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State v. Osterhoudt Petition For Review Dckt. 39287

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	NO. 39287
v.	TWIN FALLS COUNTY NO. CR 2007-2567
FRANKLIN WARD OSTERHOUDT,	APPELLANT'S BRIEF
Defendant-Appellant.	IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Franklin Ward Osterhoudt asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2013 Opinion No. 61 (Ct. App. Nov. 14, 2013) (*hereinafter*, Opinion). Mr Osterhoudt asserts that the Court of Appeals' decision affirming certain evidentiary rulings entered by the district court is inconsistent with prior precedent and this Court should grant his Petition for Review and ultimately vacate his conviction.

Statement of the Facts & Course of Proceedings

A Grand Jury indicted Frank Osterhoudt in March of 2007 alleging that he committed five counts of lewd conduct, one count of incest, and one count of rape, naming his daughter, H.O., as the victim. (R., pp.22-25.) The five counts of lewd conduct were differentiated by location: Count I – "at or near 4567 N. 1100 E., Buhl" (*hereinafter,* Father's house); Count III – "at or near Balanced Rock" (*hereinafter* Balanced Rock); Count IV – "at or near Broadway St. in Buhl" (*hereinafter,* Shelly's house); Count V – "near the lambing shed at 4567 N. 1000 E." (*hereinafter,* Lambing Shed); Count VI – "in a vehicle" (*hereinafter,* Junkyard). *Id.* The Indictment alleged that each act (including Count II – incest, and Count VII – rape) occurred "on or about or between July 4, 2002, and November 30, 2006," with the exception of Count I which allegedly occurred "on or about or between November 1, 2006, and November 30, 2006." *Id.* A warrant was issued and Mr. Osterhoudt was arrested two years later. (R., pp.26-31.)

The case proceeded to trial; however, the jury was unable to reach a verdict and the court declared a mistrial. (R., pp.149-159.)

Prior to the second trial, the State provided notice pursuant to IRE 404(b) that it would seek to present evidence that Mr. Osterhoudt committed other bad acts, and the defense filed a written objection. (R., pp.241-272.) After an evidentiary hearing, the District Court entered a written decision on the State's motion. (R., pp.289-302; Tr. 6/11/10, p.908, L.1 – p.999, L.6.) The district court identified the specific pieces of evidence sought by the State to be admitted as: 1) Mr. Osterhoudt fondled and licked H.O.'s vagina "well prior to July 4, 2002"; 2) Mr. Osterhoudt attempted to have sexual

intercourse with H.O. in the camper shell of his truck approximately three weeks prior to July 4, 2002; 3) Mr. Osterhoudt engaged in a course of conduct providing H.O. with methamphetamine in order to groom her for sex; and, 4) Mr. Osterhoudt fled from law enforcement. (R., p.290.) The district court held that the State failed to provide evidence that Mr. Osterhoudt fondled and licked H.O.'s vagina prior to July 4, 2002; however, the State presented evidence that H.O. reported such a claim when she was five, and the court ruled that such evidence may become relevant if Mr. Osterhoudt presented evidence that H.O. recently fabricated the charged allegations. (R., pp.292-294.) The court recognized that the State withdrew its notice of intent to provide evidence that Mr. Osterhoudt attempted to have intercourse with H.O. prior to July 4, 2002, and stated that such evidence would not be allowed at trial. (R., p.294.) The court held that evidence that Mr. Osterhoudt provided methamphetamine to H.O. beginning when she was fourteen was admissible as evidence of "grooming"; however, such evidence would only be relevant to the charged offense in Count I, which is the only charged offense that alleges dates entirely after Mr. Osterhoudt allegedly provided H.O. with methamphetamine. (R., pp.294-299.) Finally, the district court ruled that evidence Mr. Osterhoudt fled from law enforcement was admissible. (R., pp.299-301.)

The prosecutor committed misconduct during closing arguments of the second trial and the district court declared a mistrial. (R., pp.515-534.)

Approximately one month prior to the third trial, the State provided Mr. Osterhoudt with approximately 400 minutes of audio recordings of conversations between Mr. Osterhoudt and various family members, and defense counsel filed a motion in limine to preclude the State from being able to present this evidence. (R., pp.600-606,

608-617, 731-733; Tr.1/31/11, p.5, L.12 – p.46, L.1) The district court held that the State provided the recordings too late and would not be allowed to present them in their case in chief; however, the court ruled that they may be admissible for impeachment purposes. (Tr.1/31/11, p.46, L.2 – p.50, L.22.)

Approximately one week prior to the third trial, the State filed a Renewed Notice of Intent to Present 404(b) Evidence at Trial, and filed a supplemental brief in support of its motion. (R., pp.675-707.) Mr. Osterhoudt again objected to the presentation of such evidence. (R., pp.708-709.) The district court ruled that the previous court ruling (made prior to the second trial) would apply to this trial. (Tr.1/31/11, p.51, L.25 – p.69, L.25.)

During the third trial, the State presented evidence that on November 30, 2006, H.O. disclosed the alleged abuse to the principal of Buhl High School, a Health and Welfare worker, and a Buhl Police Detective, she was taken into custody by Health and Welfare and, the next day, she was taken to the CARES center where she was physically examined and forensically interviewed. (Tr.2/1/11, p.9, L.18 – p.24, L.23 (testimony of Mike Gemar, then principal of Buhl High School, testifying that he had a conversation with H.O. and contacted the police and Health and Welfare); Tr.2/1/11, p.34, L.5 – p.44, L.3 (testimony of Detective Karen Trent (Ret.) of the Buhl Police Department, who stated that she went to Buhl High School, spoke with H.O., and "declared" her to be in imminent danger placing her in the custody of Health and Welfare); Tr.2/1/11, p.78, L.10 – p.94, L.23 (testimony of Candice Ramsey, then Health and Welfare worker, who testified that she spoke with H.O. and Detective Trent, she took H.O. into custody, helped her gather some belongings from her home, and attended H.O.'s interview at the CARES center); Tr.2/2/11, p.141, L.11 – p.154, L.14

(testimony of Susan Hoag, CARES forensic interviewer, who testified that she conducted the forensic interview of H.O.); Tr.2/2/11, p.180, L.2 – p.228, L.15 (testimony of Patricia Billings, pediatric nurse practitioner, who testified that she conducted a physical examination of H.O. which did not reveal any signs of sexual abuse, although H.O. tested positive for the Human Papilloma Virus which indicates H.O. had engaged in sexual intercourse).

The State next called Detective Becky White of the Twin Falls Police Department, who became the lead investigator in the case. (Tr.2/2/11, p.229, L.8 – p.232, L.9.) Detective White testified generally to what she did in her investigation including watching H.O.'s CARES interview and searching the Osterhoudt residence pursuant to a search warrant. (Tr.2/2/11, p.232, L.10 – p.270, L.10; Tr.2/3/11, p.294, L.19 – p.314, L.10, p.355, L.20 – p.390. L.16.) On cross-examination, counsel for Mr. Osterhoudt asked Detective White, in reference to the allegations made on November 30, 2006, "And this is the first time that these allegations were disclosed to anyone, correct?" to which Detective Trent responded, "No, that's not true." (Tr.2/3/11, p.398, Ls.2-4.) Counsel for Mr. Osterhoudt then asked, "This was the first time to your understanding that these allegations had been disclosed; is that correct?" to which Detective White again responded, "No, that's not true." (Tr.2/3/11, p.398, Ls.5-7.) Over defense counsel's hearsay objection, the district court ruled that defense counsel opened the door through his cross-examination of Detective White that she could reveal that at age five, H.O. had alleged that Mr. Osterhoudt abused her. (Tr.2/4/11, p.461, L.20 – p.469, L.21, p.481, L.14 – p.482, L.23.) The district court specifically admonished the jury that they could not consider this allegation for the truth of the matters asserted but could

consider it only as to how it weighs on Detective White's credibility. (Tr.2/4/11, p.481, L.14 – p.482, L.15.)

Rylene Nowlin of the Idaho State Police Forensic Service Laboratory, testified that she tested the pajamas H.O. was wearing before and after the last alleged intercourse took place (*see* Tr.2/3/11, p.309, L.10 – p.310, L.19; Tr.2/3/11, p.423, Ls.8-22), and found that no body fluids were present (Tr.2/3/11, p.320, L.11 – p.331, L.15). The State further presented the testimony of Lisa Mitton who was allowed to present expert testimony regarding various aspects of child sexual abuse, although she did not personally review any materials pertaining to H.O.'s allegations. (Tr.2/4/11, p.508, L.22 – p.559, L.12.) Ms. Mitton testified that "grooming," or "a planned behavior to initiate a relationship with the child with the intent of sexual contact," frequently occurs in child sexual abuse case, and involves paying special attention, providing treats, and providing positive emotional connections, in order to infringe on the child's boundaries. (Tr.2/4/11, p.538, L.13 – p.540, L.3.) She further testified that victims of abuse may become involved with drugs and alcohol; however, she did not specifically describe an abuser providing drugs and alcohol to the victim as a method of grooming. (Tr.2/4/11, p.508, L.22 – p.559, L.12.)

