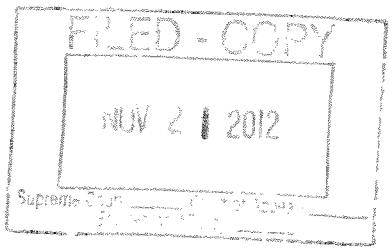
11-21-2012

Gould v. State Appellant's 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



OPENING 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

Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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A. Nature Of The Case

This is an appeal from the denial of post-conviction relief following a conviction for lewd conduct. I.C. § 18-1508.[1] The denial was erroneous because the district court relied on a variety of incorrect standards to determine whether Brandon Gould had received ineffective assistance of counsel, including whether counsel made a mistake so fundamental that it was as if Brandon had no counsel and whether counsel committed professional negligence or malpractice rather than whether counsel's performance fell below an objectively reasonable standard. Further, the district court failed to address the relevant claim regarding appellate counsel's ineffectiveness. This Court should reverse the order denying post-conviction relief.

B. Procedural History And Statement of Facts

1. *Trial*

The state's theory was that Kristen and Brandon Gould, parents of two daughters, A age 7 and A2 age 5, had a solid and strong marriage. One day, their oldest daughter A came home from school. A took a shower and then told Kristen that she had a sore on her "potty." Kristen reacted coolly and calmly asking A open ended questions including questions which allowed for an innocent reason for the sore, but A stated that her father had licked and touched her. (The sore, which was nearly impossible to see the next day, was never tied to any sort of sexual abuse, but the state maintained that it provided an opportunity for A to reveal past abuse.) Trial Tr. p. 34, ln. 5-p. 59, ln. 17.

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[1] Brandon was originally charged with lewd conduct and a second count of sexual abuse of a minor. He was only convicted of lewd conduct. Trial R 87-88.

The defense was that Brandon had never inappropriately touched A. (Although the jury did not know this, Brandon passed five polygraphs all demonstrating that he was not being deceptive when he stated that he did not inappropriately lick or touch A.) The defense presented evidence that Kristen had a bad reputation for honesty, was hypersensitive to and thought excessively about sexual abuse and sex offenders, had made prior unsubstantiated claims of abuse of both girls by people including daycare operators and other little girls, that the Goulds' marriage was not stable, that Kristen exerted control over her daughters through use of a wooden spoon, and that she was particularly upset with Brandon at the time these allegations surfaced. When A told Kristen about having a sore, Kristen panicked and demanded an answer which incriminated Brandon. While A did not intend to lie or to hurt her father, after the lie was told she became the center of positive attention, support and love and so the lie became cemented in place and she could never tell the truth. Trial Tr. p. 50, ln. 19-p. 59, ln. 17, p. 806, ln. 3-p. 828, ln. 25; p. 843, ln. 1-5; PSI p. 2.

2. *State's Case*

To support its theory of the case, the state presented the testimony of A, Kristen, Kristen's mother, police officers, CARES employees, and Mydell Yeager.

A testified that one day while she was alone with Brandon and they were watching Hannah Montana on the television, Brandon touched her leg and then took her skirt and underwear off and "licked my groin." A also referred to her "groin" as her "potty" and said that the licking was both inside and outside of her groin. She testified that when that was over, they went into her parents' bedroom where Brandon apologized and said that this was just between him and her. Trial Tr. p. 95, ln. 1-p.100, ln. 25.

With regard to the second charge, A testified that one day when her parents had just returned from a trip, her mother was "kind of getting sick" and ordered pizza. A testified that during this evening, Brandon touched her bum and groin on the outside of her clothes while she was on the couch in the living room, in the kitchen, and on her parents' bed as she, her mother, and her father all sat or laid upon the bed. This touching consisted of a "rubbing" which she testified meant moving around. Trial Tr. p. 103, ln. 1-p. 110, ln. 5; p. 146, ln. 6-13. A testified that even though Kristen was right next to her when she was being touched, she did not tell her because she was waiting for the right time. Trial Tr. p. 110, ln. 11-14.

A testified that one day she took a shower and was worried about her "potty" because she had a little scrape on it. So, she told Kristen, who looked at the scrape. And then, while Kristen dried A's hair, A told her that her father licked her potty one time and then in a different event, on the day her parents returned home from a trip, touched her. Trial Tr. p. 111, ln. 15-p. 113, ln. 6.

A testified that after she told her mother, they went to her grandmother's house where she told her grandmother. Then the police came and she went to CARES where a detective showed her around. She returned to CARES sometime later and while there she told a lady about what her father did and then a doctor looked at her body. Trial Tr. p. 113, ln. 18-p. 118, ln. 19.

When A testified, she provided an example of the difference between a truth and a lie: "If you do something and you tell the truth, like if you break your mom's favorite lamp and you say that you didn't do it, that's a lie." Trial Tr. p. 89, ln. 23-p. 90, ln. 2. On cross-examination, A testified that the prosecutor Jean Fisher told her to answer questions about truth and lies with that example. Trial Tr. p. 126, ln. 7-18. A testified that Ms. Fisher told her how to answer questions.

A could not remember how many times she met with Ms. Fisher, but it was a lot. Trial Tr. p. 126, ln. 16-17; p. 128, ln. 2-11.

A's trial testimony was inconsistent with her grand jury testimony. At the grand jury, A testified that when her parents returned from their trip, her father touched her on her bottom only, not on her groin, that he put his hands inside her pants, and that he never moved his hands, but rather held his fingers tightly together. Trial Tr. p. 132, ln. 11-p. 136, ln. 22. Further, at the grand jury, A did not testify that Brandon licked inside of her. Trial Tr. p. 145, ln. 1-22.

A's trial testimony was further inconsistent with her CARES interview. In the CARES interview, she never said that she and her father were watching Hannah Montana when the licking occurred and she told CARES that she was wearing pants not a skirt. Also, she told the CARES interviewer that when Brandon touched her upon the return from the trip, there had been no rubbing and that he had not touched her butt at all. Trial Tr. p. 141, ln. 1-25; p. 146, ln. 13-p. 147, ln. 6. Trial Tr. p. 542, ln. 14-25.

A's trial testimony was also inconsistent with itself. On direct, A testified that after the licking she and her father went into her parents' bedroom and he apologized. Trial Tr. p. 100, ln. 14-25. On cross examination, A testified that after the licking stopped her father asked if she wanted to watch naked people on television or listen to music, and even though she wanted to listen to music, they watched naked people on television. Trial Tr. p. 160, ln. 5-p. 162, ln. 2. Moreover, A's cross examination testimony was also inconsistent with the CARES interview wherein she said that her father had never shown her any naked pictures. Trial Tr. p. 162, ln. 2-12.

On cross examination, A explained a bit more about the circumstances when she

originally made allegations against her father. She testified that she told her mother about the scrape on her potty. Then her mother, while drying her hair, told her that no one should be touching her there, "especially [her] father," and that gave A the "thought of telling her." Trial Tr. p. 171, ln. 1-p. 172, ln. 21.

The state also presented Kristen's testimony.

Kristen testified that her marriage in 2007 was okay, not perfect, but just had normal problems with finances and everyday living. Trial Tr. p. 181, ln. 21-p. 182, ln. 12. She testified, "If anything was argued about, it was about money." Trial Tr. p. 182, ln. 11-13.

Kristen also testified that while she drank one or two or three drinks a year if that, Brandon drank and it caused problems. Trial Tr. p. 183, ln. 9-p. 184, ln. 14. She also testified that very rarely, she and Brandon had conflicts because his work kept him from helping out much with the children. Trial Tr. p. 184, ln. 22-p. 185, ln. 12.

Kristen testified that there was never any talk of divorce and that she and Brandon were discussing having another baby. Trial Tr. p. 185, ln. 13-p. 186, ln. 9.

