructed a key witness to misrepresent to the jury a crucial fact - in this case the record indicates that Ms. Fisher instructed Kristen to misrepresent the state of her marriage at the time of the allegations against Brandon.

Rather, the precedent is to the opposite. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair" as a violation of due process. *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976). *See also, State v. Ellington,* 151 Idaho 53, 76, 253 P.3d 727, 750 (2011), stating that a conviction obtained through the use of false testimony of a state officer is abhorrent.

As stated in *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959):

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

The state's use of false evidence to bolster the credibility of Kristen and A is exactly the type of misconduct that *Napue* condemns and forbids. It is no surprise that the Attorney General

does not now urge this Court to find that had appellate counsel raised the issue that the district court erred in not granting a mistrial or a new trial, Brandon's conviction would have been upheld.

Similarly, it is no surprise that the Attorney General does not argue that the district court did not err in denying the new trial motion. As set out at page 40 of the Opening Brief, the denial of the new trial motion was reversible error.

Insofar as the state is arguing that a post-conviction petitioner cannot prevail on a claim of ineffective assistance of appellate counsel without presentation of evidence beyond the trial and appeal records, it is incorrect. *Mintun v. State, supra.* And, further, as most tellingly demonstrated by the state's lack of argument to the contrary, the record of the trial and the appeal in this case do demonstrate that appellate counsel was ineffective in not raising the issue that the district court erred in denying the motions for mistrial and a new trial.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, the order denying post-conviction relief should be reversed.

Respectfully submitted this 14th day of March, 2013.

Deborah Whipple
Attorney for Brandon Gould

CERTIFICATE OF SERVICE

I CERTIFY that on March 14, 2013, I caused a true and correct copy of the foregoing document to be:

_X_ mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Deputy Attorney General
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Deborah Whipple