H.O., now 19 (Tr.2/4/11, p.560, Ls.8-21), testified that for her 12th birthday she and her family, including her father, her brother F.O., her father's girlfriend Lisa Eklund, her cousins S.M. and K.M., her aunt Michelle Osterhoudt, and her grandmother Sharon Williams, went on a camping trip to Balanced Rock (Tr.2/8/11, p.608, L.17 – p.610, L.13). H.O. testified that at one point during the trip, her father took her into some

willows and had intercourse with her, stopping when he heard Y.S. and T.S. walking down the trail nearby. (Tr.2/8/11, p.614, L.19 – p.619, L.6.)

H.O. further testified that the first time her father had intercourse with her was on the Fourth of July, 2002, when she was eleven years old, at her Aunt Shelly's house. (Tr.2/8/11, p.627, L.8 – p.629, L.2.) She testified that her father was living at Aunt Shelly's house at the time, and that she was visiting him. (Tr. 2/8/11, p.629, L.1 – p.631, L.8.) H.O. testified that although she did not remember much, she remembered her father placing his penis in her vagina, stopping and apologizing saying that she was not ready yet. (Tr.2/8/11, p.631, L.24 – p.632, L.18.) She testified that she later woke up and discovered that she was bleeding, she woke her father up, and he directed her to her Aunt Shelly saying that she must have started her period. (Tr.2/8/11, p.632, L.22 – p.633, L.3.) H.O. testified that she then woke up her Aunt Shelly who told her where she could find some pads, and she went and got one. (Tr.2/8/11, p.633, Ls.9-14.) She testified that she then went back into her father's room and crawled under the bed, he found her, laughed, and told her that he was sorry. (Tr.2/8/11, p.633, L.15 – p.634, L.17.)

H.O. testified that on January 1, 2006, she asked her father if she could go to the movies with some friends – her father agreed but said she would have to have sex with him before she could go. (Tr.2/8/11, p.656, Ls.9-24.) She testified that she acquiesced and her father placed his penis inside of her vagina. (Tr.2/8/11, p.665, L.17 – p.666, L.12.)

H.O. testified that there is a junkyard adjacent to their property owned by her uncle. (Tr.2/8/11, p.687, Ls.4-10.) She testified that in the summer of 2006, her father

took her to an abandoned van located in the junkyard that had a mattress in the back and he had sexual intercourse with her in the van. (Tr.2/8/11, p.689, L.4 – p.693, L.23.) H.O. testified that the last sexual act occurred at her father's house over Thanksgiving break in 2006, when he came into her room at 3:00 a.m. (Tr.2/8/11, p.712, Ls.1-25.) She testified that her father told her he wanted to have sex so she pulled down her pajama bottoms, he put his penis into her vagina, eventually ejaculating, and she pulled her pajamas back on when it ended. (Tr.2/8/11, p.713, L.8 – p.714, L.10.)

Although not tied to any specific event, H.O. testified that when she was younger she would try to fight or resist her father's actions, but he used the force of his weight to subdue her. (Tr.2/8/11, p.636, L.22 – p.638, L.24.)

H.O. also testified, over an additional objection from Mr. Osterhoudt, that her father gave her methamphetamine for the first time on April 20, 2005, although this incident was not tied to any charged offense. (Tr.2/8/11, p.673, L.1 – p.674, L.19.) She further described two specific occasions in which Mr. Osterhoudt offered to give her methamphetamine in exchange for sex, on one occasion H.O. acquiesced (although it is not entirely clear whether she did so because of the offer of methamphetamine), and the other time she did not – neither of these alleged incidents were charged as specific counts. (Tr.2/8/11, p.675, L.7 – p.678, L.5.) The district court instructed the jurors that they could only consider this evidence "for the limited purpose proof or plan to commit a charged offense in this case." (Tr.2/8/11, p.678, Ls.12-20.)

H.O. testified that she began dating Travis Pederson, who was eighteen or nineteen at the time, in May of 2006 when she was fourteen. (Tr.2/8/11, p.681, L.5 – p.683, L.1, p.686, Ls.17-18.) She testified that her father found out Mr. Pederson's age

but he did not care. (Tr.2/8/11, p.683, L.22 – p.684, L.11.) H.O. alleged that Mr. Osterhoudt and Mr. Pederson got along so well that Mr. Osterhoudt got him a job where he worked. (Tr. 2/8/11, p.683, Ls.12-21.) In October of 2006, Mr. Pederson and his parents were arrested for possessing marijuana in their house. (Tr.2/8/11, p.694, Ls.7-13.) H.O. testified that her father then told her that she could not be seen in public with Mr. Pederson any more. (Tr.2/8/11, p.694, L.16 – p.695, L.2.) Although she was not supposed to, she would see Mr. Pederson when he would pick her up and take her from school during lunch breaks. (Tr.2/8/11, p.695, Ls.8-15.) H.O. claimed that Mr. Pederson and her father got into a fight at work and it became harder for H.O. to see Mr. Pederson because Mr. Osterhoudt did not want her to see him. (Tr.2/8/11, p.696, Ls.1-19.) At some point, Mr. Osterhoudt discovered that Mr. Pederson was picking H.O. up from school, even though she was not supposed to leave the school. (Tr.2/8/11, p.699, Ls.2-13.)

H.O. testified that in November of 2006, she and her father again got into an argument about her seeing Mr. Pederson and he stopped her from leaving the property. (Tr.2/8/11, p.696, L.16 – p.701, L.5.) H.O. testified that she yelled at her father saying, "you're doing the same thing that Travis is doing." (Tr.2/8/11, p.707, L.24 – p.708, L.25.) She testified that when she returned to school after Thanksgiving break in 2006, she told Mr. Pederson, and then Mr. Pederson's mother, about the alleged abuse, and Mr. Pederson's mother told Mr. Gemar, the principal at Buhl High School. (Tr.2/8/11, p.717, L.3 – p.719, L.7.) H.O. stated that she didn't want to tell anyone and she didn't want her father to go to jail, but that she told Mr. Pederson because she, "just wanted someone to talk to. I just wanted somebody to listen to me. I wanted to feel like

somebody cared about me because I was all alone. I had nobody. And my dad wouldn't talk to me and my family hated me." (Tr.2/8/11, p.717, Ls.3-13.)

On cross-examination, H.O. testified that she was in love with Mr. Pederson at the time she made her allegations and that she was using drugs and alcohol and having sex with him. (Tr.2/9/11, p.771, L.20 – p.773, L.25.) She testified that, at one point, Mr. Osterhoudt threatened to get a restraining order if she continued to see Mr. Pederson. (Tr.2/9/11, p.774, Ls.18-23.) She again testified that she told Mr. Pederson that her father was molesting her because she "needed somebody to talk to." (Tr.2/9/11, p.787, Ls.4-24.) During her CARES interview, she lied about the nature of her relationship with Mr. Pederson. (Tr.2/9/11, p.798, L.17 – p.799, L.12.) H.O. testified that she was furious that her father would not let her see Mr. Pederson anymore and she disobeyed that order. (Tr.2/9/11, p.873, L.9 – p.875, L.2.)

Sharon Williams, Frank Osterhoudt's mother and H.O.'s grandmother (Tr.2/10/11, p.906, L.13 – p.908, L.3), testified that she told Detective White, while she was searching the residence, that H.O.'s allegations were stemming from her father forbidding her to see Mr. Pederson when he found out his age by reading a newspaper account of his arrest, but Detective White was not interested in what she had to say. (Tr.2/10/11, p.917, L.14 – p.929, L.4.) Ms. Williams also testified that she attempted to contact the elected prosecutor for Twin Falls County, the Sheriff of Twin Falls County and the Idaho Attorney General's Officer, to relay information that her son F.O. had relayed to her during a layover when he and H.O. were flying to New Zealand to live with their mother. (Tr.2/10/11, p.930, L.25 – p.937, L.13.) On cross-examination, Ms. Williams stated that she was not present when H.O. and Mr. Osterhoudt had their

argument, and was not present when any of the allegations of sexual activity took place. (Tr.2/10/11, p.957, L.5 – p.958, L.3.) When asked, "You have no testimony concerning the allegations of sex between Frank and [H.O.], do you?" she answered, "I just – I know what all took place, and I just – I know in my heart what started this." (Tr.2/10/11, p.958, Ls.4-7.) The State further cross-examined Ms. Williams on whether or not she had telephone conversations with her son regarding the substance of her testimony – Ms. Williams agreed that she had conversations with Mr. Osterhoudt about the facts of the case but denied any type of coordinating with other witnesses about their testimony, and denied asking Mr. Osterhoudt during one conversation, "'Why weren't there any sheep in the lambing shed?'" and talking about calves being in the lambing shed. (Tr.2/10/11, p.959, L.9 – p.964, L.1; Tr.2/10/11, p.974, L.18 – p.983, L.9.)