Kristen also testified that she and Brandon, along with his sister and her husband, had gone to Jackpot, Nevada for a weekend to celebrate the Goulds' anniversary. Contrary to her testimony of just a couple minutes before that she drank one to three drinks a year if that, Kristen testified that she had 10-12 drinks, specifically Yukon Jack and Cokes, while in Jackpot, but that this did not make her intoxicated. Trial Tr. p. 193, ln 3-8; p. 198, ln. 11-16.

Brandon also drank heavily that weekend and was so intoxicated that the next week he missed work for three days and had to go to a walk-in health clinic and ultimately to the emergency room. However, Kristen's testimony was that none of that resulted in an argument or

fight between them except for something on Thursday night while they were waiting at the doctor's office. Trial Tr. p. 200, ln. 8-22. Later, Kristen testified that the discussion in the doctor's office had to do with the fact that the night before while drunk Brandon had gone into the bathroom when the children were bathing and almost fell into the tub. Trial Tr. p. 556, ln. 21-p. 557, ln. 9. Kristen testified that nothing about that weekend caused any thoughts of a divorce or created any major issues in the marriage. Trial Tr. p. 204, ln. 12-19.

Kristen also testified, inconsistently with A, that the evening when they got home from Jackpot, she could not remember Brandon ever being in the bedroom with her and A. Trial Tr. p. 199, ln. 16-18.

About two weeks after the trip to Jackpot, on September 10, 2007, A came home from school and took a shower. Trial Tr. p. 204, ln. 20-24.

According to Kristen's trial testimony, A came out of the shower and said that her "potty" had been bleeding. Trial Tr. p. 208, ln. 6-9. So, Kristen asked A three questions: whether she had ridden her bicycle; whether she had fallen on the playground; or whether she had fallen on monkey bars. And, A said, "No, no." Trial Tr. p. 210, ln. 11-14.

Then, according to Kristen's testimony, Kristen asked A if she wanted to have Kristen look at the sore, and A did. So, Kristen looked at A and saw a tiny cut or scratch that had been bleeding.[2] Trial Tr. p. 210, ln. 15-p. 9.

Kristen testified that after this, as she was blow drying A's hair A seemed quiet, so

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[2] Dr. Sexton, who examined A at CARES, testified that he had initially asked A whether the scratch had hurt and A replied that it had not. Then when asked if she had felt anything, A replied, "A teensy bit." Dr. Sexton had to have Kristen's assistance to find the "sore" which he described as "a very faint line." Trial Tr. p. 429, ln. 10-p. 430, ln. 15.

Kristen told A that she could always come to her mother with anything. But, Kristen did not tell A that people should not touch her. Trial Tr. p. 211, ln. 13-p. 212, ln. 19.

Kristen testified that after A's hair was dry, she (Kristen) just went back to watching a movie, but A was hanging around. So, Kristen waited a minute, but finally paused the movie and asked A if she needed anything. And, A responded by saying that her father had "licked her down there" and touched her three or four times. Kristen testified that she then became very careful because, "I didn't want to put - - . . ." "I wanted her to be able to tell me what happened." Trial Tr. p. 213, ln. 23-p. 214, ln. 9.

Kristen testified that she had never talked to A about her father touching her and that such an idea had never been in Kristen's mind. Trial Tr. p. 214, ln. 9-16.

Kristen testified that after A told her about two separate events, Kristen asked A if she was okay. And then, A left the room. At that time, Kristen called Brandon's sister, Lisa Paternoster. However, Lisa was not home, and Kristen spoke with her husband Terry. Trial Tr. p. 215, ln. 12-p. 216, ln. 11.

Then Kristen called her mother and took the girls to her mother's house. Kristen testified that her demeanor was "I was upset, but I didn't have emotion. I didn't have tears streaming down my face." Trial Tr. p. 219, ln. 2-13.

Kristen called the police and then she, her mother, and A followed an officer to CARES. There, they met with a detective and a victim coordinator. They took a tour and left with an appointment for the next day. While they were at CARES, Brandon's sister Lisa arrived. Trial

Tr. p.224, ln. 22-p. 227, ln. 9.[3]

The next day, Kristen sent A to school and then picked her up at 11:30 and took her back to CARES. After CARES, she sent A back to school for the rest of the day. Trial Tr. p. 228, ln. 9-p. 230, ln. 4.

Kristen testified that she brought A to meet with Ms. Fisher three or four times. At the most recent meeting, shortly before trial, they all went out for ice cream and then Ms. Fisher and Diane Stecker visited with A for 30-40 minutes while Kristen waited outside. Trial Tr. p. 231, ln. 18-21; p. 233, ln. 22-p. 234, ln. 21.

Kristen testified that only after A made statements about Brandon did she start to think about divorce. She filed for divorce and it became final a few months before the trial. Trial Tr. p. 238, ln. 6-15.

On cross examination, Kristen testified that she spoke to her daughters every three months about good and bad touching and that she would point out to them where the only sex offender that she knew of lived. Trial Tr. p. 248, ln. 8-p. 249, ln. 25.

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[3] The CARES social worker who interviewed A testified that CARES is an advocacy center, defining "advocacy center" as a neutral setting. Trial Tr. p. 478, ln. 16-p. 179, ln. 7. "Advocacy" means "the act of pleading for, supporting, or recommending; active espousal." http://dictionary.reference.com/browse/advocacy?s=t "Neutral" means "not aligned with or supporting any side or position." http://dictionary.reference.com/browse/advocacy?s=t

The social worker also testified that CARES no longer does blind interviews because they were not getting as much information with blind interviews. According to the social worker's testimony, she has better results if she goes into an interview knowing that the information is "that a kid has been touched by a certain party." This allows her to make sure that the child "doesn't have any alternate explanations for what may have happened." Trial Tr. p. 484, ln. 2-9.

The social worker also testified that she did not inquire into the circumstances of Kristen questioning A because she was more interested in "what happened" than in what led to the disclosed allegation. Trial Tr. p. 541, ln. 24-p. 542, ln. 9.

Kristen also testified that she had never before had any specific concern about possible molestation of her daughters. Trial Tr. p. 251, ln. 23-p. 252, ln. 8.

Kristen testified that she had a problem with lying (which she maintained was limited to lying about finances) and that in the past she had asked Brandon's sister Lisa to help her by holding her accountable. Trial Tr. p. 252, ln. 15-p. 254, ln. 1.

Kristen further testified that she spanks her daughters with a wooden spoon and that it usually results in them doing what Kristen wants. In fact, now she can just take the spoon out of the drawer and the girls change their behavior. Trial Tr. p. 261, ln. 1-p. 252, ln. 4.

Kristen's mother Jeanne Demster testified that, contrary to Kristen's testimony that she was not showing emotion the day of the alleged disclosures, Kristen was crying when she called Jeanne. Trial Tr. p. 303, ln. 14-15. And, when Kristen arrived at Jeanne's house she had obviously been crying and was shaking. Additionally, A had been crying and her eyes were red and swollen. Trial Tr. p. 297, ln. 15-23. After talking with Kristen, Jeanne asked A "if her daddy had touched her in a place that shouldn't be" and A looked at her mother and began to cry. Trial Tr. p 299, ln. 5-p. 300, ln. 1; p 307, ln. 6-25.

The state presented evidence that after Kristen left the house with her daughters the day of the alleged disclosures, the police went to the house and confronted and questioned Brandon. The police used a variety of questioning techniques designed to get people to confess to wrongdoing, but Brandon did not confess to having done anything improper. Instead, he kept saying that he did not understand why the police were at his house and that he had never

wrongfully touched his daughter. Even when the detective lied[4] to Brandon telling him that the police had physical evidence of him abusing A, Brandon replied, "I'm here to tell you that none of those things have happened." Then, when the police upped the pressure and told Brandon that he was going to bury himself in a hole, Brandon said, "I'm not going to bury myself in a hole because there's no hole to be buried in. I didn't do it." He told the officers that when they arrived he had been afraid that they were going to tell him there had been a car accident as he did not know where Kristen and the girls were. And, he agreed to leave the house when he was told to do so – that was the last time he saw his daughter until the trial. Trial Tr. p. 333, ln 1-p 341, ln. 14; p. 349, ln. 12-19; p. 349, ln. 12-p. 353, ln. 12; p. 745, ln. 12-13.

