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Bartell v. State Appellant's Brief Dckt. 44124

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES LOGAN BARTELL, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court No. 44124 Bingham County District Court Case No. CV-2015-870

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

HONORABLE DARREN B. SIMPSON
District Judge

Deborah Whipple
ISB No. 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEYS FOR APPELLANT

Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4534

ATTORNEY FOR RESPONDENT

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

James Bartell is appealing from the summary dismissal of his petition for post-conviction relief. This Court should reverse because the district court dismissed some of the claims without proper notice and/or based its decision upon improper standards, the misapplication of the law, and the consideration of facts outside the record.

B. *Procedural History and Statement of Facts*

In April 2013, the district court sentenced Mr. Bartell, following a jury trial, to concurrent terms of eight years fixed followed by twelve indeterminate for two counts of lewd conduct with a child under sixteen. R 6.

Mr. Bartell appealed challenging only the length of the sentence. The Court of Appeals affirmed in an unpublished decision. *State v. Bartell,* No. 40958, filed April 30, 2014.

Thereafter, Mr. Bartell filed a *pro se* petition for post-conviction relief. R 5-28. Mr. Bartell alleged ineffective assistance by pre-trial, trial, sentencing, and appellate counsel. R 9-26.

Relevant to this appeal, Mr. Bartell alleged ineffective assistance by pre-trial Counsel Campbell because, among other things, she failed to contact his parents who would have alerted her to his history of mental illness and disability. She further failed obtain a competency evaluation or request a competency hearing. R 12-13.

Mr. Bartell also alleged ineffective assistance of trial Counsel Archibald. Mr. Bartell alleged that Mr. Archibald was ineffective in failing to request a competency hearing. He also alleged ineffectiveness in failing to investigate, prepare for, and present the defense that the girls' maternal grandfather and uncle committed the abuse, not Mr. Bartell. R 14-17; 19-20. He further alleged that Mr. Archibald was ineffective in failing to consult with or hire a medical expert to challenge and rebut the state's expert's testimony. R 17-18. Mr. Bartell also alleged that Mr. Archibald was ineffective in presenting and then abandoning midway through the trial the defense that the allegations of abuse were connected with the girls' parents' divorce. (Mr. Bartell's brother is the girls' father.) This was ineffective because the defense was without factual basis. Further, when Mr. Archibald abandoned it, he was unable to present evidence for his new defense - that Mr. Bartell had never been alone with the alleged victims. Mr. Archibald was unable to call Mr. Bartell's mother to support this defense because he had allowed her to remain in the courtroom during the state's case despite the order excluding witnesses. R 18-19. Lastly, Mr. Bartell alleged that Mr. Archibald was ineffective in not supporting the motion for a new trial with the necessary affidavits or other evidence. Mr. Archibald only supported the motion with his own unsworn statement:

> Defense Counsel is informed that after the jury verdict of 'guilty,' Mr. Stewart [the foreman of the jury] walked down the hall to the prosecutor's office to talk to Mark Cornelison, an attorney employed in the Bingham County Prosecuting Attorney's office. Mr. Cornelison and Mr. Stewart apparently have a business relationship. Mr. Cornelison and/or his family own an airplane, and Mr. Stewart has apparently been paid to work on and/or service the Cornelison airplane.

R 20-24.

Mr. Bartell also alleged ineffective assistance of appellate counsel for failing to challenge the denial of the motion for a new trial on appeal. R 25-26.

The district court appointed post-conviction counsel. R 53.

The state filed an answer. R 68-70.

Thereafter, counsel filed a second copy of the *pro se* petition which was properly verified. R 80-112.[1]

The state filed a motion for summary dismissal seeking dismissal on the ground that Mr. Bartell had failed to raise a genuine issue of material fact. R 113-114. Mr. Bartell filed a response to the state's arguments. Aug. R 1-14.

The motion was submitted without a hearing. R 160-161.

The district court summarily dismissed Mr. Bartell's claims regarding Counsel Campbell. R 175-183. The state argued in its memorandum in support of summary dismissal that Mr. Bartell's claim that Ms. Campbell was ineffective in failing to investigate his mental capacity and ask for a competency hearing should be dismissed because he "failed to explain to the Court that he had informed Cindy Campbell of issues with his mental health and shown (sic) that she acted unreasonably with the information that she had at the time." R 126. However, the court did not summarily dismiss for that reason. Rather, the court dismissed

[1] The second petition was filed in response to the state's argument that the original petition had not been verified. R 69. While the second petition was verified, R 112, the original petition had also been verified. R 27.

because: 1) none of Mr. Bartell's other attorneys in the case asked for an evaluation or reported that he was unable to assist in his defense; 2) Mr. Bartell testified on his own behalf at trial and his testimony did not display difficulties understanding the questions, formulating answers, or following directions; 3) following conviction, Mr. Bartell underwent a standard mental health assessment and the clinician found no documentation of mild retardation or bipolar disorder; 4) Mr. Bartell's petition was one of the best organized and argued *pro se* pleadings the court had ever seen.[2] Therefore, the record did not support his allegation of ineffective assistance. R 178-182.

The district court also dismissed Mr. Bartell's claims of ineffective assistance by Counsel Archibald. R 184-207. The state moved for summary dismissal of the claims regarding Mr. Archibald on the basis that all of his decisions were reasonable and strategic and therefore could not be the basis for a finding of deficiency. R 127-130.

Mr. Bartell responded by setting out the deficiencies of Mr. Archibald's representation and citing the court to cases which had found ineffective assistance for the same deficiencies. Aug. R 6-12.

The district court undertook an analysis not suggested by the state. R 184-207.

The court found no ineffectiveness in the failure to investigate and prepare a

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[2] Mr. Bartell had assistance in drafting the *pro se* petition because he was unable to do it himself. R 48.

defense that the girls' maternal grandfather and uncle committed the charged abuse of the girls, because IRE 412(a) and 403 would have precluded admission of evidence of prior victimization of the girls by these men. R 184-190. The court found no ineffectiveness in the failure to consult with Mr. Bartell prior to trial, stating, "Besides the issues of prior victimization and mental illness, Bartell offers nothing else Mr. Archibald should have discovered had he spent additional amounts of time consulting with Bartell." R 191. The court found no ineffectiveness in the failure to present a "somebody else did it" defense because evidence to support the defense would not have been admissible at trial. R 191-192. Likewise, the court found no ineffectiveness in counsel's failure to interview the complaining witnesses because Mr. Bartell did not offer any other information beyond that adduced at trial which counsel's interviews could have uncovered. R 192. The court found no ineffectiveness in the failure to file a witness list because no witnesses were excluded due to the failure. R 193. The court found no ineffectiveness in the failure to fully cross-examine witnesses concluding "Mr. Archibald's failure to ask questions which he knew would not lead to relevant evidence did not fall below an objective standard of reasonableness." R 193. The court further found that trial counsel had employed a tactic "for placing doubt in the juror's minds about prior mistreatment by other family members without attempting to improperly solicit inadmissible evidence." *Id.* The court found no ineffectiveness in failing to hire a medical expert because the state's expert's findings were not conclusive of any kind of sexual trauma. R 195. The court further concluded that counsel was not

ineffective in failing to call Mr. Bartell's mother as a witness to establish that he had never been alone with the girls. The court stated that whether the mother's testimony would have added to the defense was speculative, observing "it strains credulity that Bartell was never left alone with the girls, even for a few minutes." R 198-199. The court further noted that Mr. Archibald did try to call the mother as a witness, but was barred from doing so because she had been in the courtroom throughout the presentation of the state's case. This, the court concluded, "highlights the fluid nature of the trial process and the need to shift strategy as the evidence comes in." R 199. The court also made a general finding of no prejudice writing "Bartell has not brought forth different evidence which, had it been presented to the jury, would have sufficiently undermined the confidence in the outcome of his trial." R 204. Lastly, the court found no ineffectiveness in the presentation of the motion for a new trial because Mr. Archibald's failures did not affect the outcome of the motion. R 207.

The district court also dismissed Mr. Bartell's claim of ineffective assistance of appellate counsel in not raising the error in denying the new trial motion. R 210-212. The state moved for dismissal because because the district court lacked jurisdiction to hear claims of ineffective assistance of appellate counsel in post-conviction. R 132. Mr. Bartell responded that appellate counsel was ineffective. Aug. R 13. The district court held that it did have jurisdiction to hear the claim and that counsel was not ineffective because the decision to not argue the new trial motion issue was strategic and because Mr. Bartell had not identified an issue

besides the excessive nature of the sentence that had a better chance of success. R 210-211.

The district court did find ineffective assistance of counsel in sentencing counsel's failure to file a Rule 35 motion. The court summarily dismissed all claims but that claim and granted relief on that claim by ordering post-conviction counsel to file a Rule 35 motion. R 213.[3]

The district court entered its final judgment. R 215-216. This appeal timely follows. R 217.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Bartell's claim of ineffective assistance by Counsel Campbell because it did not provide adequate notice and it applied an incorrect standard?

2. Did the district court err in summarily dismissing Mr. Bartell's claim of ineffective assistance by Counsel Archibald because it did not provide adequate notice, misinterpreted the law, and relied on information outside the record?

3. Did the district court err in summarily dismissing Mr. Bartell's claim of ineffective assistance of appellate counsel because it did not provide proper notice?

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[3] The district court did not actually have jurisdiction to hear Mr. Bartell's Rule 35 motion because it was filed more than 120 days after judgment. ICR 35; *State v. Bowcut,* 140 Idaho 620, 622, 97 P.3d 487, 489 (Ct. App. 2004). Nonetheless, counsel complied with the court's order and filed a time barred Rule 35 motion. Relief was denied on July 11, 2016. ROA *State v. Bartell,* CR-2012-6529, Bingham County.

IV. ARGUMENT

A. *The District Court Erred in Summarily Dismissing the Claim of Ineffective Assistance by Counsel Campbell Without Proper Notice*

1. Standard of Review

Idaho Code§ 19-4906 authorizes summary dismissal of a petition, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleading, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Where a trial court dismisses a claim based upon grounds other than those offered by the state's motion for summary dismissal and accompanying memoranda, the petitioner must be provided with a 20-day notice period from the court. I.C. § 19-4906(b); *Kelly v. State,* 149 Idaho 517, 522-23, 236 P.3d 1277, 1282-83 (2010). Where the dismissal is based in part upon the grounds offered by the state, additional notice is not required. *Id.*

2. Argument

The state asked for summary dismissal of the claim that Counsel Campbell was ineffective in not investigating Mr. Bartell's mental capacity and asking for a competency hearing because, "Petitioner has failed to explain to the Court that he had informed Cindy Campbell of issues with his mental health and shown (sic) that she acted unreasonably with the information that she had at the time." R 126.

The district court dismissed based upon its analysis that facts arising after Counsel Campbell's representation of Mr. Bartell indicated that he was not incompetent to stand trial. R 179-181.

This dismissal was not based, even in part, upon the grounds offered by the state. Therefore, the order of dismissal should be reversed as to this claim and the case remanded for further proceedings. *Kelly v. State, supra.*

B. *The District Court Erred in Summarily Dismissing the Claim of Ineffective Assistance by Counsel Campbell Based Upon Information Unknown to Her When She Determined Not to Seek a Competency Evaluation*

1. Standard of Review

On appeal from an order of summary dismissal, the appellate court applies the same standards utilized by the trial courts and examines whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State,* 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). The appellate court exercises free review over questions of law. *Rhoades v. State,* 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009).

2. Argument

Even if the failure to give proper notice did not require reversal of the summary dismissal of the claims involving Ms. Campbell, the court's application of an improper standard requires reversal.

To establish a claim of ineffective assistance of counsel, the petitioner must show that the attorney's performance was deficient and that the petitioner was

prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 667-88, 104 S.Ct. 2052 (1984); *Self v. State,* 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct.App. 2007).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, as quoted in *State v. Dunlap,* 155 Idaho 345, 383-84, 313 P.3d 1, 39-40 (2013). Strategic decisions are "virtually unchallengeable" if made after a "thorough investigation of the law and facts relevant to plausible options . . ." *Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2066-67; *Dunlap,* 155 Idaho at 384, 313 P.3d at 40. Decisions made after less than complete investigation are reasonable only to the extent "that reasonable professional judgments support the limitations on investigation." *Id.* "Counsel is permitted to develop a strategy 'that was reasonable at the time' and may 'balance limited resources in accord with effective trial tactics and strategies.'" *Dunlap, supra,* citing *Harrington v. Richter,* 562 U.S. 86, 107, 131 S.Ct. 770, 789 (2011). "[C]ourts may not indulge '*post hoc* rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions." *Richter,* 562 U.S. at 108, 131 S.Ct. at 790, citing *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527 (2003).

In this case, the district court did not look to what counsel knew at the time

she represented Mr. Bartell. Rather, it looked to information which developed long after her representation to determine that she had acted reasonably. This was application of an improper standard and was error. *Richter, supra*; *Wiggins, supra*; *Dunlap, supra.*

Further, this error requires reversal. *See Ridgley v. State,* 148 Idaho 671, 676, 227 P.3d 925, 930 (2009) ("Where the lower court reaches the correct result, albeit by reliance on an erroneous theory, this Court will affirm the order on the correct theory.")

The claim before the court was that counsel was ineffective in failing to contact his parents who could have informed her of his mental disability and mental illness. And, as a result she did not have him examined or seek a competency hearing. R 13. Mr. Bartell averred that counsel limited her communication with him to discussions of the charges faced and the plea offer from the state. R 30-31. She would not accept his telephone calls or listen to any discussion of potential defenses. *Id.* She also failed to speak to his parents who would have told her that he had mental illness and potential competency problems. R 31. Mr. Bartell's father averred that had counsel contacted him he would have told her about his son's disabilities. R 39.

Counsel is not objectively reasonable in limiting consultation with the client to simply an explanation of the pending charges and discussion of a plea offer. *See Bouchillion v. State,* 907 F.2d 589, 597 (5th Cir. 1990) (complete failure to

investigate the defendant's competence to stand trial was not objectively reasonable performance); *Becton v. Barnett,* 920 F.2d 1190, 1193 (4th Cir. 1990) ("[A] lawyer is not entitled to rely on his own belief about a defendant's mental condition, but instead must make a reasonable investigation."). In this case, counsel's actions were not objectively reasonable. Therefore, this Court should not affirm the summary dismissal of this claim.

Moreover, this Court should not affirm the dismissal on a finding of lack of prejudice. Mr. Bartell never had notice that there was a defect in his pleadings and proof regarding the prejudice prong of this claim. R 124-26. Had Mr. Bartell had notice of a defect as to prejudice, he might have provided additional evidence to demonstrate that he was in fact not competent while Ms. Campbell represented him.[4]

Mr. Bartell asks this Court to reverse the summary dismissal of the claim of ineffective assistance by Ms. Campbell in her failures to address competency issues.

C. *The District Court Erred in Dismissing the Claim of Ineffective Assistance by Counsel Archibald Without Providing Proper Notice*

Just as the district court erred in dismissing the claim of ineffective assistance by Counsel Campbell without proper notice, it also erred in dismissing the claim of ineffective assistance by Counsel Archibald without proper notice.

The state gave notice that Mr. Bartell had failed to demonstrate that the

[4] A retroactive finding of competency may be based upon expert opinions about competency at the time in question. Later competency is not alone determinative. *State v. Hawkins,* 159 Idaho 507, 515, 363 P.3d 348, 356 (2015).

decisions of counsel were not strategic. The district court dismissed, in the main, because it found that Mr. Archibald's actions were not prejudicial based upon its erroneous conclusion that Mr. Bartell could not present a defense that someone else committed the abuse. It also dismissed based upon its conclusion that the failure to conduct an investigation for the new trial motion was not prejudicial. Given the differences between the state's theories and the court's, the court erred in not giving the 20-day notice required by I.C. § 19-4906(b); *Kelly v. State, supra.*

Insofar as the district court based its decision to dismiss upon an analysis that counsel was making strategic decisions, those conclusions were, as discussed below, based upon a misunderstanding of the law and/or evidence outside the record. Thus, the lack of notice cannot be found harmless. *Id., Ridgley v. State, supra.*

D. *The District Court Erred in Summarily Dismissing the Claims of Ineffective Assistance by Mr. Archibald on the Basis That IRE 412 and 403 Precluded Any Evidence that the Girls' Maternal Grandfather and Uncle Committed the Offenses*

Even if the lack of notice was not problematic, reversal is nonetheless required because the district court erred in its IRE 412 and 403 analysis. *Ridgley v. State, supra.*

In general, in a criminal case wherein the defendant is accused of a sex crime, evidence of the victim's prior sexual behavior is inadmissible. IRE 412; *State v. Orellana-Castro,* 158 Idaho 757, 763, 351 P.3d 1215, 1221 (2015). The court found no deficient performance by Mr. Archibald based in large part on its analysis

that evidence that the girls' maternal relatives committed the offense was inadmissible under IRE 412 and 403. However, two exceptions to IRE 412's exclusion of evidence of prior sexual conduct applied in Mr. Bartell's case.

First, IRE 412(b)(2)(A) allows admission of "past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury." In this case, the state presented testimony from Dr. Gelwix that N.B. had an "annular-appearing hymen that seems that the opening is enlarged. No bruising. No lesions. No discharge. The vaginal introitus is mildly erythematous." Aug. R Trial Tr. 69 (Trial Tr. p. 262, ln. 8-11). The state further elicited testimony from the doctor that an enlarged opening is potentially consistent with abuse and that the redness was possibly caused by abuse. Aug. R Trial Tr. 69-70 (Trial Tr. p. 263, ln. 14-16, p. 264, ln. 9-p. 265, ln. 1). And, the state relied upon this testimony in its closing. Aug. R Trial Tr. 88 (Trial Tr. p. 339, ln. 1-p. 340, ln. 17.

Given this testimony and argument, Mr. Bartell should have been allowed to present evidence that abuse by the maternal relatives could have been the source of the injury. IRE 412(b)(2)(A). *See Goodson v. State,* 566 So.2d 1142 (Miss. 1990) (under Rule 412(b)(2)(A), Miss.R.Ev., the absence of a hymenal ring is an injury); *People v. Mikula,* 269 N.W.2d 195, 198 (Mich. App. 1978) (when prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer occurrence of a sexual act, the defendant must be permitted to meet the evidence with proof of the complainant's prior sexual activity

tending to show that another person might have been responsible for her condition).

The evidence of abuse by the maternal relatives was also admissible pursuant to IRE 412(b)(1) and the Sixth and Fourteenth Amendments to the United States Constitution. Per IRE 412(b)(1), evidence is admissible when it is contitutionally required to be admitted. And, per the Sixth and Fourteenth Amendments, the rights to confront and cross-examine witnesses and to call witnesses on one's behalf are essential to due process. *See Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). Cross examination "is critical for ensuring the integrity of the factfinding process" and "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Kentucky v. Stincer,* 482 U.S. 730, 736, 107 S.Ct. 2658, 2662 (1987); *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974). A "defendant's right to confrontation may be violated if the trial court precludes an entire relevant area of cross-examination." *United States v. Lonedog,* 929 F.2d 568, 570 (10th Cir. 1991) citing *United States v. Atwell,* 766 F.2d 416 (10th Cir.), *cert. denied,* 474 U.S. 921, 106 S.Ct. 251 (1985).

United States v. Begay, 937 F.2d 515 (10th Cir. 1991), is persuasive. There, the court held that the confrontation clause required admission of evidence of prior abuse by a third party against an alleged victim of aggravated sexual abuse.

The government offered evidence to show that Begay regularly slept in the same bed as his girlfriend, Anna, and her eight-year-old daughter, D. One night, in early December, Anna thought that she saw Begay molesting D. D testified that

Begay undressed her, laid on her, put his penis in her, and went up and down. D also told a social worker that Begay had intercourse with her. *Id.,* 937 F.2d at 518.

In March of the next year, D was examined by a doctor who testified that she had an "unusually" large hymenal opening and "a streaky area" that the doctor considered to be an abrasion of some sort. On cross-examination, the doctor testified that it was impossible to determine based solely on the physical exam whether D's condition reflected one violent sexual penetration or repeated penetrations over a period of time. *Id.,* 937 F.2d at 518-19.

Begay told the authorities that "if D said it was true, then that's what happened." Later he reiterated this adding that he was too drunk on the evening of the incident to recall exactly what had happened. Shortly later, he said that he initially thought that D was Anna until he touched her, but he nevertheless "inserted his penis inside of her vagina." *Id.,* 937 F.2d at 519.

At trial, Begay sought admission of evidence of another man's previous sexual abuse of D. However, the court excluded the evidence under Fed.R.Evid. 403 and 412. *Id.,* 937 F.2d at 520.

The Tenth Circuit found a Sixth Amendment violation in the exclusion of evidence of the prior abuse by another and the limitation of cross-examination of the doctor to exclude questioning about whether sex abuse by the third party several months prior to the allegation against Begay could explain his observations. The court quoted *United States v. Saunders,* 736 F.Supp. 698, 703 (E.D.Va. 1990):

. . . Although the Rule provides no guidance as to the meaning of the

> phrase 'constitutionally required,' it seems clear that the Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material and favorable to his defense.

Id., 937 F.2d at 523 (citations omitted).

The Tenth Circuit found that the evidence of another's abuse and cross-examination of the doctor should have been allowed because the government used the evidence of D's physical condition to argue that Begay abused her. The court also found that the evidence was not more prejudicial than probative. *Id.*

The Ninth Circuit reached similar conclusions in *LaJoie v. Thompson,* 217 F.3d 663 (9th Cir. 2000). In that case, the court found that exclusion of evidence of the alleged victim's prior sexual abuse by others under Oregon's rape shield rule violated the Sixth Amendment. The court noted that the excluded evidence could have allowed the jury to determine that scarring on the child's hymenal ring and her vagina might not have been caused by LaJoie and could have provided an alternative explanation of the child's familiarity with sexual acts. The court also concluded that the probative value of the evidence was not outweighed by its prejudicial effect because evidence of non-consensual sexual abuse of a child was not likely to draw an unfavorable and unwarranted impression of her.

The district court simply erred in its IRE 412, 403 analysis to find that Mr. Archibald could not present evidence that the maternal grandfather and uncle abused the girls. This is especially true in light of the state's reliance on Dr. Gelwix's testimony regarding the physical condition of N.B. The court's dismissal of the claims of ineffective assistance by Mr. Archibald on the basis of the erroneous

analysis must be reversed.

E. *The District Court Further Erred in Basing its Summary Dismissal of the Claim of Ineffective Assistance by Mr. Archibald, in part, Upon Evidence Outside the Record*

In summarily dismissing the claim involving Mr. Archibald, the district court erroneously relied in part on evidence outside the record. *See State v. Newsom,* 135 Idaho 89, 91-92, 14 P.3d 1083, 1085-86 (Ct. App. 2000) (in general, information relied upon by the court should be made part of the record both to ensure a full opportunity to respond and to permit effective appellate review).

In dismissing, the court relied in part upon "facts" outside the record. These included that Mr. Archibald knew that any evidence regarding the maternal relatives was inadmissible, R 193, that Mr. Archibald was employing a tactic to place doubt in the jurors' minds without soliciting improper evidence, *Id.,* and that "Mr. Archibald is well-seasoned as a trial attorney and very capable of evaluating a potential witness in a short period of time." R 199. Given that the record was devoid of any evidence as to Mr. Archibald's conclusions about the admissibility of evidence, his employment of any specific tactic, or his "well-seasoned" status and witness evaluation capacities, the district court erred.

To the extent that the court relied on evidence outside the record, the order of summarily dismissal of the claims involving Mr. Archibald must be reversed. *Newsom, supra.*

F. *The District Court Erred in Dismissing the Claim of Ineffective Assistance by Appellate Counsel Without Giving Proper Notice*

As discussed above, if the district court dismisses a claim for reasons different from those offered by the state in its motion for summary dismissal, the court must give a 20-day notice of its intention. I.C. § 19-4906(b); *Kelly v. State,* 149 Idaho at 522-23, 236 P.3d at1282-83 (2010).

The state moved for summary dismissal of the claim of ineffective assistance of appellate counsel solely on the grounds that the district court did not have jurisdiction to hear the claim. R 123, 132. The district court found that it did have jurisdiction to hear the claim and dismissed on the basis that appellate counsel made a strategic decision to not raise the new trial issue on appeal based upon his research and experience. R 210-211.[5]

Because the basis for dismissal was completely different from the grounds offered by the state in its motion and brief, the district court erred in failing to give a 20-day notice and the dismissal of this claim must be reversed. I.C. § 19-4906(b); *Kelly v. State, supra.*

V. CONCLUSION

The district court erred in summarily dismissing the claims of ineffective assistance by Ms. Campbell, Mr. Archibald, and appellate counsel. Mr. Bartell

[5] The record contains no information about either appellate counsel's experience or the research conducted in preparing the direct appeal. Thus, the district court also erred in dismissing the claim involving appellate counsel because its decision was based upon "facts" outside the record. *State v. Newsom, supra.*

respectfully asks this Court to reverse the summary dismissal of those claims and remand for further proceedings.

DATED this 3rd day of November, 2016.

/s/Deborah Whipple
Deborah Whipple
Attorney for James Bartell

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 3rd day of November, 2016.

/s/Deborah Whipple
Deborah Whipple