S.M., Mr. Osterhoudt's niece and H.O.'s cousin (Tr.2/10/11, p.984, L.22 – p.987, L.16), testified the room H.O. claimed that her father stayed in and allegedly had intercourse with her for the first time was actually her room, and that her uncle never stayed there (Tr.2/11/11, p.1011, L.11 – p.1014, L.24). Furthermore, S.M. testified that she had a full-sized bed with a box spring mattress laying directly on the floor, with no bed frame. (Tr.2/11/11, p.1015, L.12 – p.1018, L.6.) In fact, the only bed in the house that had a frame belonged to her mother. (Tr.2/11/11, p.1016, Ls.6-16.) Thus, there was no way that H.O. could have hidden under the bed as she testified she had. (Tr.2/11/11, p.1016, L.17 – p.1018, L.6.) Furthermore, S.M. testified that she was on the camping trip to Balanced Rock (although there was a dispute about what year the trip took place), and that she did not believe her uncle and H.O. were ever alone, and the area where they allegedly had intercourse was not secluded. (Tr.2/11/11, p.1020,

L.22 – p.1031, L.8.) S.M. testified that the night before H.O. told authorities that Mr. Osterhoudt had been molesting her, she observed H.O. and her father get into an argument about her seeing Mr. Pederson with H.O. yelling that she loved Mr. Pederson and would go into foster care if it meant being able to see him. (Tr.2/11/11, p.1090, L.7 – p.1092, L.21.)

Michelle (Shelly) Osterhoudt, Mr. Osterhoudt's sister and H.O.'s niece (Tr.2/11/11, p.1104, L.19 – p.1106, L.1), testified that Mr. Osterhoudt never lived in her house in Buhl where H.O. claimed he had intercourse with her for the first time (Tr.2/11/11, p.1117, L.15 – p.1119, L.23). Ms. Osterhoudt testified that the bed in S.M.'s room was on a box spring mattress laid directly on the floor, with no bed frame and no way to crawl under the bed. (Tr.2/11/11, p.1120, L.4 – p.1121, L.19.) Furthermore, she testified that H.O. did not come into her bedroom on the Fourth of July, 2002, and tell her that she started her period, and she would have remembered something like that happening. (Tr.2/11/11, p.1122, L.21 – p.1123, L.15.) Ms. Osterhoudt testified that H.O. and her father got into several arguments about her relationship with Mr. Pederson prior to her telling authorities that he molested her. (Tr.2/11/11, p.1138, L.6 – p.1142, L.14.)

K.M., Mr. Osterhoudt's nephew and H.O.'s cousin (Tr.2/11/11, p.1144, L.2 – p.1145, L.16), testified all of the kids' beds in the house in Buhl were on box springs directly on the floor and that there was no way that H.O. could have crawled under the bed as she had claimed (Tr.2/11/11, p.1149, L.21 – p.1154, L.7). K.M. testified that he was on the camping trip to Balanced Rock, that he did not ever see H.O. upset during the trip, and that he did not believe that H.O. was ever alone with her father, as all of the

kids liked to be around him and would have been upset if he would go off with just one of the kids at a time. (Tr.2/11/11, p.1155, L.11 – p.1161, L.14.) K.O. testified that he, his cousin F.O., and his uncle were all tagging sheep in the lambing shed on January 1, 2006, beginning around 3:00 p.m. (Tr.2/11/11, p.1166, L.5 – p.1168, L.21.) At around 8:30 or 9:00 that night, H.O. went down into the lambing shed to ask if she could go to the movies with her friends and, after initially saying no, Mr. Osterhoudt eventually gave in to H.O.'s pleas and gave her permission when her friends pulled up to the property. (Tr.2/11/11, p.1172, L.3 – p.1173, L.25.) K.M. testified that the lambing shed itself was messy with animal waste and that he did not see H.O and Mr. Osterhoudt have sex. (Tr.2/11/11, p.1174, L.1 – p. 1176, L.11.)

Lisa Eklund, Mr. Osterhoudt's girlfriend during the period of time he was alleged to have molested H.O. (Tr.2/15/11, p.1196, L.14 – p.1197, L.18), testified that during the camping trip to Balanced Rock, she and Mr. Osterhoudt rarely had time for themselves because all of the children wanted to be around him (Tr.2/15/11, p.1205, L.18 – p.1212, L.8). Ms. Eklund testified that H.O. was happy during the entire trip and that her demeanor never changed. (Tr.2/15/11, p.1215, Ls.3-15.) She also testified that the area where Mr. Osterhoudt supposedly had intercourse with his daughter was visible from the tent they were staying in and was full of stinging nettles. (Tr.2/15/11, p.1215, L.16 – p.1216, L.1.) Ms. Eklund testified that H.O. was generally a good student but then she started skipping school to be with Mr. Pederson who Ms. Eklund had believed was only sixten, but was in fact nineteen, at the time. (Tr.2/15/11, p.1220, L.15 – p.1221, L.11.) Once she and Mr. Osterhoudt learned that Mr. Pederson was actually nineteen years-old, Mr. Osterhoudt told H.O. that she could not see Mr. Pederson

anymore. (Tr.2/15/11, p.1226, L.22 – p.1227, L.6.) H.O. began screaming and yelling at her father and she did not stop seeing him, skipping school to be with him. (Tr.2/15/11, p.1227, L.13 – p.1229, L.3.) Ms. Eklund witnessed an argument around Thanksgiving of 2006 where Mr. Osterhoudt threatened to take out a restraining order against Mr. Pederson, and H.O. screamed that she would tell Health and Welfare that Mr. Osterhoudt had been molesting her. (Tr.2/15/11, p.1229, L.4 – p.1233, L.7.)

F.O., Mr. Osterhoudt's son and H.O.'s older brother (Tr.2/15/11, p.1267, L.18 – p.1268, L.18), testified that he too was on the camping trip to Balanced Rock, and that it would have been impossible for his father to have had intercourse with H.O., both due to the fact that none of the children went off alone with Mr. Osterhoudt, and the fact that the area where they supposedly had intercourse was full of stinging nettles (Tr.2/15/11, p.1276, L.3 – p.1282, L.5). F.O. testified that he was tagging sheep in the lambing shed with his father and his cousin, K.M., on January 1, 2006, around 7:00 p.m., when H.O. came down to the shed and asked her father if she could go to a movie with friends – her father initially said no but he eventually gave in when H.O. kept pleading with him to let her go. (Tr.2/15/11, p.1284, L.8 – p.1292, L.7.) He testified that he could hear what was happening, and H.O. and her father did not walk around the corner to have intercourse, and that had they done so, she would have gotten dirty due to the state of the lambing shed. (Tr.2/15/11, p.1292, L.8 – p.1294, L.17.) K.O. testified that at one point, he and H.O. were not getting along with Ms. Eklund and H.O. told him that they could get rid of her if he just told Health and Welfare that Ms. Eklund and touched him inappropriately, but he refused. (Tr.2/15/11, p.1296, L.10 – p.1298, L.21.) He also observed an argument between Mr. Osterhoudt and H.O. about H.O. seeing

Mr. Pederson where H.O. threatened to tell Health and Welfare that Mr. Osterhoudt was molesting her. (Tr.2/15/11, p.1298, L.22 – p.1302, L.23.) F.O. further testified that H.O. told him once when they were travelling to New Zealand, and again when they were living in New Zealand with their mother, that H.O. made up the allegations; F.O. told some relatives and eventually tried to tell Detective White this information. (Tr.2/15/11, p.1307, L.16 – p.1320, L.21.)

Ms. Williams, S.M., Shelly Osterhoudt, K.M., Lisa Eklund, F.O, and Travis Pederson, all testified that, in their opinion, H.O. is not a truthful person. (Tr.2/10/11, p.969, Ls.18-25 (Sharon Williams); Tr.2/11/11, p.1092, L.22 – p.1093, L.11 (S.M.); Tr.2/11/11, p.1124, Ls.5-16 (Michelle Osterhoudt); Tr.2/11/11, p.1176, Ls.12-23 (K.M.); Tr.2/15/11, p.1233, L.8 – p.1234, L.4 (Lisa Eklund); Tr.2/16/11, p.1340, Ls.1-14 (F.O.) Tr.2/16/11, p.1397, Ls.14-24 (Travis Pederson).)