Mydell Yeager testified that she had counseled A. Trial Tr. p. 381, ln. 2-4. Ms. Yeager said that A told her that Brandon had shown her naked people on television. Trial Tr. p. 392, ln. 1-9.

Additionally, Ms. Yeager testified:

> Ultimately, the biggest problem that we have with kids that make false statements are generally kids that are involved in a divorce and generally in a very argumentative, what we call high conflict divorce, and then there are agendas and things to be gained. So the greatest risk in terms of children and suggestibility are in those situations.
>
> What happens when a child is coached and in those situations where I feel like I've seen children and they have later stated, 'No, no, no, this really didn't happen, I made it up or whatever,' in all of those situations – yes, not all of them – there has been a divorce, and the parent clearly has an agenda to have this child more for themselves, and so they will talk a lot about it.

Trial Tr. p. 403, ln. 1-23.

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[4] The detective testified that "we lie," in order to have "a good conversation with the person that we're interviewing." Trial Tr. p. 458, ln. 10-14.

3. *Defense Case*

Barbara Brown, a babysitter for the Gould family, testified that she knows Kristen and that Kristen's truthfulness is "not very good" ". . . you couldn't believe everything she says." Trial Tr. p. 567, ln. 17; p. 568, ln. 16-21.

Barbara also testified that once when she and the girls were at a park, a man followed them to the car. When she told Kristen about this, Kristen became very upset and said that "everybody is after her kids." Trial Tr. p. 569, ln. 19-p. 570, ln. 2.

Barbara also testified that the girls were "kind of scared" of Kristen. Trial Tr. p. 570, ln. 8-9.

Brian Robertson, Brandon's brother-in-law, testified that he had known Kristen for eight years and that she is not a truthful person. Trial Tr. p. 573, ln. 1-25. Brian also testified that he and his wife had been on the trip to Jackpot. Kristen's testimony about the trip was contradictory to much of Brian's – even as to seemingly irrelevant details like whether they drove on the freeway or secondary roads. Trial Tr. p. 574, ln. 2-p. 576, ln. 24.

Brian also testified that Kristen is very harsh and stern with her daughters and is the person who always disciplines them. He testified that the girls "do what she says." Trial Tr. p. 578, ln. 12-p. 579, ln. 8.

Terrance Paternoster, who is also Brandon's brother-in-law, and who lived across the street from the Gould family, testified that Kristen is the dominating parent of the girls and that whenever the girls did something that she did not like, "she was pretty much on their case and resolved it right there." Further, he had never seen the girls challenge Kristen. Trial Tr. p. 580, ln. 8-p. 583, ln. 4.

Terrance is married to Lisa and when Kristen called Lisa the day of the alleged disclosures, Terrance was the one she spoke with. Terrance reported that Kristen was very emotional when she called – she was upset, crying, and panicky. He told her to call the police. Trial Tr. p. 584, ln. 9-p. 585, ln. 20.

Terrance also testified that Kristen "lies about everything pretty much." Trial Tr. p. 586, ln. 5-10. However, on cross examination, Terrance said that he had told the state's representative that he could not say that Kristen was a liar but rather that she blows things out of proportion. Trial Tr. p. 587, ln. 10-15.

Lisa Paternoster, Brandon's sister, testified that she and Terrance lived across the street from Brandon and Kristen and she and Kristen were close. Trial Tr. p. 594, ln. 15-p. 595, ln. 9.

About ten days before the supposed disclosures, Kristen implied to Lisa that she thought Brandon would hurt his daughters sexually. In addition, Lisa was aware that Kristen had accused two other people of sexually abusing the girls. When A2 was still in diapers, Kristen said that A2 had an abrasion on her labia. Kristen was hysterical and inconsolable. So she and Lisa took A2 to the emergency room. And, then later, Kristen accused another little girl who went to after-school care with A of pulling down A's pants and "doing something with a mouth like kissing or something." Trial Tr. p. 599, ln. 5-p. 605, ln. 22.

Lisa further testified that Kristen was very interested in sex offenders. " . . . she could tell if there was a sex offender by my parents' house or my sister's house or whatever, and she would keep you up to date." Trial Tr. p. 604, ln. 11-p. 605, ln. 6.

Lisa described Kristen as aggressive with her daughters; the girls acted like they were afraid of her. Trial Tr. p. 607, ln. 3-11.

Lisa also testified that Kristen lied about everything and they often discussed this. (Lisa is a marriage and family counselor.) Kristen told Lisa that she (Kristen) lied so much that she came to believe her own lies. Trial Tr. p. 607, ln. 21-p. 608, ln. 16; p. 611, ln. 8.

Lisa tried repeatedly to contact the detective about her concerns during the investigation of the case, but the detective never called her back. Trial Tr. p. 625, ln. 9-17.

Brandon testified that he and Kristen had been married eight years and had two daughters. Trial Tr. p. 629, ln. 24-11. He worked 55 hours per week and Kristen did most of the parenting of the girls. Trial Tr. p. 624, ln. 2-3; p. 636, ln. 10. In disciplining the girls, Kristen threatened them with and hit them with a wooden spoon. ". . . they were very well aware of what that spoon meant, and obviously they knew because she used it quite often." Trial Tr. p. 637, ln. 9-18. Brandon had spanked the girls but he favored just talking with them to correct them. Trial Tr. p. 638, ln. 1-p. 639, ln. 19.

Brandon described the trip to Jackpot. He drank too much, played golf, and gambled. He and Kristen had each brought $750 to spend, but they both ran out of money. He took an additional $300 withdrawal from an ATM machine at the casino believing that they had about $5,000 in their account. However, the $300 withdrawal resulted in an overdraw. Kristen had not told Brandon that the account was empty and when he took out the $300 she became "very agitated" at him. Trial Tr. p. 646, ln. 8-p. 650, ln. 25.

They left Jackpot to return home. Kristen had to drive because Brandon had been drinking and this also made her agitated. Trial Tr p. 652, ln. 6-21. Brandon slept a lot of the way home; however, he disputed Kristen's testimony that they did not travel by freeway. Trial Tr. p. 653, ln. 8-19.

Brandon testified that when they got home, he watched a NASCAR race on television and had some beer. Kristen had testified that Brandon was sitting on the couch with A with a blanket over them. Brandon testified that he did not have a blanket over him or A and that would not have made sense because it was a hot August day. Further, he never went into the bedroom to lay on the bed with Kristen and A as A had testified. Trial Tr. p. 658, ln. 16-p. 661, ln. 18.

Brandon testified that he never placed his hands on his daughter's behind or groin. "No, I would never do something like that. No, never." Trial Tr. p. 662, ln. 18-p. 663, ln. 2.

Prior to the alleged disclosures by A, when Brandon and Kristen were in the waiting room at Primary Health because Brandon was sick from the Jackpot weekend, Kristen claimed he had pulled down the shower curtain when the girls were in the tub. She said that she had to keep her eye on him. Brandon was surprised by her statements which he believed were false. He asked Kristen if she was accusing him of wrongdoing, but she did not respond. Trial Tr. p. 669, ln. 1-23.

After that day at Primary Health, Brandon wound up in the emergency room where there was discussion that he was ill from alcohol. He has not had a drink since. Trial Tr. p. 673, ln. 1-6.

The following Monday, the day that Kristen says A disclosed to her, prior to the alleged disclosures, Kristen called Brandon at work. She was sad and depressed. She asked him if he was working with an attractive woman. She said that she was having a bad day and needed him to tell her that he loved her. He said that he loved her. Later, she called to remind him of a teacher's conference that evening. Trial Tr. p. 674, ln. 15-p. 676, ln. 20.

Brandon came home early and hurried to get ready. But, Kristen and the girls were not

home. He waited and then tried to call Kristen but did not get a response. This was strange because she usually called him 5-10 times per day. He got very worried. Eventually, about 9:00 p.m., the police came. Trial Tr. p. 677, ln. 15-p. 679, ln. 16.

Brandon testified that he was concerned that Kristen had been in an accident because a year before she had been in an accident.[5] His first thought upon seeing the police was that there had been another accident. Trial Tr. p. 680, ln. 21-p. 682, ln. 20.

But, the police told him that A was accusing him of sexual abuse. Brandon was stunned. The police would not let him speak for a while. When he was allowed to speak, he told them that he had never done anything like that. The officer told him that a real man would leave the house, so he did. Trial Tr. p. 683, ln. 1-p. 684, ln. 16.

Kristen always talked about sex abusers and fear that the girls had been abused. Trial Tr. p. 690, ln. 7-13. She thought someone at daycare had abused A2. Trial Tr. p. 691, ln. 8-11. She thought that another child had abused A at after-school care. Trial Tr. p. 691, ln. 20-23. She thought that Barbara Brown's adult son had an erection after A was sitting on his lap. Kristen told Brandon about this at the time she thought it happened and he looked carefully, but could not see any indication that the man had an erection. Trial Tr. p. 692, ln. 9-23.

Brandon testified that Kristen either lied or embellished about most everything. Trial Tr. p. 693, ln. 23-p. 694, ln. 11.

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[5] Kristen had received cash as a result of the accident. The Goulds used the money for vacations and other big and small purchases. They were using money from the settlement account for the trip to Jackpot. Brandon had believed that the account still had about $7,000 before taking out $1,500 for the trip to Jackpot and he begged Kristen to save the remaining money. He did not know until he took the $300 from the ATM in Jackpot that she had already spent the money. Trial Tr. p. 740, ln. 7-741, ln. 13.

Brandon testified that he had not known about any pending divorce at the time Kristen says A accused him. However, he did not want to have another child, and they fought a lot, often over Kristen's dishonesty. Trial Tr. p. 734, ln. 1–p. 735, ln. 25.

As he had stated from the moment he was accused, Brandon testified, " I love my daughters more than anything in the entire world." Trial Tr. p. 746, ln. 13-14. "I would never, ever, ever, ever touch my kids in an inappropriate way. Never, never." Trial Tr. p. 746, ln. 24-25.

4. *Probable and Demonstrable Prosecutorial Misconduct*

Kristen's credibility and possible motive to intentionally or unintentionally elicit a false accusation from A were central to this case. The following transpired relative to that question:

In her opening statement, Ms. Fisher told the jury, "That while their marriage has not been perfect, it had troubles, but there was no talk or instigation of divorce or a breakup. They had problems that many marriages have." Trial Tr. p. 37, ln. 7-10. She followed this with:

> Now, ladies and gentlemen, this family was an intact family. There was no discussion of divorce before September 10, September 11 of 2007. They had their problems. They had problems within their marriage that many, many people face, that the word of divorce, the word separation, the word counseling, the word of any of those things were not concerns to Kristen Gould on September 10.

Trial Tr. p. 48, ln. 5-12.

Ms. Fisher then said, in reference to A, "Before September 10 of 2007, she definitely had an intact family." Trial Tr. p. 49, ln. 3-4.

At the end of her opening statement, Ms. Fisher said, "There was no reason for A to make this up. It's not about divorce. This was not about getting anything out of a marriage." Trial Tr. p. 50, ln. 5-7.

Shortly thereafter, outside the presence of the jury while arguing the admissibility of A's statements to her mother, Ms. Fisher argued that A's statements to her mother could be admitted for the truth of the matter asserted and would be enough standing alone to support a conviction. In making this argument, Ms. Fisher reiterated her theme: "I understand the defense in this case is going to say that mom put her up to it, but the jury is going to hear there was nothing going on in this family that mom actually put her up to it." Trial Tr. p. 70, ln. 16-19.

During Kristen's testimony, Ms. Fisher elicited testimony from Kristen regarding the marriage:

> "It [my marriage] was okay. It wasn't perfect; your normal problems with finances and just everyday living. But it wasn't bad.
>
> . . .
>
> If anything was argued about, it was about money.

Trial Tr. p. 181, ln. 25-p. 182, ln. 3; p. 182, ln. 12.

Ms. Fisher then elicited testimony from Kristen that she and Brandon had "very rare" conflicts about the minimal role he played in the children's care but that she and Brandon were discussing having another baby. Trial Tr. p. 185, ln. 11-p. 186, ln. 4.

Ms. Fisher asked Kristen if there was ever, during their eight years of marriage, talk of divorce, and Kristen testified that there was something one time, "but there was no – nothing about divorce." Kristen clarified that this prior event had been years ago when she was pregnant with A, but that after A was born they never had serious discussions about divorce. Trial Tr. p. 186, ln. 5-21.

At the close of her direct testimony, Ms. Fisher asked Kristen whether "after the

disclosures were made in September of 2007, at that point was your marriage in a different state?" And, Kristen replied that it was and she filed for divorce which became effective in June of 2008. Trial Tr. p. 238, ln. 4-15.

However, at the same time Ms. Fisher was eliciting testimony from Kristen that the marriage was stable, that the only disputes were over finances, and that there had been no thought of divorce, Ms. Fisher was also aware that on the morning of the day during which A made her "disclosure," Kristen had learned, by spying on Brandon's computer activity, that Brandon was enrolled in a gay friend finder service and had received emails from men in and around Boise wanting to meet him. Trial Tr. p. 500, ln. 24-p. 501, ln. 16. Ms. Fisher was also aware that Brandon had, shortly before the allegations, shown Kristen a sexually explicit text message he had received. Kristen chased down the source of the message and believed it was a 14 year old girl. The defense moved for a mistrial on the basis that in order to establish the falsity of Kristen's testimony about the stability of the marriage, it would have to prejudice Brandon by evidence that he was receiving sexually explicit communications from young girls and looking for gay meet ups. Trial Tr. p. 500, ln. 10-p. 522, ln. 24.

Ms. Fisher told the court that she was aware of the sexually explicit text message and the gay friend finder service and Kristen's discovery and awareness of both. Ms. Fisher stated that it appeared that Brandon had put the gay friend finder website and emails it generated in a position on the computer so that Kristen would discover them in order to catch her spying on him. But, Ms. Fisher stated that she purposefully did not present that evidence to the jury, because that evidence is "way far away from the case at this end, is did he molest this little – did he molest his daughter. And so we didn't put it on there." Trial Tr. p. 504, ln. 10-0. 604, ln. 9.

In ruling on the mistrial motion, the court noted that the state of the marriage at the time of the accusations was very relevant and it was a very serious issue. Trial Tr. p. 514, ln. 22-25. The court denied the motion for a mistrial – noting that the sexually explicit text message was not very probative of instability in the marriage because Brandon had shown it to Kristen and expressed surprise that he received it. The court noted that the gay friend finder evidence was probative of "martial discord" and would "perhaps give the offended spouse a motive to get even with the spouse or to fabricate an allegation such as this." However, the defense could present this evidence itself, knowing that the state could go into the nature of the website "realizing that there is a danger of unfair prejudice" but that the court would give a limiting instruction under IRE 403. Trial Tr. p. 516, ln. 22-p. 522, ln. 24.

In the argument regarding the mistrial motion, defense counsel stated that he did not know why the state presented the theory that the marriage was on solid ground when it knew that was false. Ms. Fisher was not questioned about whether she had presented a false theory of the case, but she also never volunteered a denial. Trial Tr. p. 518, ln. 1-9. Rather, Ms. Fisher maintained that she deliberately told Kristen not to go into anything about other problems with the marriage. Ms. Fisher stated that she would put on witnesses to testify that she had told Kristen not to go into these marriage issues and that for the defense to "call my witness a liar" because Ms. Fisher put on a theory that the marriage was strong was "very prejudicial against the state, and it is wrong to do so." Trial Tr. p. 513, ln. 18-p. 514, ln. 21.