Over defense objection, the district court allowed the State to present testimony from H.O. that she had made a similar allegation against her father when she was five years old, as evidence purportedly rebutting the defense theory that H.O. made up the allegations in order to be with Mr. Pederson. (Tr.2/16/11, p.1400, L.8 – p.1425, L.15; Tr.2/16/11, p.1472, L.23 – p.1475, L.23.) The next day, the district court gave the jury an instruction that told them they could not consider the evidence to prove the defendant's character but rather, "[s]uch evidence may be considered by you only for the limited purpose of proof of a motivation to disclose and those issues concerning the witness' credibility and disclosure." (Tr.2/17/11, p.1496, L.22 – p.1497, L.7.) Furthermore, over defense counsel's hearsay objection, the district court allowed the State to present, as substantive evidence, nine, short audio recordings, one of a

conversation between Mr. Osterhoudt and his niece, S.M., and the other eight conversations between Mr. Osterhoudt and his mother, Sharon Williams. (Tr.2/16/11, p.1456, L.15 – p.1471, L.4; Tr.2/17/11, p.1482, L.6 – p.1510, L.19.)

The jury found Mr. Osterhoudt guilty of two counts of lewd conduct with a minor under sixteen (Count I – Father's house; Count V – Lambing Shed), incest, and forcible rape, and found Mr. Osterhoudt not guilty of three other counts of lewd conduct (Count III – Balanced Rock; Count IV – Aunt Shelly's house; Count VI – Junkyard). (R., pp.843-845.) The district court sentenced Mr. Osterhoudt to a unified term of life, with twenty-five years fixed, for each of the lewd conduct and the rape conviction, and a twenty-five year fixed-term for the incest conviction with each count to run concurrently for a total unified sentence of life, with twenty-five years fixed. (R., pp.925-938; Tr.9/9/11, p.92, Ls.5-13.)

Mr. Osterhoudt filed a timely Notice of Appeal (R., pp.956-959), and he asserted that the district court erred when it allowed H.O. to testify that Mr. Osterhoudt provided her with methamphetamine. Relying upon its own precedent in *State v. Blackstead*, 126 Idaho 14 (Ct. App. 1994, and *State v. Truman*, 150 Idaho 714 (Ct. App. 2010), the Court of Appeals held that the district court did not err in admitting evidence that Mr. Osterhoudt provided H.O. with methamphetamine, even though the two acts occurred more than a year prior to the time period in which Count I was alleged to occurred, finding, "his previous pattern of providing H.O. with the addictive drug was relevant to show he was cultivating a controlling relationship over H.O., allowing him to sexually abuse her in November 2006." (Opinion, pp.5-7) The Court further found that,

because the district court provided the jury with a limiting instruction, the probative value of the evidence outweighed its prejudicial effect. (Opinion, p.7.)

Mr. Osterhoudt further asserted that the district court erred when it allowed the State to present evidence that at age five H.O. claimed that Mr. Osterhoudt sexually abused her, purportedly in rebuttal to Mr. Osterhoudt's defense that H.O. was making up the allegations in order to be with her boyfriend. Mr. Osterhoudt asserted that, because H.O.'s allegation at age five did not actually rebut the defense assertion that she was making up the allegations Mr. Osterhoudt was actually defending against in order to be with Mr. Pedersen, the district court erred in allowing the highly prejudicial prior bad acts evidence to be presented. A majority of the Court of Appeals, however, simply agreed with the district court. (Opinion. pp.8-9.) Judge Lansing wrote separately disagreeing with the majority's logic fining that, "The majority opinion holds, in substance, that H.O.'s testimony about the prior disclosure somehow corroborates her testimony about the subsequent abuse, but in my view that idea is without support and logic." (Opinion, p. 13-14 (J.Lansing *concurring in the result).*) Both the majority and Judge Lansing further supported their opinions by noting that Detective White had previously testified that H.O. made the disclosure at age five. (Opinion, pp.8-9, pp.13-14 (J.Lansing, *concurring in the result*).) However, both the majority and Judge Lansing failed to recognize that Detective White's testimony was not admitted for the truth of the matter asserted, and the jury was specifically instructed that they could only consider the evidence as it weighed in their determination of Detective White's credibility. (Tr.2/4/11, p.481, L.14 – p.482, L.15.).

Mr. Osterhoudt additionally asserted that the district court erred in admitting recordings of phone conversations that he had with his mother and his niece for the truth of the matter asserted, rather than for the limited, non-hearsay purpose of impeaching his mother and niece. The Court of Appeals agreed with Mr. Osterhoudt that the recordings were admissible only for non-hearsay purposes; however, the Court apparently held that the district court did, in fact, admit the evidence for purposes other than the truth of the matter asserted, and that Mr. Osterhoudt simply failed to ask for a limiting instruction. (Opinion, pp.10-12) Having found no errors in the district court's rulings, the Court of Appeals denied Mr. Osterhoudt's cumulative error argument as well. (Opinion, p.12.) Mr. Osterhoudt filed a timely Petition for Review.

ISSUE

Should this Court grant Mr. Osterhoudt's Petition for Review and ultimately vacate his conviction?

ARGUMENT

This Court Should Grant Mr. Osterhoudt's Petition For Review And Ultimately Vacate His Conviction

A. Introduction

Mr. Osterhoudt asserts that the district court erred in allowing H.O. to testify that Mr. Osterhoudt provided her with methamphetamine and that when she was five years old, he committed an act of oral to genital contact on her. He further asserts that the district court erred in allowing the State to present the recordings of conversations between he and his niece and he and his mother, as substantive evidence, rather than for the limited, non-hearsay purpose of evaluating the credibility of witnesses. He asserts that the Court of Appeals' decisions affirming the district court's ruling are in part inconsistent with prior precedent from this Court and are in part based upon a misunderstanding of the record in this case; therefore, Mr. Osterhoudt asks this Court to grant his Petition for Review. Furthermore, because the State failed to argue on appeal that any of the errors were harmless beyond a reasonable doubt, this Court must vacate Mr. Osterhoudt's convictions.

B. Standards Governing Petitions For Review

The decision on whether to grant a Petition for Review is left to the sound discretion of the Idaho Supreme Court and will be granted only when there are special and important reasons for doing so. I.A.R. 118(b). The criteria for granting a Petition for Review include whether the Court of Appeals' decision is inconsistent with prior precedent. I.A.R. 118(b)(2)-(3). When the Supreme Court grants a Petition for Review, it directly reviews the trial court's decisions. *State v. Pepcorn*, 152 Idaho 678, 686

(2012). For the reasons stated below, this Court should grant Mr. Osterhoudt's Petition for Review and ultimately vacate his conviction.

C. This Court Should Grant Mr. Osterhoudt's Petition For Review And Ultimately Hold That The District Court Erred By Allowing The State To Present Evidence, Pursuant To IRE 404(B), That Mr. Osterhoudt Provided Methamphetamine To H.O., As Such Evidence Was Not Relevant To Any Charged Count

1. Introduction

Over defense objection, the district court allowed the State to present evidence that Mr. Osterhoudt was "grooming" H.O. by providing her methamphetamine, beginning when she was fourteen years old. The district court ruled that such evidence was admissible only as it related to Count I, which alleged an act of lewd conduct committed on or between November 1, 2006, and November 30, 2006. As H.O. herself testified, she had stopped using methamphetamine by October of 2006. Therefore, because Mr. Osterhoudt's alleged supplying H.O. with meth is not tied to any charged crime, such evidence was not relevant. As such, the district court erred in finding that the evidence was relevant and abused its discretion by admitting this evidence. Furthermore, the State will be unable to prove that the admission of this evidence was harmless beyond a reasonable doubt.

2. Evidence Of Other Wrongs Committed By The Defendant Are Generally Not Admissible Against The Defendant

It is a fundamental tenet of the American legal system that a defendant may only be convicted based upon proof that he committed the crime with which he is charged and not based upon poor character. *State v. Wood*, 126 Idaho 241, 244 (Ct. App. 1994). Evidence of misconduct not charged in an underlying offense may have an

unjust influence on the jurors and may lead them to determine guilt based upon either: (1) a presumption that if the defendant did it before, he must have done it this time; or (2) an opinion that it does not really matter whether the defendant committed the charged crime because he deserves to be punished anyhow for other bad acts. *Id.* at 244-45. "The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *State v. Grist*, 147 Idaho 49, 52 (quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978)). Therefore, I.R.E. 404 precludes the use of character evidence or other misconduct evidence to imply that the defendant must have acted consistently with those past acts or traits. *Id.*

Idaho Rule of Evidence 404 provides in pertinent part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

IRE 404. "Admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose is subject to a two-tiered analysis." *Grist*, 147 Idaho at 52. "First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Id.* (citations omitted). "The trial court must then determine whether the other crime or wrong is relevant to a material and disputed issue *concerning the crime charged*, other than propensity." *Id.* (citations omitted) (emphasis added). This evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Id.* (citation omitted). The question of

whether or not proffered evidence is relevant is reviewed *de novo* on appeal. *State v. Shutz*, 143 Idaho 200, 202 (2006).

Next, the trial court must engage in a balancing analysis pursuant to IRE 403 and must determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Grist*, 147 Idaho at 52 (citation omitted). This balancing is committed to the discretion of the court. *Id.* (citing *Field*, 144 Idaho at 569). In reviewing the district court's discretionary decisions, a reviewing Court must examine whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason. *Id.* at 51 (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94 (1991) (in turn, citing *State v. Hedger,* 115 Idaho 598, 600 (1989)).

3. Evidence That Mr. Osterhoudt Provided H.O. With Methamphetamine Was Not Related To The Crimes Charged And, Therefore, Such Evidence Was Not Relevant To Any Material And Disputed Issue

The district court ruled that the State provided "sufficient foundational evidence that a reasonable jury could believe" that on two specific occasions, Mr. Osterhoudt offered H.O. methamphetamine in exchange for sex, but no sexual activity actually occurred, and that Mr. Osterhoudt provided H.O. with methamphetamine on a regular basis after July 4, 2006, until she went into foster care on November 30, 2006. (R., pp.294-297.) The district court's factual determination is, in part, in error. H.O. testified during the pre-trial hearing that the last time Mr. Osterhoudt *offered* her methamphetamine was in November of 2006, but that the last time she used methamphetamine with her father was in September of 2006. (Tr.6/11/10, p.944, L.14 –

p.960, L.24.) The district court ruled that the evidence Mr. Osterhoudt attempted to bribe H.O. with methamphetamine in exchange for sex was relevant as it related to Count I, as "such evidence is probative of a continuing criminal design by the defendant to cultivate a relationship with [H.O.] to induce her submission to his sexual demands, i.e., grooming." (R., pp.294-299.)

The district court based its decision on the Idaho Court of Appeals' decision in *State v. Blackstead*, 126 Idaho 14 (Ct. App. 1994). (R., pp.294-299.) In *Blackstead*, the Court of Appeals held that the defendant's drug use with the alleged victim and asking her to "'slip away'" during an incident occurring after he had provided the victim with drugs and had sexual intercourse with her, "was probative of a continuing criminal design by Blackstead to cultivate a relationship with R.S., induce her submission to his sexual demands and procure her silence through use of drugs — a process which the district court referred to as 'grooming.'" *Id.* at 19-20. The *Blackstead* Court's finding that other wrongs may be admissible if they support a finding of "continuing criminal design," relied upon by the district court in the present case, is questionable in light of the *Grist* Court's reiteration of the fact that IRE 404(b) is designed to keep out evidence that a defendant is a person of bad character, which "induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *Grist*, 147 Idaho at 52 (quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978)). Nevertheless, assuming but not conceding that *Blackstead* is still good law, the district court's admission of evidence that Mr. Osterhoudt provided methamphetamine to H.O. and offered her methamphetamine in exchange for sex, was in error in this case,

as the evidence was not relevant to the crime charged in Count I, the only charge that the district court found the evidence was relevant to.

In affirming the district court's ruling, the Court of Appeals relied upon both *Blackstead*, and its later opinion in *State v. Truman*, 150 Idaho 714 (Ct. App. 2012), for the proposition that "grooming" evidence is admissible because it is an application of, and not an "exception" to, I.R.E. 404(b). (Opinion, pp.5-6.) The Court of Appeals found that "similar to our determination in Truman, Osterhoudt's act of repeatedly offering H.O. methamphetamine demonstrates his continuing criminal design to achieve submission to his sexual demands." (Opinion, p.6 (citing *Truman*, 150 Idaho at 722.))

However, both the district court and the Court of Appeals failed to recognize that that the *Grist* opinion rejects the very rationale used to justify the admission of the evidence in this case. Regardless of what label the Court uses to justify its admission, "[t]he trial court must then determine whether the other crime or wrong is relevant to a material and disputed issue *concerning the crime charged*, other than propensity." *Grist*, 147 Idaho at 52 (citations omitted) (emphasis added) Labeling evidence as "grooming" or finding that it is part of a "continuing criminal design" to commit some criminal act at some point in the future, does not alleviate the general bar on admitting evidence of the defendant's poor character, or the specific requirement that such evidence is only admissible if it can be tied to the specific crimes charged. As such, the Court of Appeals opinion in this case is inconsistent with this Court's precedent as stated in *State v. Grist*.

In the present case, H.O. testified over an additional objection from Mr. Osterhoudt that her father gave her methamphetamine for the first time on April 20, 2005.

(Tr.2/8/11, p.673, L.1 – p.674, L.19.) She further described two specific occasions in which Mr. Osterhoudt offered to give her methamphetamine in exchange for sex, on one occasion H.O. acquiesced (although it is not entirely clear whether she did so because of the offer of methamphetamine), and the other time she did not – but neither of these alleged incidents were charged as specific counts, and both of these incidents occurred in the summer of 2005. (Tr.2/8/11, p.675, L.7 – p.678, L.11.) Unlike the pre-trial hearing, at trial H.O. failed to testify that her father continued to offer her methamphetamine after July 4, 2005. *Id.* In fact, H.O. testified at trial that she stopped using methamphetamine completely by October of 2006. (Tr.2/8/11, p.686, Ls.4-9.) As Count I alleged that the lewd conduct occurred sometime between November 1, 2006, and November 30, 2006 (R., p.125), the State failed to tie this alleged 404(b) evidence to any specific count. Because proffered evidence of other wrongs is only admissible pursuant to 404(b) if it can be tied to one of the counts charged, rather than just demonstrate the bad character of the defendant (*see Grist*, 147 Idaho at 52), the district court erred, as a matter of law, in determining that the evidence was relevant.

4. Even If In Its *De Novo* Review This Court Determines That Evidence Mr. Osterhoudt Provided H.O. With Methamphetamine Was Relevant, This Court Should Find That The District Court Abused Its Discretion In Admitting This Evidence As The Probative Value Of The Evidence Was Substantially Outweighed By Its Prejudicial Effect

To the extent the evidence Mr. Osterhoudt provided H.O. with methamphetamine is relevant at all, its relevance is minimal. Without tying the alleged methamphetamine use to the act alleged in Count I (Mr. Osterhoudt allegedly going into H.O.'s bedroom at 3:00 a.m. and having intercourse with her, with no offer or use of meth mentioned (*see* Tr.2/8/11, p.712, L.1 – p.714, L.10)), evidence that Mr. Osterhoudt had previously

provided H.O. with methamphetamine and on two occasions, about a year and one-half earlier, and had offered her methamphetamine in exchange for sex, was highly prejudicial. Rather than having to determine whether the State proved Count I based solely on H.O.'s allegation, in light of Lisa Eklund's testimony that she usually woke up if Mr. Osterhoudt got out of bed (Tr.2/15/11, p.1260, Ls.4-12), and in light of the fact that the pajamas did not contain any bodily fluids (Tr.2/3/11, p.320, L.11 – p.331, L.15), the jury was allowed to consider the fact that Mr. Osterhoudt was a person of ill character who had previously provided his daughter with methamphetamine. The district court's limiting instruction, not withstanding (*see* Opinion, p.7), such evidence is highly prejudicial and this Court should find that the district court abused its discretion by allowing such evidence to be presented to the jury.

5. The State Will Be Unable To Prove That The Erroneous Admission Of This Evidence Was Harmless Beyond A Reasonable Doubt

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967). *State v. Perry*, 150 Idaho 209, 227 (2010). Mr. Osterhoudt objected to the admission of evidence that he provided and offered H.O. methamphetamine (R., pp.27-272, 708-709) and, as argued above, the district court erred in admitting this evidence. The State failed to either assert or demonstrate in its Respondent's Brief that any error in this case was harmless beyond a reasonable doubt. *See generally* Respondent's Brief. As such, if

this Court finds error, it must vacate Mr. Osterhoudt's convictions. *See State v. Almaraz,* 154 Idaho 584, 598-599 (2013).

Should this Court consider a harmless error argument made for the first time on review, in light of the evidence presented contradicting H.O.'s claims, and in light of the fact that the jury acquitted Mr. Osterhoudt of three of the seven charges it considered, the State will be unable to prove that the error in admitting this evidence was harmless beyond a reasonable doubt. Shelly Osterhoudt, S.M. and K.M. all testified that the beds in their former house in Buhl (Aunt Shelly's house) where Mr. Osterhoudt allegedly had intercourse with H.O. were on box springs; therefore, H.O. could not have hidden under the bed after the alleged intercourse took place. (Tr.2/11/11, p.1011, L.11 – p.1017, L.5; Tr.2/11/11, p.1120, L.4 – p.1121, L.19; Tr.2/11/11, p.1149, L.21 – p.1154, L.7.) Shelly Osterhoudt further testified that H.O. did not come into her bedroom on the Fourth of July, 2002, to tell her that she started her period, and she would have remembered something like that happening. (Tr.2/11/11, p.1122, L.21 – p.1123, L.15.) S.M., K.M., Lisa Eklund, and F.O. all testified that they were on the camping trip with H.O. and they did not see H.O. go off alone with Mr. Osterhoudt at any time. (Tr.2/11/11, p.1020, L.22 – p.1031, L.8; Tr.2/11/11, p.1155, L.11 – p.1161, L.14; Tr.2/15/11, p.1205, L.18 – p.1212, L.8; Tr.2/15/11, p.1276, L.3 – p.1282, L.5.) Furthermore, Ms. Eklund testified that H.O. was happy on the trip and her demeanor never changed, and both she and F.O testified that the area where the intercourse allegedly took place was full of stinging nettles. (Tr.2/15/11, p.1215, L.3 – p.1216, L.1; Tr.2/15/11, p.1276, L.3 – p.1282, L.5.)