At another point in the proceedings, during a discussion outside the presence of the jury regarding testimony to be presented in the defense case, Ms. Fisher stated "There is no report of a false allegation at the school or any other issue where Kristen has falsely alleged that other

people have been involved in molesting her children." Trial Tr. p. 526, ln. 8-13. However, as will be discussed in relation to the post-conviction proceedings, there were medical records regarding A2 establishing that Kristen had taken A2 to the emergency room for a similar "sore" on her labia and that Kristen had expressed concern that A2 had been sexually abused at daycare – concerns which the emergency room doctor determined were unfounded. Pet. Ex. 1.

At another point in the trial, the defense raised violations of ICR 16(b)(6) and/or *Brady.*[6] In particular, when A testified, she testified to information not previously disclosed to the defense. Trial Tr. p. 152, ln. 2-19. The following exchange took place:

> The Court: Well, I think that Mr. Roker's objection is that he believes, based on the testimony today, that A has made other detailed disclosures to you or others that have not been provided to the defense by way of updates in discovery responses.
>
> Ms. Fisher: I know of no other statements, testimony, anything that she has given to any other person that he doesn't have police reports for. As to myself –
>
> The Court: Let me ask you this: Do you have any reports from any CARES folks, counselors, law enforcement officers, detectives, or anybody else that you have not disclosed to the defense?
>
> Ms. Fisher: No. He has everything.

Trial Tr. p. 154, ln. 7-21.

Ms. Fisher took the position that she had no duty to notify defense counsel of any other statements A made because no written reports were made and because any statements A made were Ms. Fisher's work product and trial preparation. Trial Tr. p. 157, ln. 4-p. 158, ln. 25. The court said that as Ms. Fisher had represented that she had given every report to the defense, the

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[6] *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

court would leave it at that. Trial Tr. p. 158, ln. 22-p. 159, ln. 5.[7]

Defense counsel later moved for a mistrial on the same basis. A testified that her father had shown her a dirty movie after licking her; however, this information had not been disclosed and was directly contrary to the information A gave in the CARES interview wherein she denied that her father had ever shown her any photos or movies. Ms. Fisher stated that she knew A was going to testify that Brandon had shown her movies and that the defense had Mydell Yeager's notes from October 3 and 10 of 2007, wherein A stated that she saw naked people on television at different times. Ms. Fisher claimed that she did not know anymore than that. Trial Tr. p. 241, ln. 24-p. 243, ln. 20.

The record also indicates that Ms. Fisher may have engaged in other misconduct during trial. Defense counsel notified the court that, while he had not seen it himself, others in the courtroom had told him that when he was questioning witnesses Ms. Fisher would shake her head and be demonstrative. The court noted that it had not observed this behavior. However, Ms. Fisher was not questioned. Nonetheless, she did not volunteer a denial of this behavior. The court cautioned that if it saw such behavior it would admonish the offending party. Trial Tr. p. 436, ln. 19-p. 437, ln. 16.

5. *Verdict*

The jury members deliberated for 12 hours. They convicted Brandon of lewd conduct but

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[7] ICR 16(b)(6) requires the prosecution to furnish upon written request "the statements made by the prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney or the prosecuting attorney's agents or to any official involved in the investigatory process . . ." This rule, by its plain language applies to "statements" regardless of whether they are later incorporated into written reports. *See State v. Ridebaugh,* 124 Idaho 758, 765, 864 P.2d 596, 603 (1993).

could not reach a verdict on the charge of sexual abuse. Trial Tr. p. 842, ln. 3-10.

6. *New Trial Motion*

After the verdict, Brandon filed a motion for a new trial on the basis that the court had erred in not granting a mistrial after Ms. Fisher elicited false testimony from Kristen about the state of her marriage and further ruled that if Brandon presented evidence to impeach Kristen, the court would not limit Ms. Fisher's inquiry into the evidence used to impeach the false evidence.

Citing the due process clause, that casts into doubt any conviction obtained by the prosecutor's knowing or reckless use of false testimony, the new trial motion stated:

> What made the presentation of this false testimony especially egregious was that it created a catch twenty-two for Defendant. Impeach the lie and the prosecution would introduce that Defendant had received a sexually explicit text message from a fourteen-year old girl and had set up a gay Friend Finder account and was receiving e-mail from men in Boise wanting to meet with Defendant. . . . This catch twenty-two presented to Defendant more than having to make a difficult decision in trial strategy. It presented the option of not impeaching the false testimony which was a cornerstone of the State's case or impeaching the false testimony and suffering the unfairly prejudicial effects of evidence that would not have otherwise been allowed.

Trial CR 90.

The motion also stated that upon denying the mistrial motion, the court furthered erred in not granting the defense motion under IRE 403 to limit state inquiry into the age of the person sending the text message or the sexual orientation of the people solicited on and responding to the friend finder website. Trial CR 91.

The court denied the new trial motion without a hearing. Trial CR 92-93.

7. *Sentencing*

Brandon continued to maintain his love for his family and his innocence. He told the PSI

investigator, "My version is that I will never stop fighting for my kids' lives, innocence, and the well being they are losing everyday this injustice continues." PSI p. 2.

A psychosexual evaluation concluded that Brandon was a low risk to sexually, violently or criminally re-offend, noted that because he maintains his innocence, he is not amenable to sex offender treatment, and stated that he would benefit from alcohol abuse treatment. PSI.[8]

The state argued for a twenty year sentence with five fixed. Trial Tr. p. 859, ln. 10-12. The defense argued for an eight year sentence with two fixed, suspended in favor of a term of probation. Trial Tr. p. 868, ln. 3-p. 869, ln. 16.

The trial court sentenced Brandon to ten years with three fixed. Trial Tr. p. 874, ln. 18-20. But, after imposing sentence, the court stated:

> Again, Mr. Gould, honestly, if you were innocent of the crime, I just don't know of hardly anything worse than somebody being falsely convicted. Do you understand? Especially of this particular crime.
>
> But I don't second guess the jury. . . .

Trial Tr. p. 876, ln. 3-8.

8. *Direct Appeal*

An appeal was taken, but appellate counsel only raised the issue of whether the sentence was excessive. Relief was denied in an unpublished decision. And, a subsequent petition for review was denied. *State v. Gould,* No. 35797.

9. *Petition For Post Conviction Relief*

Thereafter, Brandon filed a *pro se* petition for post-conviction relief. R 5. He raised

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[8] The PSI pages are numbered up through page 99, but then the numbering stops. The psychosexual evaluation is the last twelve pages of the PSI and the conclusions of the evaluation are on the final two pages of the evaluation.

three claims for relief: 1) prosecutorial misconduct; 2) ineffective assistance of trial counsel; and 3) ineffective assistance of appellate counsel. R 7-10.

Of relevance to this appeal, Brandon alleged that Ms. Fisher had withheld a medical report which showed that Kristen had earlier made a false report of sexual abuse of one of the girls. R 7. He also alleged that "the prosecution had used false evidence and testimony to obtain a conviction." R 7.

Brandon alleged that trial counsel was ineffective in not obtaining medical records as to both A and A2 which made any mention of a chief complaint of sexual abuse. R 8.

And, Brandon alleged that appellate counsel was ineffective in not raising issues related to the denial of the new trial motion and prosecutorial misconduct. Brandon's allegations reference the two requests for a mistrial; the district court error in not limiting the state's inquiry into the details of impeachment evidence under IRE 403 (evidence that was necessary to respond to the false testimony that the state elicited); and prosecutorial misconduct in eliciting false testimony from Kristen. R 5-6.

In his affidavit of facts in support of the post-conviction petition Brandon offered support for his claims. R 12-33.

With regard to prosecutorial misconduct, Brandon stated that he had discovered evidence which had been withheld by the state despite the defense discovery request pursuant to ICR 16. This evidence included a medical record from St. Luke's emergency room documenting a visit Kristen made on March 16, 2004, with A2. The medical record showed that Kristen presented A2 with exactly the same injury she later claimed A had – a small tear in the same place on the labia – and that she told medical personnel that she was concerned that the injury resulted from

sex abuse by a day care provider. The record also showed that the emergency room doctor did not believe that sex abuse was involved and sent Kristen home. R 12-15; 99.

Brandon noted that during trial the district court had specifically asked Ms. Fisher, "Do you have any reports from any CARES folks, counselors, law enforcement officer, detective or anybody else that you have not disclosed to the defense?" And Ms. Fisher replied, "No, he has everything." Brandon averred that this was a "bald face lie" by Ms. Fisher. R 14.

Brandon further averred that Ms. Fisher withheld Health and Welfare Records which showed that Kristen applied for child support, food stamps, and health insurance prior to any allegations allegedly being made by A. Brandon stated that the records from Health and Welfare show that Kristen signed the "Assignment of Rights" form, the last step in obtaining child support, on September 10, 2007, and that it was only after signing this form that she went home and obtained the alleged disclosure from A that her father abused her. R 15-16.

With regard to trial counsel's ineffectiveness, Brandon averred that he and his sister both told trial counsel about the prior false allegation of sex abuse of A2 at daycare and that Kristen had taken A2 to St. Luke's Emergency regarding this. However, counsel did not obtain the medical records from St. Luke's. R 16-17.

With regard to appellate counsel's ineffectiveness, Brandon averred that appellate counsel should have raised on appeal the denial of a mistrial motion made after A's testimony at trial. R 29. Brandon also referenced the state's presentation of Kristen's testimony that the marriage was on solid ground when it knew that this testimony was false and also knew that trial counsel could not challenge the false testimony without unfair prejudice. Brandon averred that appellate counsel should have raised the denial of the mistrial motion made in response to the presentation

of the false testimony on appeal. R 29-30.

Brandon's petition was also supported by the affidavit of Lisa Paternoster, his sister. Lisa's affidavit chronicles the evidence she found after Brandon's trial which goes to prove that Kristen was romantically involved with another man prior to any alleged disclosures by A and that Kristen may have used the allegations of child sexual abuse to get Brandon out of the picture so that she could pursue the relationship with the new man. This evidence included the records from Health and Welfare. R 35-48.

Brandon also filed a motion to take judicial notice of the underlying criminal record[9] and a motion for the appointment of counsel. R 159-165.

Counsel was appointed and moved for summary judgment as the state had never filed any sort of answer. R 169, 174-176. The state then filed its answer and the same day an amended answer. R 177-180. The state also filed a motion for summary judgment. R 198-201.

Counsel then moved to file an addendum to Brandon's petition to add claims that trial counsel was additionally ineffective in 1) failing to obtain Health and Welfare records relating to an application for benefits made by Kristen prior to the alleged disclosures by A; 2) failing to obtain medical records regarding visits made by A and A2 to a pediatrician after the allegations but prior to trial; and 3) failing to investigate the existence of a motive to lie and/or create false evidence on behalf of Kristen. The amendment further alleged ineffective assistance of appellate counsel in not asserting a *Brady* violation in the failure of the state to disclose the Health and

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[9] By its order of October 17, 2012, this Court has augmented the record on appeal with Clerk's Record and transcripts from the direct appeal.

Welfare and medical records to trial counsel.[10] R 210-212.

The state filed an answer to the addendum to the petition. R 213-215. The state also filed a motion for summary dismissal of the addendum to the petition which appeared to argue that there was no *Brady* violation because defense counsel had "serious strategy decisions to make in regard to both issues." With regard to the Health and Welfare records, the state argued that while the records could demonstrate a motive on the part of Kristen to lie in her testimony, it could also be inferred that she acted quickly to protect her daughters. With regard to the medical records, the state argued that it was plausible that Brandon was "actually looking at homosexual sites" which counsel might not want the jury to know. R 216. The state did not explain how the fact that the undisclosed evidence was potentially useful to the defense and would present the defense with "serious strategy" decisions exempted the evidence from discovery and the requirements of *Brady*. R 216. The state's final argument was that "discovery violations within the context of *Brady v. Maryland* should have been raised first on appeal." R 217.

In her objection to the state's motion to dismiss, Brandon's counsel stated that she wished to "narrow the issues, but not the nature of the allegations" into ineffective assistance of trial and appellate counsel. R 227. Counsel maintained that the state had committed misconduct – but that prosecutorial misconduct "falls properly under the umbrella issue of ineffective assistance of appellate counsel." R 227.

Thereafter the district court dismissed the claim of prosecutorial misconduct on the basis that it should have been raised on appeal and was not. R 232-234.

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[10] Counsel appeared to assert that the additional *Brady* claim should have been raised by appellate counsel and so was also an element of ineffective assistance of appellate counsel. But the addendum is not entirely clear. R 211.

The state then filed a second motion for summary dismissal. In the motion, the state asserted that there was nothing in the Health and Welfare records to support the theory that Kristen applied for public assistance prior to September 12, 2007, and thus nothing to support the theory that she had a plan prior to allegations being made against Brandon to leave him and that the allegations of sexual misconduct were part of a larger scheme to facilitate their separation. R 238-239. The state supported these statements with an affidavit from Kristen averring that she applied for assistance on September 12, 2007. R 240-241.

The district court implicitly denied the state's renewed motion as the matter then proceeded to an evidentiary hearing. But, it is of note that the statements in the state's renewed motion regarding the Health and Welfare records were demonstrably false. A letter from the Department of Health and Welfare regarding Kristen's application for benefits stated that the department's "system shows an Assignment of Rights form was complete for this case on 9/10/07. This form is normally completed upon application for assistance from the State of Idaho." Petitioner's Exhibit 2. Whether or not the validity and veracity of the Department's records are contested, the records did in fact contain material to support the theory that Kristen applied for assistance prior to September 12, 2007. PC Pet. Ex. 2. Additionally, the letter from Health and Welfare calls into question the veracity of Kristen's affidavit attached to the state's motion and later admitted as an exhibit in the evidentiary hearing. State's Ex. A.

An evidentiary hearing was held. Evidence was presented that there were Health and Welfare records which did show that Kristen applied for child support benefits prior to the time A allegedly disclosed to her. EH Tr. p. 27, ln. 3-8, Pet. Ex. 2 and 3. The Department of Health and Welfare reported that an "Assignment of Rights" form was completed on September 10,

2007, a form normally completed upon an application for assistance from the state. Pet. Ex. 2.

Evidence was also presented that in 2004, three years prior to the allegations in this case, Kristen had taken A2 to St. Luke's with an "injury" nearly identical to the "sore" on A that supposedly led to A's allegations of abuse by Brandon. At St. Luke's with A2, Kristen expressed concerns that A2 (then two years old) had been the victim of sexual assault at daycare. The emergency room doctor wrote, "I do not think it is related to sexual abuse." Rather, the doctor concluded that the injury resulted from A2 stretching to get out of the tub while Kristen was bathing her. Pet. Ex. 1.

Trial counsel testified that the trial strategy and theory of the case was that Kristen was very manipulative, hypersensitive about issues relating to sexual abuse, and a habitual liar. While the defense pointed out the inconsistencies in A's reports, the focus was on Kristen and the pressures that came from Kristen. EH Tr. p. 136, ln. 5-21, p. 138, ln. 16-17.

While counsel was aware of the 2004 visit to St. Luke's with A2 because Lisa Paternoster testified to it in the defense case at trial, counsel did not get the medical records to back up the testimony she gave. EH Tr. p. 138, ln. 1-p. 139, ln. 20.

Trial counsel testified:

> I mean, I understand that the jury could take that position, that Lisa is covering for Brandon, and it's self-serving testimony on their part as opposed to Kristen. I don't think there's any doubt that had I had that medical record to be able to show that in fact the child was taken in, and the concern was that she had been sexually abused, that it would have been a benefit.