Furthermore, both K.M. and F.O. testified that they were present tagging sheep in the lambing shed on January 1, 2006, where H.O. alleged that her father made her have intercourse with him before she could do to the movie – both testified that H.O. convinced Mr. Osterhoudt to let her go to the movie after he initially said no, they both would have known if any sexual contact took place, and both indicated that no sexual contact occurred. (Tr.2/11/11, p.1166, L.5 – p.1176, L.11; Tr.2/15/11, p.1284, L.12 – p.1294, L.17.) Lisa Eklund testified that when Mr. Osterhoudt would get out of bed, she would usually wake up although she indicated that she would not know what Mr. Osterhoudt was doing if he did get out of bed at 3:00 on the night of the last alleged incident of intercourse. (Tr.2/15/11, p.1260, Ls.4-12) Furthermore, Rylene Nowlin of the Idaho State Police Forensic Service Laboratory, testified that she tested the pajamas H.O. was wearing before and after the last alleged intercourse took place (*see* Tr.2/3/11, p.309, L.10 – p.310, L.19; Tr.2/3/11, p.423, Ls.8-22), and found that no body fluids were present (Tr.2/3/11, p.320, L.11 – p.331, L.15).

S.M., Shelly Osterhoudt, Lisa Eklund, and F.O. all testified that they witnessed H.O. and her father get into arguments about him forbidding her from seeing Mr. Pederson anymore, including H.O. threatening to tell Health and Welfare that Mr. Osterhoudt was molesting her if he did not let her see him. (Tr.2/11/11, p.1090, L.7 – p.1092, L.21; Tr.2/11/11, p.1138, L.6 – p.1142, L.14; Tr.2/15/11, p.1226, L.22 – p.1233, L.7; Tr.2/15/11, p.1298, L.22 – p.1302, L.32.) H.O. herself testified that she was furious that her father would not let her see Mr. Pederson anymore and that she disobeyed that order. (Tr.2/9/11, p.873, L.9 – p.875, L.2.)

F.O. testified that H.O. once suggested that he tell Health and Welfare that Lisa Eklund was inappropriately touching him, and further testified that H.O. admitted to him that she had made up the allegations. (Tr.2/15/11, p.1296, L.10 – p.1298, L.21; Tr.2/15/11, p.1307, L.16 – p.1320, L.21.) Ms. Williams, S.M., Shelly Osterhoudt, K.M., Lisa Eklund, F.O, and Travis Pederson, all testified that, in their opinion, H.O. is not a truthful person. (Tr.2/10/11, p.969, Ls.18-25 (Sharon Williams); Tr.2/11/11, p.1092, L.22 – p.1093, L.11 (S.M.); Tr.2/11/11, p.1124, Ls.5-16 (Michelle Osterhoudt); Tr.2/11/11, p.1176, Ls.12-23 (K.M.); Tr.2/15/11, p.1233, L.8 – p.1234, L.4 (Lisa Eklund); Tr.2/16/11, p.1340, Ls.1-14 (F.O.) Tr.2/16/11, p.1397, Ls.14-24 (Travis Pederson).)

Based upon the above evidence tending to, at the very least, create a reasonable doubt as to the veracity of H.O.'s allegations, Mr. Osterhoudt asserts that the State will be unable to demonstrate the error in allowing the jury to hear evidence that Mr. Osterhoudt provided H.O. methamphetamine was harmless beyond a reasonable doubt. As such, Mr. Osterhoudt asserts that this Court must vacate his convictions.

D. This Court Should Grant Review And Ultimately Find That The District Court Erred In Allowing The State To Present Evidence, In Rebuttal And Pursuant To IRE 404(b), That Ms. Osterhoudt Molested H.O. When She Was Five Years Old, As Such Evidence Did Not Rebut Any Arguments Or Claims Made By The Defense And Was Highly Prejudicial

1. Introduction

Over defense objection, the district allowed H.O. to testify that she first claimed that Mr. Osterhoudt had sexually abused her when she was five years old, purportedly in rebuttal to the claim that she accused Mr. Osterhoudt of the crimes he was actually charged with so that she could be with Mr. Pederson. However, this evidence did not

actually rebut any evidence presented by the defense, and was pure propensity evidence. As such, the district court abused its discretion by admitting this evidence. Furthermore, the State will be unable to prove that the admission of this evidence was harmless beyond a reasonable doubt.

2. The District Court Erred In Determining That The Allegation H.O. Made When She Was Five Was Relevant To Rebut A Claim That She Made The Later Allegations In Order To Be With Mr. Pederson

The proper standards used in reviewing a district court's admission of evidence pursuant to IRE 404(b) are articulated in section C(2) of this Brief above and will not be repeated in detail but are incorporated herein by reference.

The district court ruled as follows:

> Well, the reason or motivation behind the disclosure in 2006 has been the focus of extensive testimony in the trial from a variety of witnesses. And some of that's gone both ways, including from the last witness called, who, frankly, went against some of the other witnesses, saying she may have only reported it to get it off of her chest.
>
> There was conflicting evidence, to be sure, but there was extensive testimony about the motivation to go to the school and disclose at the time in November. And so there's an obvious factual issue that's the heart of the trial. Whether was that was done for some improper purpose of getting back at her father or mad about being grounded or mad about not being able to see Travis Pederson or whether this really happened, it's the obvious issue of the case. And there was extensive defense testimony put on that.
>
> It is 404(b) evidence, but it's evidence of another crime or act, and that's not admissible for certain purposes. There are purposes it can be offered for in terms of [H.O.'s] motive to disclose, so 404(b) is not -- has many suggested purposes. It's not exclusive. And I'm aware of the Grist case, saying you can't just bolster a witness or assert corroboration or somehow somebody can testify about all kinds of incidents just to bolster their own testimony, but here it seems, based on the proffer, that it goes to a narrower purpose than that.

> And I don't see any details here of the prior abuse. It goes to disclosure and it says touching. Obviously there is an indication that it was improper touching.
>
> In the context of the trial its purpose is even clearer: There are more detailed or inflammatory alleged acts discussed throughout the trial. And it's highly relevant evidence because entirety -- or not entirety -- but extensive testimony went to [H.O.'s] motivation to disclose as she did at the school. And it's notable that the proffer is that when she was young she told somebody at the school about it, so there are similarities in that regard. And there does not appear to be the presence of other improper motive. So it's highly relevant to rebut the implication that the defense has gone to extensive trouble and presented extensive testimony on to set forth that the only reason she was disclosing was for Travis and she had an improper motive in somehow disclosing. And this evidence directly rebuts that.

(Tr.2/16/11, p.1420, L.1 – p.1421, L.21.) The Court of Appeals simply acquiesced to the district court's analysis finding that because the prior disclosure occurred prior to H.O. meeting Mr. Pederson, the prior disclosure "directly rebuts" the defense allegation that H.O. made up the current allegations to be with Mr. Pederson. (Opinion, pp.8-9)

H.O. testified that her father had molested her when she was five and that she contemporaneously told authorities of this abuse. (Tr.2/16/11, p.1472, L.23 – p.1475, L.23.) The next day, the district court gave the jurors an instruction that told them they could not consider the evidence to prove the defendant's character but rather, "[s]uch evidence may be considered by you only for the limited purpose of proof of a motivation to disclose and those issues concerning the witness' credibility and disclosure." (Tr.2/17/11, p.1496, L.22 – p.1497, L.7.)

The district court's ruling that the evidence was relevant to rebut evidence proffered by the defense is logically challenged and factually erroneous. "Rebuttal evidence is evidence which explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of an adverse party." *State v. Olsen,* 103 Idaho

278, 281 (1982). Logically, the fact that H.O. made an allegation when she was five, an allegation that was never charged and never proven, does not explain, repel, counteract, or disprove a claim that she made up the allegations charged in the present case in order to be with Mr. Pederson. Had H.O. testified that she made the allegations that were actually charged prior to meeting Mr. Pedersen, or had she testified that she really didn't want to be with Mr. Pederson, the State would have presented evidence to rebut the claim that she made up the allegations in order to be with Mr. Pederson. Simply put, H.O.'s allegation at age five has nothing to do with whether or not she made up allegations against her father at age fifteen in order to be with Mr. Pederson. Her allegation at age five has nothing to do at all with her motivation to accuse at age fifteen.

Furthermore, the district court's ruling is factually erroneous. H.O. did not testify that her motivation to disclose allegations at age fifteen had anything to do with the fact that she made an allegation when she was five. Such evidence, if actually presented, could reasonably be called rebuttal evidence. However, H.O. testified the reason she disclosed was that, "I just wanted someone to talk to. I just wanted somebody to listen to me. I wanted to feel like somebody cared about me because I was all alone. I had nobody. And my dad wouldn't talk to me and my family hated me." (Tr.2/8/11, p.717, Ls.3-13.) Her testimony that she made the disclosure because she wanted to have someone to talk to, certainly rebuts the claim that she made up the allegations in order to be with Mr. Pederson, and the jury could decide which of these two explanations to believe. The opposite is equally true - evidence presented by the defense that suggested H.O. made up the allegations in order to be with Mr. Pederson is rebuttal

evidence of H.O.'s testimony that she disclosed due to feelings of loneliness, etc. Both logically and factually, H.O.'s allegation at age five has nothing to do with her motivation to accuse at age fifteen. The district court's determination that the evidence was relevant is in error.

3. The District Court Abused Its Discretion In Determining That The Relevance Of The Fact That H.O. Alleged Her Father Had Molested Her When She Was Five Was Not Outweighed By Its Prejudicial Effect

Even assuming there was some relevance to the fact that, when she was five years-old, H.O. had alleged Mr. Osterhoudt abused her, any relevance was substantially outweighed by the danger of unfair prejudice. The district court weighed the probative value versus the prejudicial impact and concluded as follows:

> The court still has to, if relevant, do the 403 analysis. So I would rule that it is relevant and the door's been opened extensively to her motivation for disclosure. And there's the implication of recent fabrication. I'm aware of the difference in the hearsay rule versus the 404 rule, but –
>
> So then the question is, if relevant, the evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. Here the evidence is highly relevant. It has substantial probative value. There is a danger of unfair prejudice, but I'd note that that's lessened by a couple of things.
>
> One, it appears based on the transcript I've read by way of proffer that it's a fairly discreet and isolated incident. **It has already been mentioned fairly because the door was already directly opened by other witnesses. So to the extent it's got some improper purpose, it's already out there and it explains quite of bit of what's going on at the trial.**
>
> So there is not an undue danger of unfair prejudice or confusion of the issues. It will clarify the issues. And what is -- as I ruled before when the door was opened already to other -- to essentially something similar about the prior disclosure -- what is unfair is to try the case in a vacuum. And that is misleading to the jury.

> And I'm aware the purpose of 404(b) has the effect of keeping highly relevant truthful information out because of the danger of unfair prejudice; but it's also problematic to allow an entire area that in this case can't be seen as a slip up or an accident or something, it's the entire gist of extensive testimony from multiple witnesses that there was some improper motive to disclose it at the time it was and then not to be able to somehow rebut that with testimony that things had been disclosed at prior times. So there's that.
>
> So there's a highly relevant purpose aside from mere propensity that doesn't go into the details too much about a particular incident that directly rebuts extensive testimony.
>
> ...
>
> But the topic of [H.O.'s] motivation and disclosure was the entirety of the defense. So in that light it is a proper purpose, there's not an undue risk of unfair prejudice. There is a risk of confusion of the issues if it's not admitted. So it's a little bit different in this case: That keeping it out will confuse the issues more than letting it in.
>
> And I've noted that at the time, so I would rule that in rebuttal the state may ask [H.O.] about the disclosure at age five, assuming it's along the lines of the transcript pages we've discussed. If there are anymore extensive details than that, we'd have to revisit the issue.

(Tr.2/16/11, p.1421, L.22 – p.1424, L.3 (emphasis added).)

Both the district court and the members of the Court of Appeals (Opinion, pp.8-9, pp.13-14 (J.Lansing, *concurring in the result*)), operated under the erroneous belief that the proffered evidence was already in evidence - it was not. Over defense counsel's hearsay objection, the district court ruled that defense counsel opened the door through his cross-examination of Detective White that she could reveal that at age five, H.O. had alleged that Mr. Osterhoudt abused her. (Tr.2/4/11, p.461, L.20 – p.469, L.21, p.481, L.14 – p.482, L.23.) The district court specifically admonished the jury that they could not consider this allegation for the truth of the matter asserted and could consider only as to how it weighs on Detective White's credibility. (Tr.2/4/11, p.481, L.14 – p.482,

L.15.) Therefore, prior to the district court allowing H.O. to testify that she made a disclosure at age five, such an allegation could not have been considered for the truth of the matter asserted, i.e., it could not have been considered as substantive evidence by the jury. The district court simply failed to adequately consider the prejudicial impact of the proffered evidence.

Second, in reality, the evidence was pure propensity evidence. Evidence of prior bad acts may be admitted to corroborate a victim's testimony or as evidence of a common scheme or plan; however, "trial courts must carefully scrutinize evidence offered as 'corroboration' or as demonstrating a 'common scheme or plan' in order to avoid the erroneous introduction of evidence that is merely probative of the defendant's propensity to engage in criminal behavior." *Grist*, 147 Idaho at 53. While prior bad acts evidence may be offered to corroborate a victim's testimony, "evidence offered for the purpose of 'corroboration' must actually serve that purpose; the courts of this state must not permit the introduction of impermissible propensity evidence merely by relabeling it as 'corroborative' or as evidence of a 'common scheme or plan.'" *Grist*, 147 Idaho at 53-54. "Evidence of uncharged misconduct may not be admitted pursuant to IRE 404(b) when its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.* In order to demonstrate that the proposed evidence demonstrates a "common scheme or plan," the State must demonstrate such a plan "embrac[es] the commission of two or more crimes so related to each other that proof of one tends to establish the other . . . ." *Grist*, 147 Idaho at 54- (citations omitted.)

The evidence presented suggested to the jury that Mr. Osterhoudt had been sexually abusing H.O. for a much longer period than had been alleged in the charging document. This evidence was highly prejudicial and this prejudice substantially outweighed the minimal, if any, probative value the State asserted, i.e., H.O.'s purported reason for disclosure, which she actually disavowed through her own testimony. Thus, the district court abused its discretion by allowing H.O. to testify that she, at age five, made an allegation of abuse against her father.

4. The State Will Be Unable To Prove That The Erroneous Admission Of This Evidence Was Harmless Beyond A Reasonable Doubt

As the State failed to assert and prove that any error is harmless beyond a reasonable doubt, this Court must vacate his convictions. (*See generally* Respondent's Brief; *see also State v. Almaraz,* 154 Idaho 584, 598-599 (2013). If this Court considers a harmless error argument raised for the first time on review, for the reasons articulated in section C(5) of this Brief above, which are incorporated herein by reference, Mr. Osterhoudt asserts that the State will be unable to prove that the evidence that H.O. accused her father, at age five, of molesting her, is harmless beyond a reasonable doubt. As such, Mr. Osterhoudt asserts that this Court must vacate his convictions.

E. If This Court Grants Review, It Should Find That The District Court Erred In Admitting Recordings Of Phone Conversations Between Mr. Osterhoudt And His Niece, And Mr. Osterhoudt And His Mother, As Substantive Evidence For The Truth Of The Matter Asserted

1. Introduction

Over defense objection, the district court allowed the State to present audio recordings of phone conversations that Mr. Osterhoudt had with his niece and his

mother, as substantive evidence. Assuming the evidence was admissible as either impeachment evidence or evidence of bias on the part of either S.M. or Sharon Williams, the proffered evidence was still hearsay and should not have been admitted for the truth of the matter asserted. By allowing the jury to consider these recordings as substantive evidence, rather than merely impeaching, the district court abused its discretion in admitting the evidence. Furthermore, the State will be unable to prove the error in admitting the evidence was harmless beyond a reasonable doubt.

2. Standards Of Review

This Court reviews a trial court's decision to admit evidence for abuse of discretion. *State v. Grist*, 147 Idaho 49, 51 (2009) (citing *State v. Field,* 144 Idaho 559, 564 (2007) (in turn citing *State v. Robinett,* 141 Idaho 110, 112 (2005)). This Court must examine whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason. *Id.* (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94 (1991) (citing *State v. Hedger,* 115 Idaho 598, 600 (1989)).

The Idaho Supreme Court recognized the distinction between substantive evidence and impeachment evidence in *State v. Ellington*, 151 Idaho 53 (2011), in which the Court stated,

> The Court of Appeals has aptly described the difference between impeachment evidence and substantive evidence:
>
> > Unlike substantive evidence which is offered for the purpose of persuading the trier of fact as to the truth of a proposition on which the determination of the tribunal is to be asked, impeachment is that which is designed to discredit a witness, i.e. to reduce the

> effectiveness of his testimony by bringing forth the evidence which explains why the jury should not put faith in him or his testimony. **Examples of impeachment evidence would include prior inconsistent statements, bias, attacks on [the] character of a witness, prior felony convictions, and attacks on the capacity of the witness to observe, recall or relate**. Evidence may be both substantive and impeaching.

Id. at 74 (emphasis added) (citing *State v. Marsh,* 141 Idaho 862, 868–69 (Ct. App. 2004) (in turn quoting *Small v. State,* 132 Idaho 327, 334–35 (Ct. App. 1998)). The *Ellington* Court further stated, "'One recognized method of impeachment is by showing that on a prior occasion, the witness made a statement inconsistent with testimony he gave at trial.'" *Id.* (quoting *State v. Drapeau,* 97 Idaho 685, 688 (1976); I.R.E. 613(b).) Furthermore, "[i]n Idaho, a prior inconsistent statement can also be used as substantive evidence, so long as the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement was given under oath at a prior proceeding." I.R.E. 801(d)(1).

3. The District Court Abused Its Discretion By Allowing The Audio Recordings To Be Considered As Substantive Evidence

The defense objected to the admission of these audio recordings for multiple reasons, including based upon the fact that they contain hearsay. (Tr.2/16/11, p.1456, L.15 – p.1471, L.4.) The district court held that the audio recordings were admissible as "some of the statements in these are prior inconsistent statements, or could be viewed that way," and that,

> What these tape-recorded conversations show is a pattern of witnesses planning testimony, conferring about it. Concoct may be a strong word, but that is an inference that can properly be drawn from the recordings. Getting their stories together, at best.

> Now there may be an alternate explanation for that, so the court in making this ruling does not need to find that fact exactly if the evidence has the tendency to show that, which is an obvious and reasonable inference from the context of these calls.
>
> So as to the relevance objection, some of the calls are brief, and perhaps if that were the only fragment would not appear to have much relevant information, but in light of the other phone calls they have obvious and extensive relevance.
>
> As to the question of impeachment, what we're dealing with here is not merely impeachment of a prior inconsistent statement. We're talking about bias, and I guess to put it uncharitably and maybe the most extreme inference again, fabrication or concocting of testimony. The witnesses testified to that. Their motive, their bias is all relevant. It is the most important issue in the trial. It is the most important function of the justice system, as the defense has argued when it came to the 404(b) evidence, to get at the truth.
>
> So bias is not collateral and bias is not something that is limited necessarily by the impeachment rule of prior inconsistent statements. And here by bias we have an effort where an inference can be drawn strongly from these recordings that there was an effort to coordinate testimony which was denied directly on the stand.

(Tr.2/17/11, p.1493, L.4 – p.1495, L.13.) The jury was allowed to hear the contents of the audio recording with no instruction limiting what they could be considered for, indicating that the district court admitted the audios as substantive evidence, rather than merely impeaching evidence or evidence of alleged bias. (R., pp.816-842; Tr.2/17/11, p.1482, L.6 – p.1508, L.4.)

There is no question that the statements in the conversations made either by S.M. or by Sharon Williams are hearsay – that is, they were statements "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IRE 801(c). S.M. and Ms. Williams were not under oath when they made the statements. *See* IRE 801(d)(1). On the other hand, the statements made by Mr. Osterhoudt in the same conversations would not be considered

hearsay. *See* IRE 801(d)(2). Thus, if they are admissible at all, the statements made by S.M. and Ms. Williams were not admissible to prove the truth of the matter asserted. *See Ellington*, 151 Idaho at 74.

The district court, however, even when recognizing that the statements could be admissible for impeachment purposes or to show bias on the part of the witness, failed to recognize that the jury could not consider the evidence for the truth of the matter asserted. As noted above, the court found that bias was not collateral and not limited by the impeachment rule of prior inconsistent statements. (Tr.2/17/11, p.1493, L.4 – p.1495, L.13.) While the district court's distinction between evidence that is "impeaching" and evidence that shows "bias" may be a simple matter of semantics, a distinction the *Ellington* Court found the Court of Appeal correctly recognized as unavailing (*see Ellington* at 74), the statements made by S.M. and Ms. Williams were made out of court, and not under oath, and, therefore, were inadmissible to show the truth of the matter asserted.

The district court abused its discretion by admitting these statements as substantive evidence, i.e., as truth of the matter asserted.

4. The State Will Be Unable To Prove That The Erroneous Admission Of This Evidence Was Harmless Beyond A Reasonable Doubt

As the State failed to assert and prove that any error is harmless beyond a reasonable doubt, this Court must vacate his convictions. (*See generally* Respondent's Brief; *see also State v. Almaraz,* 154 Idaho 584, 598-599 (2013). If this Court considers a harmless error argument raised for the first time on review, for the reasons articulated in section C(5) of this Brief above, which are incorporated herein by reference,

Mr. Osterhoudt asserts that the State will be unable to prove that the evidence that H.O. accused her father, at age five, of molesting her, is harmless beyond a reasonable doubt. As such, Mr. Osterhoudt asserts that this Court must vacate his convictions.

Furthermore, Mr. Osterhoudt asserts there are additional reasons why the State will be unable to demonstrate the admission of these audio recordings are harmless beyond a reasonable doubt. During the conversations, first S.M. and Mr. Osterhoudt, then Ms. Williams and Mr. Osterhoudt, discussed letters that had been sent and whether other individuals had read them, but the content of the letters was never revealed, and the letters themselves were not admitted into evidence. (*See generally*, Exhs. 66-74.) Notably, Ms. Williams and Mr. Osterhoudt discussed whether or not there were sheep or calves in the lambing shed on January 1, 2006. (*See* Exhs.70, 71, 73.) The issue of whether or not K.M., F.O., and Mr. Osterhoudt were tagging sheep on January 1, 2006, was highly relevant for the jury's consideration as, if they found that the three were tagging sheep on that day, it is much less likely that they would have believed H.O.'s claim that she went into the lambing shed and had intercourse with Mr. Osterhoudt within earshot, if not eyesight, of K.M. and F.O., with sheep feces on the floor, and then immediately went to the movies with her friend. However, if the jury believed they were not tagging sheep at the time, H.O.'s story may have had more validity. The jury convicted Mr. Osterhoudt of this charge. (R., p.844.)

In short, the State will be unable to prove that the district court's erroneous admission of these audio recordings as substantive evidence is harmless beyond a reasonable doubt. Thus, this Court should vacate Mr. Osterhoudt's conviction.

F. Even If Individually Harmless, The Accumulation Of Preserved Errors In This Case Deprived Mr. Osterhoudt A Fair Trial, Requiring This Court To Vacate His Convictions

"Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Perry* 150 Idaho at 230 (citing *State v. Martinez,* 125 Idaho 445, 453 (1994)). "However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Id.* (citing *State v. Hawkins,* 131 Idaho 396, 407 (Ct. App.1998)). Each of Mr. Osterhoudt's claimed errors were admitted over timely objects. Thus, he asserts that the cumulative error doctrine should be applied in this case. *See Perry*, 150 Idaho 230-231 (recognizing that the cumulative error doctrine apply only to claims of errors preserved by a contemporaneous objection).

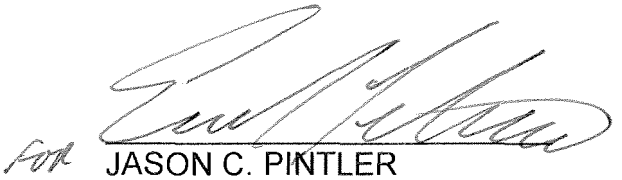
Due to the fact that the State has failed to claim that any error in any of the district court's rulings are harmless beyond a reasonable doubt, if this Court finds that the district court incorrectly ruled on *any* of the preserved claims of error, this Court must vacate his conviction. *See State v. Perry*, 150 Idaho 209, 227 (2010) (holding that where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also State v. Almaraz*, 2013 Opinion No. 41 (Idaho, April 1, 2013) (*petition for rehearing pending*). If the Court considers a harmless error argument raised for the first time on review, for the reasons articulated above, Mr. Osterhoudt asserts that each error was not individually harmless. However, even if this Court finds that these errors were

individually harmless, he asserts that the cumulation of the evidence that he provided H.O. methamphetamine, that H.O. alleged, when she was five years-old, that Mr. Osterhoudt had sexually abused her, and the admission of the telephone conversations between Mr. Osterhoudt and S.M. and Mr. Osterhoudt and Ms. Williams, as substantive evidence, deprived Mr. Osterhoudt of a fair trial and requires this Court to vacate his convictions.

CONCLUSION

Mr. Osterhoudt respectfully requests that this Court grant his Petition for Review and ultimately vacate his convictions and remand his case for a new trial.

DATED this 16th day of January, 2014.



for JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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