EH Tr. p. 140, ln. 7-15.

Trial counsel further testified that even though Brandon and Lisa had told him that Kristen was a habitual liar, he could not imagine that she would take the stand as she did at trial

and deny that she had ever had any concerns about sexual abuse of A2. He testified that the record from the 2004 emergency room visit would have been very helpful to impeach Kristen – more helpful than Lisa's testimony alone because 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. Counsel concluded:

> So when I see the document [the St. Luke's emergency room report on A2] that you're referring to from the hospital, in looking back in hindsight I cannot deny that that would have been a good document to have when Kristen under oath said, 'I was not concerned about sexual abuse.' And that document throughout indicates the child was brought in for fears of sexual molestation.

EH Tr. p. 165, ln. 8-14.

Trial counsel also testified that he did not get the Health and Welfare records to show that Kristen had completed an application for benefits sometime earlier in the day on the day that A supposedly made the unsolicited unmanipulated allegations against Brandon. EH Tr. p. 169, ln. 13-17. Counsel testified that had he understood that Kristen had obtained benefits for a single mother with two children prior to the allegations, it would have been important to get the records. The records would have been helpful because upon seeing them the jury would have thought, "Well, Kristen, are you planning something in advance?" EH Tr. p. 155, ln. 19-p. 156, ln. 3. Counsel stated, "And so there's no doubt that I would have seen that as something important that we need to get." EH Tr. p. 156, ln. 4-6. However, counsel also testified that no one had told him that Kristen's application for benefits might have preceded the allegations. EH Tr. p. 156, ln. 13-23. Counsel further testified that it just never occurred to him that records from Health and Welfare including statements Kristen had attested to would be helpful to showing that Kristen was a liar. EH Tr. p. 169, ln. 13-16.

Appellate counsel testified that he reviewed the case and determined that even though various matters had been preserved though objections, motions for mistrial, and a new trial motion, he did not believe that the trial court erred in any of its rulings. Therefore, he raised nothing but a sentencing issue. EH Tr. p. 110, ln. 1-6; p. 115, ln. 1-22; p. 116, ln. 21-22; p. 122, ln. 8-9; p. 124, ln. 10-11; p. 125, ln. 10-15.

The district court ruled from the bench at the end of the hearing. The court denied post-conviction relief.

In particular, the court found that all the witnesses presented were credible. EH Tr. p. 189, ln. 8-11. The court then stated that to find ineffective assistance of counsel, it must first determine whether trial and appellate counsel "failed to provide competent legal counsel." EH Tr. p. 189, ln. 12-22.

The court stated that there had been no evidence, including evidence from an expert, to show that the attorneys were "negligent" or that the services they provided "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.

The court explained that the question was whether or not trial counsel's failure to obtain the medical records for A2 "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. The court stated that there was no testimony that it constituted "professional malpractice" for a trial attorney to fail to get the medical records. EH Tr. p. 191, ln. 11-15.

With regard to the Health and Welfare records, the court held that there was no evidence that "failure to obtain that record in and of itself constituted professional negligence and ineffective assistance of counsel." EH Tr. p. 192, ln. 1-5. The court further noted that even if counsel had obtained the record, he might not have introduced it at trial and likewise noted that even if counsel had been aware of other medical records, he might not have used them at trial. EH Tr. p. 192, ln. 6-p. 193, ln. 14.

The court concluded that since it did not find that trial counsel was "negligent" it would not reach the question of prejudice. EH Tr. p. 193, ln. 8-14.

With regard to the claim of ineffective assistance of appellate counsel, the court noted that appellate counsel had been an appellate public defender for many years and handled many cases. The court then focused on counsel's failure to consult with Brandon during the appeal and stated, "Again, there's no evidence in this record that failure to do so [consult with Brandon] constituted deficient performance on the part of appellate counsel." EH p. 194, ln. 14-16. Therefore, the court declined to address the question of prejudice. EH p. 194, ln. 16-22.

The court did not specifically comment on Brandon's claim that based upon the trial record there were issues that should have been raised on appeal but were not. EH p. 181, ln. 1-19. Rather, the court later entered a written order finding that neither trial nor appellate counsel were deficient. R 244-245.

This appeal timely followed. R 246-248.

III. ISSUES PRESENTED ON APPEAL

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?

IV. ARGUMENT

A. Standard Of Review

The standard of review applicable to this case is set out in *Rossignol v. State*:

> In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State,* 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State,* 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State,* 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

152 Idaho 700, 702-3, 274 P.3d 1, 3-4 (Ct. App. 2012).

B. The District Court Erred In Applying A Variety of Incorrect Standards To Determine That Trial And Appellate Counsel Were Not Ineffective

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *McKay v. State,* 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). An ineffective assistance of counsel claim may

be raised in post-conviction. *Baxter v. State,* 149 Idaho 859, 862, 243 P.3d 675, 678 (Ct. App. 2010). To prevail, the petitioner must show that the attorney's performance was deficient and that the deficiency was prejudicial. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Booth v. State,* 151 Idaho 612, 617, 262 P.3d 255, 260 (2011). Deficient performance is established when the petitioner shows that "counsel's performance fell below an objective standard of reasonableness." *McKay,* 148 Idaho at 570, 148 P.3d at 703, quoting *Aragon v. State,* 114 Idaho 758, 762, 760 P.2d 1174, 1178 (1986)(quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064).

The district court applied a variety of standards to determine deficient performance including whether counsels' errors were so fundamental that it was as if Brandon did not have counsel. The court equated with this standard with negligence, professional negligence, and professional malpractice.

This standard – mistakes so fundamental that it was as if Brandon did not have counsel at all – is akin to the standard set out in *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984). In *Cronic,* the Supreme Court held that if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights makes the adversary process itself presumptively unreliable." This is a standard clearly distinguished from *Strickland's* standard of objectively reasonable performance and clearly was not applicable in this case.

The second standard mentioned by the district court, professional negligence, appears from the court's comments to have been equated with errors so great that it was as if there was no counsel at all. That standard, as just discussed, was not applicable to this case.

But even if the court was thinking of the standard of negligence as the standard applied in

civil cases seeking recovery for negligence/professional negligence against attorneys, there was error. The civil standard of negligence is not applicable to *Strickland* claims in post-conviction. The elements of a negligence claim are (1) duty; (2) breach; (3) causation; and (4) damages. To establish a claim for attorney malpractice or professional negligence, a plaintiff must show (1) the creation of an attorney/client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or the standard of care by the lawyer; and (4) that the failure to perform the duty was a proximate cause of damages suffered by the client. *Estate of Becker v. Callahan,* 140 Idaho 522, 525-6, 96 P3d. 623, 626-7 (2004). This is clearly a different standard with different requirements than the *Strickland* standard of objective reasonableness. *McKay, supra*; *Aragon, supra*; *Strickland, supra.*

Applying free review to the district court's application of the relevant law to the facts, *Rossignol, supra,* the denial of post-conviction relief based upon application of the wrong standards was erroneous. Therefore, the order denying the petition should be reversed.

C. Applying The Proper Standard Of Objective Reasonableness, This Court Should Reverse The District Court And Remand With Instructions To Grant Relief.

Applying the proper standard – whether counsel's performance fell below an objective standard of reasonableness, *Aragon, supra,* – this Court should hold that Brandon established deficiency.

The objective standard of reasonableness of trial counsel in investigation is set out in *Davis v. State,* 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

> Generally, defense counsel is bound to conduct a prompt and thorough pretrial investigation of his or her case. *State v. Perez,* 99 Idaho 181, 579 P.2d 125 (1978). The course of that investigation will naturally be shaped by a variety of

> factors, many peculiar to the particular case. *Id.* Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *See State v. Larkin,* [102 Idaho 231, 628 P.2d 1064 (1981)].

116 Idaho at 407, 775 P.2d at 1249.

The American Bar Association's Standards Relating to the Defense Function are a starting point for determining whether counsel's actions were objectively reasonable. *Larkin,* 102 Idaho at 233, 628 P.2d at 1067. Criminal Justice Standard 4-4.1 states that counsel should "explore all avenues leading to facts relevant to the merits of the case . . . The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. . . ."

Because the question of whether counsel's pretrial preparation falls below a level of reasonable performance is a question of law, it is not necessary to have expert testimony to establish a deficiency. *Davis, supra.* And, because it is a question of law, this Court exercises free review. *Rossignol, supra.*

In this case, counsel's trial plan was to demonstrate to the jury that Kristen was dishonest, was hypersensitive to issues concerning sexual abuse, controlled her children, was upset with Brandon, and elicited a false accusation from A who then could not recant the accusation because of pressures and positive reinforcement. Medical 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, were obviously an avenue leading to facts relevant to the merits of the case. Likewise, records showing that Kristen had applied for welfare benefits prior to the accusations against Brandon were an avenue leading to facts relevant to the merits of the case –

in counsel's words at the evidentiary hearing, "Kristen, were you planning something?"

Counsel's failure to investigate by obtaining medical and Health and Welfare records was objectively unreasonable.

After holding that trial counsel's performance was objectively unreasonable, this Court should find that it was also prejudicial. The facts presented at trial are set out above. The jury deliberated for 12 hours and could not reach a verdict on the sexual abuse charge. Had the jury had evidence that Kristen was planning something before any accusations were made by A and that Kristen had made a nearly identical allegation of sex abuse in the case of A2 which was determined by a doctor to be false, there is a reasonable probability that the jury would have also failed to reach a verdict on the lewd conduct charge. *Strickland, supra.*

Likewise, applying the proper standard of objective reasonableness, this Court should find that appellate counsel also was ineffective.

While it is difficult to establish ineffective assistance of appellate counsel, it is possible to bring a *Strickland* claim based on deficient performance of appellate counsel. *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). When ignored issues are clearly stronger than those presented, the presumption of effective assistance of counsel will be overcome. *Id.*

In this case, appellate counsel raised an issue of excessive sentence. Appellate relief on a claim that a sentence was excessive is extremely difficult to obtain. The appellate court rightfully defers to the sentencing court. To obtain relief, the appellant must show that the sentence was excessive under *any* reasonable view of the facts and where reasonable minds could differ, the discretion of the trial court will be respected. *State v. Marsh,* 153 Idaho 360, 367, 283

P.3d 107, 114 (Ct. App. 2011).

The sentencing issue was weak. On the other hand, as set out in the statement of facts above, there were other preserved issues that were clearly stronger. The issue of prosecutorial misconduct as established and preserved through the mistrial and new trial motions was clearly a stronger appellate issue than the sentencing issue. Also, the issue of error in ruling on the IRE 403 motion was a stronger issue than the sentencing issue.

The motion for a new trial was brought pursuant to I.C. § 19-2406(5) and states that the district court erred in denying Brandon's motion for a mistrial as Brandon was denied a fair trial when the prosecutor elicited false testimony from Kristen and the prosecutor knew or had reason to know that the testimony was not the truth. Specifically, Ms. Fisher asked Kristen if there were any problems in the marriage besides differences over finances and alcohol, and Kristen responded that there were not. Yet, Ms. Fisher knew that there were serious problems in the marriage including those demonstrated by the sexually explicit text message and the gay friend finder membership. The new trial motion argued that the mistrial motion should have been granted and that the requirement of constitutional due process casts into doubt any conviction obtained by a prosecutor's knowing or reckless use of false testimony citing *Smith v. Groose,* 105 F.3d 1045, 1049 (8th Cir. 2000). Tr R 90-92.

In *Smith,* the Eighth Circuit granted habeas relief and ordered that murder, armed criminal action and robbery convictions be vacated where the murder conviction was obtained on the basis of testimony from a witness that was inconsistent with, if not diametrically opposed to testimony the witness subsequently gave at the trial of another man convicted of crimes related to the murder. The Eighth Circuit wrote, "The due process requirement will cast into doubt a

conviction obtained by a prosecutor's knowing or reckless use of false testimony." 205 F.3d at 1049, citing *Napue v. People of the State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959).

Napue holds that a conviction obtained through the use of false testimony, known to be such by representatives of the state, is a denial of due process, and further that there is also a denial of due process when the state, though not soliciting false evidence, allows it to go uncorrected when it appears.

In this case, Ms. Fisher told the district court during arguments on the mistrial motion that she deliberately told Kristen to not reveal to the jury problems in her marriage and to testify that there were no problems other than financial problems and some minor conflict over drinking. Ms. Fisher offered to bring witnesses to testify that she told Kristen to hide the true state of the marriage from the jury. She also argued repeatedly to the jury that this was not a case wherein there was a divorce planned or wherein there were issues which could have motivated Kristen to elicit a false accusation from A.

Clearly, the issue of prosecutorial misconduct preserved and established both through the motion for a mistrial and the motion for a new trial was a stronger issue than the sentencing issue raised. In fact, after the appeal in this case, Idaho's Supreme Court wrote a strong opinion in a direct appeal raising claims of prosecutorial misconduct. The Court wrote:

> We have no way to know whether or not the prosecutor had any knowledge of the falsity of Cpl. Rice's testimony given his past testimony and training materials, but we recognize the serious constitutional implications of the possibility. . . . It is abhorrent to this Court, as it would be to any other court, that a man can be sentenced to twenty-five years for second-degree murder based primarily on the false testimony of a trooper of this State.

State v. Ellington, 151 Idaho 53, 76, 253 P.3d 727, 750 (2011).

Ellington is proof that prosecutorial misconduct in knowingly presenting false evidence is a valid and strong appellate issue. Indeed the misconduct issue in this case is not a matter of speculation as it was in *Ellington*, but is a matter of fact. Ms. Fisher admitted that she deliberately instructed Kirsten to not tell the jury about problems in the marriage and then repeatedly argued to the jury that it should believe Kristen because she had a strong marriage and no reason to want to harm Brandon. Based upon *Grouse, Napue,* and *Ellington,* there is a reasonable probability that had Ms. Fisher's misconduct in putting on a false case been raised on appeal relief would have been granted.

The district court's erroneous ruling under IRE 403 was also a stronger appellate issue than the sentencing issue. In the new trial motion, Brandon's trial counsel argued that the district court erred in denying his request after denying the motion for a mistrial to limit under IRE 403 the state's inquiry into impeachment evidence of Kristen's false testimony regarding the state of the marriage. Tr R 91. And, the district court did err in that decision. Rather than balancing of probative value against danger of unfair prejudice, confusion of the issues or misleading the jury, undue delay, waste of time or presentation of cumulative evidence, the district court stated that it would give a limiting instruction under IRE 403 if Brandon wished to impeach Kristen's false testimony. Trial Tr. p. 522, ln. 16-22. However, Evidence Rule 403 is a rule which allows the exclusion of relevant evidence. It requires a balancing by the district court and the failure to conduct the balancing is reversible error. *Debestani v. Bellus,* 131 Idaho 542, 544, 961 P.2d 633, 635 (1998). The failure to conduct the balancing was reversible error in this case.

There were issues that were clearly stronger than an excessive sentence argument. And, had they been raised, there is a reasonable probability of a different outcome. Therefore, per

Mintun, this Court should find ineffective assistance of appellate counsel.

Post-conviction relief is required because of the ineffective assistance of trial counsel. Relief is also required because of the ineffective assistance of appellate counsel.

V. CONCLUSION

For the reasons set forth above, the order denying post-conviction relief should be reversed. The case should be remanded with instructions to grant Brandon post-conviction relief.

Respectfully submitted this 21st day of November, 2012.

Deborah Whipple
Attorney for Brandon Gould

CERTIFICATE OF SERVICE

I CERTIFY that on November 21, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Idaho State Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple