7-6-2016

Grove v. State Respondent's Brief Dckt. 43537

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY LEWIS GROVE,	)	
	)	**No. 43537**
Petitioner-Appellant,	)	
	)	**Nez Perce Co. Case No.**
vs.	)	**CV-2012-1798**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

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STATEMENT OF THE CASE

Nature Of The Case

Stacey Lewis Grove appeals from the denial of post-conviction relief where some claims were summarily dismissed and other claims were denied after an evidentiary hearing.

Statement Of The Facts And Course Of The Proceedings

Grove was convicted by a jury, after a trial, for the first-degree murder of K.M., an infant in his care and control. State v. Grove, 151 Idaho 483, 485, 259 P.3d 629, 631 (Ct. App. 2011). The Court of Appeals affirmed his conviction. Id. at 497, 259 P.3d at 643. Relevant to this appeal, the Court of Appeals rejected Grove's unpreserved claim that admission of an autopsy report and testimony by Dr. Ross, the pathologist who conducted the autopsy of K.M., violated his confrontation rights because they relied, in part, on a report of injuries observed by a non-testifying pathologist when he reviewed brain matter samples sent by Dr. Ross for review. Id. at 489-93, 259 P.3d at 635-39. Specifically, the Court of Appeals concluded that Grove had failed to show fundamental error. Id.

Grove filed a petition for post-conviction relief (R., pp. 11-46) alleging (1) a violation of his confrontation rights (R., pp. 13-22, 141-150); (2) prosecutorial misconduct at trial (R., pp. 22-29, 150-157); (3) a violation of due process because jurors were sleeping during the presentation of evidence (R., pp. 29-31, 157-159); (4) ineffective assistance of trial counsel for failing to object to the prosecutorial misconduct alleged in the second cause of action (R., pp. 31-33, 159-161); and (5) ineffective assistance of counsel for failing to take 33 different

actions in trial that Grove concluded should have been taken (R., pp. 34-45, 162-177).

The parties filed cross motions for summary disposition. (R., pp. 85, 93-125, 181-193, 195-96.) The district court denied Grove's motion and granted the state's motion in part and denied it in part. (R., pp. 315-354.) The claims not dismissed were for ineffective assistance of counsel for allegedly failing to keep evidence of Grove's relationship with his son out of the trial; failing to provide all necessary evidence to the defense's medical expert; failing to move for a mistrial due to sleeping jurors; and deficient performance during closing argument. (R., pp. 352-353.)

The case proceeded to evidentiary hearing, after which the district court denied the remaining claims as unproven. (R., pp. 586-611.) Grove filed a timely appeal from the final judgment denying his petition. (R., pp. 612, 614-17.)

ISSUES

Grove states the issues on appeal as:

A. Did the court err in dismissing the confrontation clause claim as it can be raised for the first time in a post-conviction petition and is meritorious?

B. Did the district court err in dismissing the prosecutorial misconduct claim as it can be raised for the first time in a post-conviction petition and is also meritorious?

C. Did the court err in dismissing some aspects of the IAC claim, particularly those which were dismissed for reasons not raised by the respondent's motion and those dismissed without comment?

D. Did the court err in denying the claim of IAC during the direct and cross-examination of Stacey?

E. Did the court err in denying the claim of IAC during the direct and cross-examination of Dr. Arden?

F. Did the court err in denying the claim of IAC during closing argument?

G. Did the cumulative effect of counsel's deficient performance prejudice Stacey?

(Appellant's brief, pp. 4-5.)

The state rephrases the issues as:

1. Has Grove failed to demonstrate that the district court erred in summarily dismissing claims that could have been addressed in the criminal proceedings, but were not because they were not raised?

2. Has Grove failed to show error in the district court's summary dismissal of all but four of the claims of ineffective assistance of counsel?

3. Has Grove failed to show that application of the law to the facts found by the district court shows error in the district court's determination that Grove failed to prove ineffective assistance of counsel at trial?

ARGUMENT

I.
Grove Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing Claims That Could Have Been Addressed In The Criminal Proceedings

A. Introduction

The district court dismissed the claims of a confrontation violation, prosecutorial misconduct, and denial of due process resulting from allegedly sleeping jurors because no objection to these alleged errors had been raised in the criminal proceedings and therefore they were not properly addressed in post-conviction. (R., pp. 319-342.) Grove argues that there is no bar against raising claims of constitutional error (specifically an alleged confrontation violation and alleged prosecutorial misconduct) for the first time in post-conviction, even if the claims could have been, but were not, raised in the criminal proceedings. (Appellant's brief, pp. 12-14, 25-27.) Grove's argument fails because claims abandoned, waived or forfeited in the criminal proceedings may not be directly raised in post-conviction; rather, the post-conviction petitioner is limited to asserting that the abandonment, waiver or forfeiture of such issues was the result of ineffective assistance of counsel.

B. Standard Of Review

"On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to

relief." Caldwell v. State, 159 Idaho 233, ___, 358 P.3d 794, 798 (Ct. App. 2015). "Over questions of law, we exercise free review." Id.

C. Grove Was Barred From Bringing Claims Of Error That Could Have Been Asserted In The Criminal Proceedings

A proceeding in post-conviction "is not a substitute for nor does it affect any remedy incident to the proceedings, in the trial court." I.C. § 19-4901(b).[1] See also Parrott v. State, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990) ("post conviction relief proceedings are not a substitute for proceedings in the trial court, or of an appeal from the sentence or conviction"); Heartfelt v. State, 125 Idaho 424, 428, 871 P.2d 841, 845 (Ct. App. 1994) ("An application for post-conviction relief is not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction."). "Generally, post-conviction relief cannot be used to correct mere errors or irregularities in the proceedings of a trial court which are not jurisdictional and which, at the most, render a judgment merely voidable." Maxfield v. State, 108 Idaho 493, 499, 700 P.2d 115, 121 (Ct. App. 1985) (internal quotes omitted). "[T]he proper way for a defendant to challenge an unpreserved trial error is to assert ineffective assistance of trial counsel in a post-conviction proceeding." Bias v. State, 159 Idaho 696, ___, 365 P.3d 1050, 1057 (Ct. App. 2015) (stating this was the holding of Mintun v. State, 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007)). The Court of Appeals has not held, "even

[1] An exception to this general rule exists if the petitioner shows both "substantial doubt about the reliability of the finding of guilt" and that the claim "could not, in the exercise of due diligence, have been presented earlier." I.C. § 19-4901(b). Grove does not contend that this exception applies to his claims of constitutional error. (See generally Appellant's brief.)

tangentially, that an unpreserved trial error itself can be raised in a post-conviction proceeding." Id. (upholding dismissal of claims of prosecutorial misconduct asserted for the first time in post-conviction). Contrary to Grove's argument, his claims of trial error, even of constitutional dimensions, may not be made for the first time in post-conviction, and were therefore properly dismissed.

This statutory bar against post-conviction claims that could have been raised in the criminal proceedings is consistent with proscriptions against "sandbagging" employed in other contexts. "[R]equiring a contemporaneous objection prevents the litigant from sandbagging the court, i.e., 'remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.'" State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (quoting Puckett v. United States, 556 U.S. 129, 134 (2009)). "No procedural principle is more familiar to this Court than that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Puckett, 556 U.S. at 134 (internal quotes and ellipses omitted).

By failing to object at trial, Grove forfeited his claim that certain evidence should have been excluded under the Confrontation Clause; that the prosecutor engaged in misconduct before the jury; and that the trial was in violation of due process because jurors were sleeping during the presentation of evidence. It would invite sandbagging of the worst kind if defense counsel could choose to not object in the trial court because he or she was secure in the knowledge that the objection could always be raised for the first time in post-conviction,

bypassing the fundamental error rule applicable on appeal. Grove's potential remedy is not in raising the claims of error for the first time in post-conviction—rather, his potential remedy is in claiming, and proving, that the forfeitures of claims of errors in the trial court were the result of ineffective assistance of counsel. Grove has failed to show error in the summary dismissal of his confrontation, prosecutorial misconduct, and due process claims.

II.
Grove Has Failed To Show Error In The District Court's Summary Dismissal Of All But Four Of The Claims Of Ineffective Assistance Of Counsel

A. Introduction

The district court summarily dismissed all but four of the assertions of ineffective assistance of counsel. (R., pp. 345-53.) On appeal Grove challenges the summary dismissal of 15 of his claims of ineffective assistance of counsel, asserting several errors, including that he had presented viable claims, that he was deprived of notice, and that the district court failed to specifically address some claims. (Appellant's brief, pp. 27-40.) Application of relevant legal standards to the record in this case shows no error.

B. Standard Of Review

The standard of review is set forth in Section I.B., above.

C. The District Court Properly Concluded That Most Of Grove's Claims Of Ineffective Assistance Of Counsel Were Subject To Summary Dismissal

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief. A claim for post-conviction relief is subject to summary

dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)). In order to establish a prima facie claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989).

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

1. The District Court Properly Dismissed Grove's Claim Of Ineffective Assistance Of Counsel For Not Asserting A Confrontation Objection

Grove alleged that his trial counsel was ineffective for not objecting to admission of an autopsy report and testimony that mentioned the result of a neuropathology consultation by a non-testifying pathologist. (R., pp. 163-65 (¶

70).[2]) The district court dismissed the claim, concluding such an objection would not have been meritorious because the pathologist's observations were not "testimonial" as that term is used in the context of the Confrontation Clause. (R., p. 346; see also R., pp. 336-38.) The district court specifically stated that "the issue of whether an autopsy report is testimonial is a matter of first impression in Idaho," that counsel's choice to not object might have been tactical (and that lack of objection is a tactical decision), and that "any objection to the testimony would have been overruled." (R., pp. 336-38.) Application of the relevant legal standards shows no error by the district court.

The Confrontation Clause prevents the government from using evidence of out-of-court testimonial statements unless the declarant is unavailable and the defendant has had the prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004); State v. Hooper, 145 Idaho 139, 143, 176 P.3d 911, 915 (2007). The primary evil at which the Clause is aimed is the government's gathering of ex parte evidence with the purpose of using that evidence at a later trial. Crawford, 541 U.S. at 50-52; Hooper, 145 Idaho at 143, 176 P.3d at 915. A statement is testimonial when the circumstances surrounding the making of the statement objectively show that the primary purpose of the interrogation is to gather evidence for use in prosecution. Davis v. Washington,

[2] Grove argues that trial counsel should have objected to this evidence on both confrontation and I.R.E. 703 grounds. (Appellant's brief, pp. 28-33.) Because the same tactical reasons for non-objection apply to both, the state adopts its argument regarding confrontation as its argument regarding why it was not deficient performance to not object on other grounds as well. The state will address below the claim the court erred by not specifically addressing this claim.

547 U.S. 813, 822 (2006); Hooper, 145 Idaho at 143-44, 176 P.3d at 915-16. Thus, statements made in response to police questioning while police are investigating a crime are testimonial, but statements made to police or their agents while the declarant is seeking emergency assistance are not. Davis, 547 U.S. at 822; Hooper, 145 Idaho at 143-44, 176 P.3d at 915-16. Likewise, "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment" are not testimonial. Giles v. California, 554 U.S. 353, 376 (2008).

The evidence admitted at the criminal trial relevant to this issue is as follows: A 17-page autopsy report authored by Dr. Ross, a pathologist who did testify at trial, included the following:

> E. neuropathology consultation (University of New Mexico; Albuquerque, NM)
>
> 1. acute cerebral subdural hemorrhage, bilateral
> 2. acute cerebral subarachnoid hemorrhage, bilateral
> 3. brain swelling with tonsillar herniation
> 4. corpus callosum laceration
> 5. global hypoxic-ischemic brain injury
> 6. widespread vascular axonal injury
> 7. autolysis ("respirator brain" or non-perfused brain changes)

(#36211 Exhibit 11.) Dr. Ross testified that, pursuant to standard practices, he sent K.M.'s brain for examination by a neuropathologist, Dr. Reichard. (Trial Tr., vol. II, p. 900, L. 15 – p. 901, L. 7; p. 927, L. 21 – p. 928, L. 20.) He testified that Dr. Reichard's examination showed bilateral subdural hemorrhage, bilateral subarachnoid hemorrhage, a tear in the corpus callosum, hypoxic-ischemic injury, vascular axonal injuries, and autolytic changes. (Trial Tr., vol. II, p. 928, L. 21 – p. 929, L. 15.) He defined those terms and explained the significance of the

presence of some of those injuries. (Trial Tr., vol. II, p. 928, L. 21 – p. 930, L. 23.) The seven observations listed above are the total of Dr. Reichard's statements admitted as evidence. (R., pp. 320-22 (district court's findings discussing evidence; noting that other testifying doctors relied on Dr. Ross's report but did not testify as to its contents; and that "only a portion" of Dr. Reichard's report was "incorporated in to Dr. Ross's Autopsy Report").)

As noted by the district court, the question of whether an autopsy report is testimonial is a matter of first impression in Idaho. Moreover, the law as it existed at the time of trial, in July 2008, suggested that a confrontation objection would not have been meritorious.[3] See, e.g., United States v. De La Cruz, 514 F.3d 121, 133 (1st Cir. 2008) (report memorializing what medical examiner "saw and did during an autopsy" is "in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*"); Sauerwin v. State, 214 S.W.3d 266, 270 (Ark. 2005) ("the defendant's confrontation right extends to the testifying expert witness, not to those who do not testify but whose findings or research merely form the basis for the witness's testimony" (internal quotes omitted)); Com. v. Nardi, 893 N.E.2d 1221, 1230 (Mass. 2008) ("The fact that Dr. McDonough's expert opinion on the cause of Barchard's death was based, in large part, on findings made during the course of an autopsy that he did not perform does not infringe on Nardi's right to confrontation concerning this

[3] Grove's counsel acknowledges that cases decided after the trial "[do] not apply given the ineffective assistance of counsel claim looks back to see what a reasonably competent attorney would have done at the time." (Appellant's brief, p. 28 (citing Strickland, 466 U.S. at 689).)

issue."); People v. Freycinet, 892 N.E.2d 843, 846 (N.Y. 2008) ("autopsy report was clearly not testimonial"); But see State v. Johnson, 756 N.W.2d 883 (Minn. App. 2008). Given the lack of controlling authority, and the at best split in persuasive authority, it is clear that counsel's decision to forgo objecting was not based on ignorance of the law or any other objective shortcoming. Furthermore, the district court's conclusion that the objection would have been overruled is supported.

Even if trial counsel could have prevailed on this objection, such alone does not support a *prima facie* claim of ineffective assistance of counsel. It is well established that the "lack of objection to testimony fall[s] within the area of tactical, or strategic, decisions." Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 689). "When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). Moreover, because there was no controlling authority it was not deficient performance to elect not to present a novel legal theory. State v. Abdullah, 158 Idaho 386, 487, 348 P.3d 1, 102 (2015). Grove's claim of deficient

performance fails for lack of any evidence suggesting that counsel's lack of objection was based on any objective shortcoming.

Grove's trial counsel, Scott Chapman, testified that he did not object to admission of evidence regarding Dr. Reichard's report because he thought his expert could demonstrate that "reliance on that report [was] misplaced" and because he wanted to avoid the possibility that Dr. Reichard would be called as a live witness. (Chapman Depo., p. 19, L. 14 – p. 20, L. 5 (Augmentation).) Grove claims that this reasoning and the tactical decision to not object was "unreasonable." (Appellant's brief, p. 31.[4]) His subjective claim of unreasonableness ignores, however, that his burden is to show "that counsel's representation 'fell below an *objective* standard of reasonableness.'" Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000) (quoting Strickland, 466 U.S. at 688) (emphasis added). To meet this *objective* standard Grove must show the decision "resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." Payne, 146 Idaho at 561, 199 P.3d at 136. Grove failed to present a *prima facie* claim of an objective shortcoming by trial counsel below. His appellate argument simply ignores his burden to show an objective shortcoming. He has therefore failed to show error.

[4] In making this argument, Grove misstates the tactical decision involved. Grove claims that Chapman unreasonably allowed admission of allegedly excludable evidence so that he could "poke holes" in the allegedly excludable evidence. (Appellant's brief, p. 31.) Chapman testified, however, that "a number of doctors were relying on the autopsy report, including Reichard's report" and therefore "poking holes" in Dr. Reichard's findings with a live expert would "hopefully make reliance on that report misplaced." (Chapman Depo., p. 19, Ls. 14-25.) Thus, trial counsel's goal was to "poke holes" in the state's experts conclusions based on the report, not merely to "poke holes" in the report itself.

2. The District Court Properly Dismissed Grove's Claim Of Ineffective Assistance Of Counsel For Not Asserting A Hearsay Objection

When asked what time she was told her child would not survive, the victim's mother answered that at "around 3:00" she was told that K.M. "had blood in his brain" and there was "nothing they could do." (Trial Tr., vol. II, p. 755, L. 14 – p. 756, L. 1.) Grove alleged that not asserting a hearsay objection to this testimony was ineffective assistance of counsel, on the theory that by excluding this evidence and the evidence from the doctors regarding the cause of death "the state would have had no proof of the cause of death." (R., pp. 165-66 (¶ 71).) The district court dismissed this count on both Strickland prongs, concluding that a hearsay objection would not have been sustained and there was no evidence of prejudice. (R., p. 348.) On appeal Grove does not challenge the district court's determination there was no evidence of prejudice. (Appellant's brief, pp. 33-34.) The district court must therefore be affirmed on this unchallenged basis. State v. Goodwin, 131 Idaho 364, 366-367, 956 P.2d 1311, 1313-1314 (Ct. App. 1998) (appellate court will not reverse where trial court's ruling is based on an unchallenged "independent, alternative basis").

3. The District Court Properly Dismissed Grove's Claim Of Ineffective Assistance Of Counsel For Not Objecting To A Paramedic's Testimony That Grove Appeared "Too Calm"

The paramedic who talked to Grove to obtain K.M.'s medical history as other paramedics carried him to the ambulance and rushed him to the hospital testified in part:

> Q. Describe, if you can, his demeanor while you were talking to him.

A. It was calm, very calm. Too calm, in my opinion.

Q. By saying "too calm," you didn't know him before, did you?

A. Huh-uh.

Q. And you don't know how he reacts to—

A. Not at all.

Q. But when you say "too calm," is that based on your experience with other people in similar situations?

A. Yes. Parents are usually excitable when their child is very sick.

(Trial Tr., vol. II, p. 838, L. 20 – p. 839, L. 6.) Grove alleged that his trial counsel was ineffective for failing to object to the statement, "Too calm, in my opinion," because the paramedic "was not a psychologist or psychiatrist and had no qualifications as an expert on the appropriate reactions in a crisis." (R., p. 166 (¶ 72).) The state moved for summary disposition on this (and other claims of trial error) on the basis that this claim was unsupported by evidence. (R., pp. 133-34, 191-92, 268.) The district court dismissed this claim on the basis that the testimony was admissible as a lay opinion, and "petitioner has not raised an issue of material fact that counsel was deficient for failing to object" and also failed to establish a material issue of fact as to prejudice. (R., pp. 348-49.) Review shows the district court's decision to be correct.

> The Idaho Rules of Evidence provide that a lay witness may give testimony containing an opinion or inference if the testimony is 'limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge ….'

State v. Ehrlick, 158 Idaho 900, 923, 354 P.3d 462, 485 (2015) (quoting I.R.E. 701, other quotations omitted, ellipses original). That Grove appeared "too calm" for the circumstances was rationally based on the witness' perception as he talked with Grove to obtain a medical history, was helpful to understanding the testimony of the witness or the determination of a fact in issue in that it showed a general lack of concern for the well-being of the child, and was not based on scientific, technical or specialized knowledge but instead on the witness' life experience as a paramedic.

Grove argues that the testimony "was not rationally based upon the perception of the witness" because "[n]o foundation existed for this lay opinion." (Appellant's brief, p. 34.) Specifically, the witness was not familiar with Grove, did not state his "past experience," and did not give evidence that his experience with parents would translate to people in a parental circumstance like Grove. (Appellant's brief, pp.34-35.[5]) This argument is belied by the record, which establishes that the witness was testifying based on Grove's "demeanor while [he was] talking to him." (Trial Tr., vol. II, p. 838, Ls. 20-21.) The witness had been a paramedic for 14 years. (Trial Tr., vol. II, p. 832, Ls. 22-24.) The evidence also showed that Grove had claimed he felt that K.M. was his son. (Trial Tr., vol. II, p. 758, Ls. 3-13.) Grove presented no evidence that trial counsel could have interposed a successful foundational objection (in part because this was not his

[5] Grove's claim that "the evidence showed that the opinion was based on the false assumption that [Grove] was K.M.'s parent" (Appellant's brief p. 35) is false. The witness testified that Grove told him that K.M. "was sick" when he "came back from his dad." (Trial Tr., vol. II, p. 837, Ls. 1-10.)

claim below); there is no evidence in the record suggesting, for example, that quibbles currently asserted by Grove would have mattered to the trial court while exercising discretion or that further foundation, if required, could not have been laid. Grove has therefore failed to show error by the district court.

4. The District Court Properly Dismissed Grove's Claim Of Ineffective Assistance Of Counsel For Not Objecting To Dr. Harper's Testimony

During trial Dr. Harper was asked, "Are you familiar with Dr. Marco Ross?" She answered: "I am. Dr. Ross, I'm sorry to say, is no longer our—in our Medical Examiner's Office, because he is a super clinician. But he had another opportunity and has moved on. But yes, I am familiar with Dr. Ross." (Trial Tr., vol. II, p. 1031, Ls. 11-15.) She also testified that the kind of force necessary to inflict injuries similar to those in K.M.'s abdomen was comparable to being dragged by a horse, having a horse step on you, or being an unrestrained passenger in a car accident, and that she likely lacked the upper-body strength to inflict such injuries absent kicking, stomping, or using a bat. (Trial Tr., vol. II, p. 1034, Ls. 7-21.)

Grove claimed that trial counsel was ineffective for not asserting objections that the former statement was vouching and that latter lacked foundation. (R., pp. 168-69 (¶ 82).) He asserts these same claims on appeal. (Appellant's brief, pp. 38-39.) These claims also fail because there is no evidence in the record of any objective failing of counsel, such as inadequate preparation or ignorance of the law. Moreover, the alleged "vouching" was merely a kind word by a colleague that likely meant little to the jury and would

only have been made more prominent by an after-the-fact objection, and therefore there is no evidence to rebut the presumption of a proper tactical choice. Likewise, there is no evidence that additional foundation for the testimony regarding force could not have been laid, and therefore no evidence either that the lack of objection was not a proper tactic or that Grove was prejudiced. Grove has not set forth a *prima facie* claim of either deficient performance or prejudice.

5. The District Court Properly Dismissed Grove's Claim Of Ineffective Assistance Of Counsel For Not Objecting To Photographic Exhibits

During Detective Birdsell's testimony, the state offered and the trial court admitted without objection three photographs the detective had taken of the crime scene about three weeks after K.M.'s death. (Trial Tr., vol. II, p. 996, L. 8 – p. 1000, L. 7.) Grove claimed in post-conviction that trial counsel should have objected under I.R.E. 403 to the photos because they were "inflammatory because they included a large display of sympathy cards sent to Lisa Nash." (R., p. 169 (¶ 83).) The district court determined that Grove had failed to "establish how sympathy cards sent to Nash were inflammatory or unduly prejudicial to the Petitioner" and therefore failed to establish either element of a Strickland claim. (R., p. 350.)

Evidence may be excluded if its potential for "unfair prejudice" substantially outweighs its probative value. I.R.E. 403. "Unfair prejudice" is the tendency to suggest a decision on an improper basis. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010). Grove has never articulated how evidence of expressions of sympathy for loss of a child unfairly prejudiced him. Surely

expressions of sympathy for the loss of a child would have flowed regardless of how the child died. There is nothing prejudicial, much less unfairly prejudicial, in letting the jury know that friends and family expressed sympathy for the death.

Grove argues that the photographs had to show where he claimed the injuries happened to be relevant, and that "discover[y of] the sympathy cards while examining the exhibits during deliberations" would "evok[e] sympathy" for K.M.'s mother, resulting in "unfair prejudice" to Grove. (Appellant's brief, p. 39.) This argument is absurd. Evidence is not irrelevant because it is inconsistent with the defense theory of the case. Likewise, knowledge that others had expressed sympathy for the loss of a child would not result in unfair prejudice, as stated above. Because the objection had no merit, Grove has shown neither deficient performance nor prejudice. See State v. Abdullah, 158 Idaho 386, 487, 348 P.3d 1, 102 (2015) (failure to make motion that would not have been granted is generally determinative of both prongs of the Strickland test).

D. Grove Has Failed To Show That The District Court Was Required To Address Every Paragraph Of His Claim Of Ineffective Assistance Of Counsel

Grove argues the district court erred by not "expressly" addressing several of the sub-claims included in his claim of ineffective assistance of counsel. Review of the applicable law shows this argument to be meritless.

"Summary disposition of a post-conviction relief application under I.C. § 19-4906(c) is the procedural equivalent of summary judgment under I.R.C.P. 56." Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). It is well settled that "findings of fact are not necessary to support decisions of

summary judgment motions under I.R.C.P. 56, or to support a decision relating to any other motion, except with respect to motions for involuntary dismissal under I.R.C.P. 41(b)." Bank of Idaho v. Nesseth, 104 Idaho 842, 846, 664 P.2d 270, 274 (1983) (citing I.R.C.P. 52(a)). See also Gibson v. Ada Cty., 142 Idaho 746, 759, 133 P.3d 1211, 1224 (2006) ("findings of fact are unnecessary" in summary judgment motions); Keesee v. Fetzek, 111 Idaho 360, 361, 723 P.2d 904, 905 (Ct. App. 1986) ("Although findings of fact and conclusions of law are encouraged in summary judgment cases, they are not mandatory."). Furthermore, this Court will employ the "same standards" employed by the district court, without deference to that court's decisions. Caldwell, 159 Idaho at ___, 358 P.3d at 798. The district court in this case was not required to set forth its findings or analysis.

Grove's argument to the contrary is without merit. (Appellant's brief, pp. 28 ("summary disposition" of "claims without any discussion" "should be vacated"), 35-38 (dismissal of paragraphs 73-77, 79-81), 40 (dismissal of paragraph 99).) As support for his argument Grove cites Dawson v. Cheyovich Family Trust, 149 Idaho 375, 234 P.3d 699 (2010). In that case the district court dismissed the plaintiff's claims for failure to prosecute and granted summary judgment on the defendant's counter-claims. Id. at 378, 234 P.3d at 702. The plaintiff moved both for reconsideration and to set aside the judgment under I.R.C.P. 60(b)(6). Id. at 378-79, 234 P.3d at 702-03. The district court denied the reconsideration but "did not issue a ruling on Dawson's Rule 60(b)(6) motion." Id. at 379, 234 P.3d at 703. The Court held that the district court "erred

by failing to issue a ruling on Dawson's Rule 60(b)(6) motion." Id. at 380, 234 P.3d at 704.

In the present case the district court did not fail to rule on the state's motion for summary disposition. Rather, the district court held as follows:

> Based upon the foregoing analysis, there are issues of material fact with regard to whether the Petitioner received ineffective assistance of counsel during the trial in this case. Thus, an evidentiary hearing will be held on these issues, limited to those four claims as set forth above. The State's motion for summary disposition is denied with respect to these limited issues. However, the State's motion is granted as to the remaining issues, consistent with the foregoing analysis.

(R., p. 353.) The record establishes that the district court did rule on the state's motion, granting it as to all but four claims. That the district court did not set forth its analysis as to some of those claims was not, as set forth above, error.

Grove also relies on Agrisource, Inc. v. Johnson, 156 Idaho 903, 332 P.3d 815 (2014). (Appellant's brief, p. 32.) In that case the Court said, "When a district court fails to explain why a case does not meet I.R.C.P. 60(b)'s circumstances, the court abuses its discretion." Id. at 914, 332 P.3d at 826. It then reversed for the district court's failure to address why some of the affidavits submitted in support of the motion failed to meet the requirements of Rule 60(b). Id. Unlike the review of the discretionary decision posed by a Rule 60(b)(6) motion, however, in summary disposition proceedings the appellate court reviews the ruling without deference to the lower court. Caldwell, 159 Idaho at ___, 358 P.3d at 798. Knowing the district court's analysis is not necessary for that purpose. As set forth above, the law is clear that the district court need not articulate the grounds for granting summary disposition or judgment. Grove's

claim that the Rule 60(b) jurisprudence should control over law that is on point is without merit. Grove has failed to show error.

E. Grove Has Failed To Show That The District Court Deprived Him Of Notice Of The Grounds For Disposition

Grove asserts that two of his ineffective assistance of counsel claims—related to the victim's mother's testimony regarding what doctors told her in the emergency room and the paramedic's opinion that Grove was "too clam"—were dismissed without adequate notice. (Appellant's brief, pp. 33-34.) This argument is without merit.

Where a summary dismissal is based in whole or in part on grounds asserted by the state in its motion, a post-conviction petitioner is not entitled to claim that he lacked notice for the first time on appeal. Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). He may, however, make such a claim if the grounds for dismissal are other than those offered by the state in support of its motion. Id.; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986) ("When the court dismisses a case upon the state's motion for dismissal, it must still provide twenty-days notice [as required by I.C. § 19-4906(b)] if the dismissal is based on grounds different from those presented in the motion for dismissal."). See also Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). Grounds for dismissal in a motion and in an order are different only if they are "different in kind," meaning they lack "substantial" overlap. Buss v. State, 147 Idaho 514, 517-18, 211 P.3d 123, 126-27 (Ct. App. 2009) (citing

Workman, 144 Idaho at 524, 164 P.3d at 804). Review of the record shows that the dismissal by the district court was not on different grounds than requested by the state.

The state moved to dismiss the fifth cause of action (embracing all of Grove's claims of ineffective assistance of counsel) because Grove "has not shown that any of trial counsel's strategic decisions resulted from inadequate preparation or ignorance of the relevant law." (R., p. 192; see also pp. 133-34, 268.) Grove responded to this argument, in part, by asserting that the "failure to object to *inadmissible evidence* and prosecutorial misconduct is conclusively shown by the absence of a proper and timely objection in the record of the trial proceedings." (R., p. 235 (emphasis added).) In the briefing supporting his own motion for summary dismissal he argued that the testimony by the victim's mother was inadmissible hearsay and the paramedic's testimony was inadmissible as a lay opinion. (R., pp. 245-46.) The district court denied the claims on the basis that the objections counsel was allegedly ineffective for failing to make were not meritorious because the mother's testimony was not hearsay (not offered for the truth of the matter asserted) and the paramedic's testimony was a proper lay opinion. (R., pp. 348-49.)

Because failing to make a non-meritorious objection cannot arise from ignorance of the law (only making such an objection can), the district court's grounds were not different in kind or lacking in substantial overlap. Grove's own arguments conclusively establish that he understood the admissibility of the evidence was at issue. Grove's claim that he was not aware that the

admissibility of the evidence was at issue, on a claim that counsel was ineffective for failing to claim the evidence was inadmissible, rings hollow.

Even if the grounds articulated by the district court were different than presented by the parties, this Court may still affirm on the asserted grounds. Johnson v. McPhee, 147 Idaho 455, 466, 210 P.3d 563, 574 (Ct. App. 2009) (the appellate court "must consider … any alternative ground" set forth in the summary judgment motion and "affirm the district court if … summary judgment on this cause of action would have been proper on an alternative basis that was presented below"); see also Schultz v. State, 153 Idaho 791, 797, 291 P.3d 474, 480 (Ct. App. 2012) (affirming on ground different than trial court, but raised in state's motion to dismiss). There is no evidence in this record that rebuts the presumption of effective assistance of counsel in making tactical decisions regarding objecting to evidence. Counsel could have (rightly) concluded that the objections were not meritorious or were at best doubtful; could have concluded that the evidence was not particularly harmful to the defense; could have concluded that making repeated and numerous objections would have soured the jury; or could have concluded that making after-the-fact objections (as in both claims) would merely highlight the evidence. Even if Grove's claim that he lacked notice that the merits of the objections were at issue had merit, he has failed to show that summary dismissal of his claims was error.

III.
Grove Has Failed To Show Error In The Denial Of His Claim Of Ineffective Assistance Of Counsel At Trial

A. Introduction

Grove alleged that his counsel was ineffective in relation to (1) the presentation of Grove's testimony (R., pp. 170-72 (¶¶ 85-86, 91-92)); (2) the presentation of the testimony of Dr. Arden, the defense medical expert (R., pp. 170-71, 173-77 (¶¶ 87-88, 97-99)); and (3) closing arguments (R., pp. 172-73 (¶¶ 95-96)). After the evidentiary hearing, the district court rejected these claims factually and legally. (R., pp. 591-610.) Grove contends the district court erred (Appellant's brief, pp. 40-63), but his arguments do not withstand scrutiny. Application of the relevant law to the facts found by the district court shows that it correctly concluded that Grove had failed to prove his claims of ineffective assistance of counsel.

B. Standard Of Review

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is

entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. Grove Had The Burden Of Proving By A Preponderance Of Evidence Both Deficient Performance And Prejudice

To demonstrate ineffective assistance of counsel, the petitioner must prove both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). "To establish deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' To demonstrate prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Abdullah, 158 Idaho 386, 417, 348 P.3d 1, 32 (2015) (brackets original) (quoting Strickland, 466 U.S. at 688, 694).

> The defendant also must overcome a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. 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. Thus, strategic decisions are virtually unchallengeable if made after a thorough investigation of law and facts relevant to plausible options. Decisions made after less than complete investigation are still reasonable to the extent reasonable professional judgments support the limitations on investigation. Counsel is permitted to develop a strategy.

Id. at 418, 348 P.3d at 33 (internal quotations and citations omitted).

D. Application Of The Law To The Factual Findings Of The District Court Shows No Error In The Denial Of Claims That Trial Counsel Was Deficient In Relation To Grove's Trial Testimony

The district court's factual findings relevant to this issue are as follows:

Whether counsel's performance was deficient during direct and cross-examination of the Petitioner.

4. Grove claims Chapman's performance was deficient when he questioned Grove on direct and cross-examination. First, Grove claims Chapman should have objected when the prosecutor questioned Grove regarding his relationship with his biological son. When asked why he failed to object to the prosecutor's question regarding child support, Chapman stated that he thought about objecting but chose not to in order to not draw the jury's attention to the issue more than it already had been.

5. During the trial, the prosecutor made the statement, "Mr. Grove, I understand the story you've told this morning is the story you need the jury to believe, but there are some things I am curious about. They just don't really seem to make sense." Chapman objected to the statement and the objection was sustained by the Court. Chapman did not recall why he did not ask the statement to be stricken.

6. When asked about the prosecutor's questions to Grove regarding the Ativan prescription and his inability to testify as scheduled at trial, Chapman stated that he was not sure that under the circumstances the testimony was objectionable.

7. Grove presented Attorney Andrew Parnes as an expert regarding his claims of ineffective assistance of counsel. Parnes has been a member of the California State Bar since 1978, the Idaho State Bar since 1990 and various federal district courts and the United States Supreme Court, and also courts of appeal, Ninth and Tenth Circuit. His practice includes representation in capital litigation, habeas corpus cases and appellate practice.

8. Parnes opined trial counsel should have objected to the prosecutor's cross-examination regarding Grove's biological son, trial counsel should have asked the prosecutor's statements regarding "the story you need the jury to believe" to be stricken, and that trial counsel should have objected when

> the prosecutor questioned Grove regarding his Ativan prescription and the delay of the trial.

(R., pp. 591-92.)

After applying the relevant legal standards (R., pp. 596-97) to these facts, the district court concluded Grove "has not met his burden of showing counsel was ineffective" because the "testimony in question falls into the category of strategic and tactical decision making which occurs during the trial process" and counsel's decisions were "within the wide range of reasonable professional assistance" (R., p. 598). Lack of objections did not result from "inadequate preparation, ignorance of the law or other shortcomings capable of objective review." (Id.) "Further, even if the Petitioner were to establish the first prong of *Strickland,* there is no evidence in this record that prejudice resulted from this deficiency." (R., p. 600; see also pp. 601-03.) Because the district court correctly applied the proper law to the facts, Grove has failed to show error.

1. Relationship With And Child Support For Son

Grove argues that, because his expert concluded there was no tactical reason to not object to evidence about Grove's relationship with his biological son and non-payment of child support, and because trial counsel initially indicated he would object, a lack of objection at trial "was below reasonable professional standards." (Appellant's brief, pp. 41-44.) However, as found by the district court (R., pp. 591, 598-601), counsel's stated reason of not drawing attention to the evidence is a viable tactical decision. Ramsey v. State, 159 Idaho 887, 367 P.3d 711, 718 (Ct. App. 2015) ("Trial counsel's decision not to object or move to strike and emphasize the testimony to the jury falls within the

broad discretion afforded counsel to formulate trial strategy and tactics and is inapposite to a conclusion of ineffective assistance of counsel."); State v. Roles, 122 Idaho 138, 147, 832 P.2d 311, 320 (Ct. App. 1992) ("Trial counsel for Roles may well have made the tactical decision not to object and move to strike, so as not to draw further attention to the passing reference.").

Grove next argues that, because trial counsel hedged his testimony that he acted with intent to not draw further attention to the evidence with the phrases "I guess" and "best as I can recollect," there is no "evidence of a strategic decision." (Appellant's brief, p. 43.) It was the trial court's prerogative, however, to give this evidence appropriate weight. Peterson, 139 Idaho at 97, 73 P.3d at 110 (credibility of the witnesses, weight to be given to their testimony, and inferences to be drawn from the evidence are all matters solely within the province of the district court). Moreover, Grove's argument completely overlooks his burden of proof. His belief that trial counsel's testimony should have been disbelieved, and his expert's testimony believed, does not show the district court erred in concluding that deficient performance had not been proven.

Finally, Grove argues that he was prejudiced by the lack of an objection because the evidence "was prejudicial." (Appellant's brief, p. 44.) This conclusory argument fails because mere prejudice is not even a basis for excluding the evidence. The evidence was that, because of difficulties with the boy's mother, Grove had decided that pursuing a relationship with his son would actually be detrimental to the child, and also testified that he was not currently paying child support because of the costs of the trial. (Trial Tr., vol. II, p. 1073, L.

23 – p. 1074, L. 24; p. 1115, L. 6 – p. 116, L. 2.) This evidence was relevant and admissible because it tended to rebut evidence that Grove was good in his father-figure roles. (See, e.g., Trial Tr., vol. II, p. 724, L. 23 – p. 725, L. 6; p. 780, Ls. 4-17; p. 793, L. 4 – p. 794, L. 7; p. 1072, L. 10 – p. 1073, L. 22; p. 1453, Ls. 19-23). It was not unfairly prejudicial such that unfair prejudice substantially outweighed its probative value. I.R.E. 403. Even if it was potentially excludable, it was so tangential to the primary issue of when and how the fatal injuries were inflicted on K.M. that its admission did not undermine confidence in the outcome of the trial. McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." (quotations omitted)). Grove's mere claim that the evidence was prejudicial falls far short of showing error by the district court.

2. Motion To Strike

Trial counsel successfully objected to comments by the prosecutor as a preamble to questioning Grove when he testified, on the ground that the prosecutor was presenting argument. (Trial Tr., vol. II, p. 1113, Ls. 8-14.) The record also shows that the jury was instructed in the final instructions that arguments and statements by lawyers are not evidence. (#36211 R., vol. II, p. 228.) Grove has failed to show error in the district court's determination that he failed to show either prong of an ineffective assistance of counsel claim for not moving to strike the prosecutor's comments after successfully objecting to them. (R., p. 601.)

3. Cross-Examination About Medication

Grove claims the district court erred in finding neither deficient performance nor prejudice for not objecting when the prosecutor cross-examined Grove about what medication he was taking and why. (Appellant's brief, pp. 45-46.) Grove has failed to support his argument with any authority showing that the cross-examination was objectionable. (Appellant's brief, pp. 45-46 (citing United States v. Wolf, 787 F.2d 1094, 1099 (7th Cir. 1986).) As found by the district court, the authority Grove relies on is inapplicable (R., p. 602), and Grove has failed to address that analysis on appeal. Grove has therefore failed to show error in the district court's determination there was neither an objective shortcoming nor prejudice. (R., pp. 601-03.)

E. Application Of The Law To The Factual Findings Of The District Court Shows No Error In The Denial Of Claims That Trial Counsel Was Deficient In Relation To The Defense Expert's Trial Testimony

Grove alleged that counsel was ineffective for not providing certain medical slides to Dr. Arden, the defense medical expert, and not objecting to aspects of cross-examination of Dr. Arden by the prosecutor. (R., pp. 170-71, 173-77 (¶¶ 87-88, 97-99).) The district court's factual findings relevant to this issue are as follows:

> **Whether counsel was deficient during the direct and cross-examination of Dr. Arden.**
>
> 9. Grove asserts that Chapman's performance was deficient for failing to provide the expert witness, Dr. Arden, with copies of iron stained slides the medical examiner reviewed during the autopsy. Chapman sent a letter to the prosecutor seeking recuts of slides made during the autopsy. He could not recall if he followed up with Dr. Arden to see if Dr. Arden had received all

the slides he wanted. However, it was his practice to facilitate getting information to an expert if it was requested of him.

10. Grove also asserts Chapman was deficient in his handling of information available for purposes of impeaching Dr. Arden's testimony. Chapman was aware of potential impeachment issues regarding Dr. Arden's employment as Chief Medical Examiner in Washington, D.C. Chapman explained he did not object to the prosecutor's attempt to impeach because none of the issues went to Dr. Arden's opinion or his medical abilities, and the jurors would see that. He did not feel an objection would make a difference to the opinions presented. In hindsight, Chapman thought it may have been better to present the issue in direct testimony, or "pull the thorn," by presenting it to the jury first so it doesn't look like you are trying to hide the information.

11. Dr. Jonathan Arden testified in the criminal trial as an expert witness on behalf of the defendant. Dr. Arden is a forensic pathologist who has held his medical license since 1981. He currently conducts a consulting practice in forensic pathology and medicine, and also has a part-time appointment as a medical examiner in the state of West Virginia.

12. Dr. Arden was called as the last defense witness in the criminal trial. During cross-examination he was questioned by the prosecutor regarding the issue of his departure from his employment as Chief Medical Examiner in Washington, D.C. Dr. Arden confirmed he had discussed this matter with defense attorney Scott Chapman when Chapman contacted him to potentially be a witness in the case. Dr. Arden explained that the issues of his departure from employment as the Chief Medical Examiner in Washington, D.C. did not relate to his medical expertise, credibility, or honesty as a witness.

13. In preparing for the criminal case, Dr. Arden requested a set of all the microscopic slides that were done pursuant to this autopsy, both the general autopsy and the brain examination, including slides that utilized special stains. At the time of trial, Dr. Arden had copies of all slides, except iron stain slides that were reviewed by the medical examiner who conducted the autopsy on the body, Dr. Marco Ross. Dr. Arden did review the iron stain slides of the abdomen in preparation for the evidentiary hearing on post-conviction relief.

14. Dr. Arden felt that in preparation for the criminal trial he had received everything he needed to support the opinions he was

prepared to render regarding the timing of the injuries to the victim. However, recently, when reviewing the iron stain slides from the abdomen, he learned additional information to support his determinations regarding the timing of the injuries to the victim's abdomen, including pancreas and mesentery.

15. At the criminal trial, without the benefit of reviewing the iron stain slides from the abdomen, Dr. Arden opined that there were injuries in this area that were 48 to 72 hours of age. By reviewing the iron stain slides, he found evidence of injuries that were substantially older, on the order of a week or more. Similar evidence was also noted from review of iron stain slides from the eyes and optic nerves. There were no iron stain slides made of the brain, thus, Dr. Arden did not review any such slides to prepare for this evidentiary hearing. Ultimately, Dr. Arden opines he has now expanded his original opinion at trial as a result of the review of the iron stain slides. However, Dr. Arden confirmed that his opinion regarding the age of the most recent injuries, which were the injuries that led to the victim's death, were the same as his opinion presented at trial.

(R., pp. 592-94.)

Applying the law to these facts, the district court concluded that, because Dr. Arden had testified at trial that he had been provided the materials he needed, trial counsel was not ineffective for failing to provide any materials. (R., pp. 603-605.) The district court also concluded there was no prejudice from any alleged failure to provide materials because there was no significant difference in Dr. Arden's conclusions with and without the materials. (Id.) The district court also concluded Grove failed to prove deficient performance or prejudice in relation to the prosecutor's impeachment of Dr. Arden. (R., pp. 605-06.) Specifically, the district court concluded there was no objective deficiency in the tactical decision regarding how to handle Dr. Arden's impeachment. (Id. ("there is no evidence to support counsel's decisions resulted from inadequate preparation or ignorance of the relevant law").) Because Grove failed to prove

either an objective shortcoming resulting in deficient performance or prejudice, he has failed to show error by the district court.

Grove first argues that the district court's analysis of whether trial counsel's performance in providing materials to the defense expert was deficient "misses the central point" that "it was counsel's duty to supply the expert with all the materials, including the iron stains." (Appellant's brief, p. 50.[6]) There is no basis in law, however, for claiming that defense counsel is constitutionally required to determine what materials an expert needs to review. Here, in response to the question of whether there was "any information" he "needed in order to form opinions" that he "was not provided," Dr. Arden testified, "No," and that "what I requested I was given." (R., p. 604 (quoting Trial Tr., p. 1252, L. 25 – p. 1253, L. 9).) That trial counsel did not provide materials the expert did not request was not deficient performance.

Grove has also failed to show error in the finding he failed to show prejudice. Grove argues that moving Dr. Arden's estimates of when some of the injuries happened from days before to weeks before would have convinced jurors he was not guilty. (Appellant's brief, pp. 53-54.) The district court explained the error in this reasoning:

> At the evidentiary hearing, Dr. Arden testified that examination of the iron stains led to the discovery of evidence of healed injuries in one of the victim's eyes, his back, and the mesentery in his abdomen. However, during the trial Dr. Arden testified regarding

[6] Grove's argument is based in part upon the claim, unsupported by any citation to the record, that the "State agreed that Dr. Arden asked counsel for all slides and it did not send the iron stains." (Appellant's brief, p. 50.) This is the opposite of the state's argument below. (R., pp. 535-36 (arguing that Dr. Arden's trial testimony established he was supplied with everything he requested).)

> his observations of injuries that were more than a week old based upon his examination of the evidence provided to him at that time. The existence of injuries older than those which caused the victim's death does not call the verdict into question.

(R., pp. 604-05.) In addition, moving Dr. Arden's estimate regarding some of the injuries from one time when Grove could not have caused them to another time when he could not have caused them would not have benefited the defense or called into question the verdict. (See, e.g., Tr., vol. II, p. 872, L. 1 – p. 875, L. 22 (injuries would likely have resulted in immediate unconsciousness); p. 948, L. 12 – p. 950, L. 17 (injuries would have been immediately debilitating); p. 1033, L. 22 – p. 1037, L. 24 (K.M. would have been incapable of activities described on day before death after injuries inflicted).) If anything, an opinion that fatal injuries had been inflicted a week or more before death, and K.M. had shown no signs of distress for most of that time, is even less credible than the original testimony that the fatal injuries occurred a day before K.M. was taken to the hospital. (Tr., vol. II, p. 1306, L. 15 – p. 1310, L. 25; p. 1316, L. 12 – p. 1317, L. 13 (Dr. Arden's trial opinion that K.M.'s symptoms of lack of enthusiasm, intermittent engagement with family, and throwing up were consistent with injuries having been already inflicted).)

Grove next argues that lack of reviewing the stained slides "undermine[d] [Dr. Arden's] credibility." (Appellant's brief, p. 54.) However, at trial Dr. Arden relied on the autopsy report's conclusions for when iron staining was present. (Trial Tr., vol. II, p. 1355, Ls. 6-19.) Grove has not articulated a plausible reason that using the state's expert's conclusions regarding the presence of iron staining "undermined" Dr. Arden's credibility. Grove has failed to show error in the district

court's conclusions that he had failed to prove either deficient performance or prejudice.

Grove also argues the district court erred by finding neither deficient performance nor prejudice in relation to the cross-examination of Dr. Arden. (Appellant's brief, pp. 51-53, 55-57.) This argument fails because, as found by the district court (R., p. 606), the evidence that Dr. Arden had been forced to change career paths because he was fired for mismanagement was admissible and therefore lack of an objection was neither objectively unreasonable nor prejudicial. See Abdullah, 158 Idaho at 487, 348 P.3d at 102 (failure to make motion that would not have been granted is generally determinative of both prongs of the Strickland test). Grove argues evidence of the circumstances of Dr. Arden leaving his job as head medical examiner in Washington, D.C., was irrelevant. (Appellant's brief, pp. 56-57.) This argument does not withstand analysis.

During direct examination Dr. Arden described a "20-year career of government employment for public service working for four different medical examiner offices" after completing his education. (Trial Tr., p. 1242, Ls. 14-22.) He "first worked in the Office of the Medical Examiner for Suffolk County," New York. (Trial Tr., p. 1240, Ls. 22-25.) After two years in Suffolk County he "then went to Delaware, where [he] was an assistant medical examiner for the state of Delaware for a three-years period." (Trial Tr., p. 1243, Ls. 3-5.) He then worked nine years in the Office of Chief Medical Examiner in New York City, first as a medical examiner, then as a deputy chief medical examiner supervising the office

covering one of the five burrows, and finally as First Deputy Chief Medical Examiner. (Trial Tr., p. 1243, L. 5 – p. 1244, L. 4.) He then became the Chief Medical Examiner of Washington, D.C., a position he left in October, 2003. (Trial Tr., p. 1244, Ls. 5-10.) After leaving government service he opened a private consulting practice "in the field of forensic pathology and medicine." (Trial Tr., p. 1244, Ls. 11-17.)

In cross-examination the prosecutor explored Dr. Arden's transition from government employ to private consulting work. (Trial Tr., p. 1375 L. 8 – p. 1378, L. 8.) The topics included how fast he was able to grow his consulting business, why there is an apparent gap in his work history, and why he had recently taken part-time work for a medical examiner's office. (Id.) The prosecutor then asked, "Doctor, why did you resign your position in Washington, DC?" (Trial Tr., p. 1382, Ls. 6-7.) Dr. Arden testified that he took over a "dysfunctional" office, tried to "revitalize it" by being "very tough in enforcing standards" which made "a bunch of people unhappy" so they made "all kinds of allegations" and "said that [he] did all kinds of terrible things and harassed them," so "under pressure from the government, [he] resigned [his] position." (Trial Tr., p. 1382, L. 8 – p. 1383, L. 4.) The prosecutor then asked Dr. Arden a series of questions based on the "Final Report of Inspection of the Office of the Chief Medical Examiner conducted by the District of Columbia Office of the Inspector General" and an investigation by the Office of Corporate Counsel for Washington DC. (Trial Tr., p. 1383, L. 5 – p. 1388, L. 11.) Dr. Arden acknowledged that he resigned under pressure, but was not fired and was paid $70,000 so that he would not sue. (Trial Tr., p. 1388,

Ls. 5-11.) Mr. Chapman on re-direct asked if anything in cross examination had "chang[ed] the opinions [he] provided to this jury under direct examination," to which Dr. Arden responded, "No, sir." (Trial Tr., p. 1388, Ls. 20-25.)

In closing arguments the prosecutor told the jury the evidence shows that Dr. Arden "was a well-paid public servant for many years" but "resigned his position under pressure." (Trial Tr., p. 1428, Ls. 20-23.) This resignation led to him making his living for the previous five years as a "paid consultant." (Trial Tr., p. 1428, L. 23 – p. 1429, L. 1.) The prosecutor encouraged the jury, when deciding credibility, to consider whether the circumstances under which Dr. Arden left public employment and entered consultancy might have created a financial incentive to take less than clear-cut cases and provide testimony ultimately beneficial to the defendants who hired him. (Trial Tr., p. 1429, Ls. 2-13.)

In closing arguments trial counsel argued, "Don't let the Prosecutor fool you" with argument about how Dr. Arden is a paid consultant, because the evidence established he was an accomplished medical examiner. (Trial Tr., p. 1441, L. 19 – p. 1444, L. 3.) He also argued that although the circumstances under which Dr. Arden left the Washington, DC, medical examiner's office were "less-than-ideal," they "were administrative things at best and have nothing at all to do with his qualifications to render an opinion or the opinion he has rendered." (Trial Tr., p. 1444, Ls. 4-12.) He asserted the prosecutor's approach was "if you can't get at the man's testimony, get at the man." (Trial Tr., p. 1444, Ls. 13-16.) He asserted the prosecutor wanted to "harp on" the resignation, which was

political in nature, because he had nothing to undercut Dr. Arden's integrity or his skills and qualifications. (Trial Tr., p. 1444, Ls. 16-24.)

The record from the underlying criminal case thus establishes that the prosecutor attempted to impeach Dr. Arden with evidence that he had left his job as the head medical examiner in Washington, DC, involuntarily to start a consulting business, and that lead to a reasonable inference of a financial motive to take consulting jobs in questionable cases and testify favorably to defendants. Counsel chose to respond to that tactic by arguing that the circumstances of leaving the DC job and becoming a consultant did not affect Dr. Arden's opinion in any way, and even suggested that the prosecutor's tactic was a sign of weakness in the ability to attack the substance of that opinion.

Grove presented no evidence that counsel's tactical choice to address the circumstances of Dr. Arden leaving the DC job through argument was the result of objective shortcomings. In fact, the evidence presented shows quite the opposite. When asked, Mr. Chapman testified that he was aware of both the facts and the law[7] related to the issue and tactically handled it the way he did because he concluded the evidence related to Dr. Arden leaving the DC office did not undermine "Dr. Arden's opinion or his medical abilities and that the jurors would see that." (Tr., p. 204, L. 8 – p. 207, L. 6.) Grove has failed to show error

[7] Mr. Chapman testified that evidence regarding Dr. Arden's forced departure from the DC examiner job was not "relevant to his credibility as to his medical opinions" or the "credibility of his medical testimony," and that it "could be" prejudicial. (Tr., p. 205, Ls. 1-13.) This testimony was consistent with his closing argument to the jury. Mr. Chapman did not testify he thought the evidence was irrelevant to all issues in the case, was *unfairly* prejudicial, or that it was inadmissible.

in the district court's determination that there was neither deficient performance nor prejudice in trial counsel's decision to address this impeachment through closing argument.

Finally, Grove also argues it was ineffective assistance of counsel to not object to the prosecutor's question regarding whether not preparing a pre-trial report of his findings showed Dr. Arden had a "special mission" to not assist the state. (Appellant's brief, p. 51; Trial Tr., vol. II, p. 1321, L. 18 – p. 1322, L. 6.) It was neither deficient nor prejudicial to conclude, as did trial counsel (Tr., p. 292, L. 13 – p. 293, L. 5), that allowing Dr. Arden to answer that question (by affirmatively stating that he had fully cooperated with making his opinions available to the prosecution before trial (Trial Tr., vol. II, p. 1321, L. 18 – p. 1322, L. 6)) was more effective than objecting. Likewise, because the central point of the question was valid and the witness explained why it was unfair to characterize the lack of a report as a "special mission," there is no reason to find the district court's determination that there was no prejudice to be error.

F. Application Of The Law To The Factual Findings Of The District Court Shows No Error In The Denial Of Claims That Trial Counsel Was Deficient In Relation To The Prosecutor's Closing Arguments

Grove alleged counsel was ineffective for not objecting during closing arguments. (R., pp. 172-73 (¶¶ 95-96).) The facts relevant to this issue as found by the district court are:

> **Whether defense counsel's performance during closing argument was deficient.**
>
> 20. Grove asserts counsel was ineffective for failing to object to several statements made by the prosecutor during closing

argument and rebuttal argument. Further, Grove claims counsel was ineffective for failing to move for a mistrial based upon the prosecutor's misconduct.

21. Chapman confirmed that he did not make objections to the statements set forth in the Amended Petition. Chapman did object once to statements made by the prosecutor during the closing statement. When Chapman made his closing statement, he responded to the State's theory of the case and explained where the State failed to meet its burden of proving the evidence beyond a reasonable doubt.

22. Parnes testified that in his opinion Chapman should have objected to the statements made by the prosecuting attorney. He opined that because Chapman did not have an explanation of why he did not object to the statements, there was no tactical or strategic reasoning employed during the closing arguments.

(R., pp. 595-96.)

Applying the correct legal standards to these facts, the district court concluded that the decision to not object to certain argument was strategic, and there was no prejudice from lack of an objection. (R., pp. 609-10.) The district court properly concluded that none of the allegedly objectionable arguments rose to the level of being sufficiently "egregious" that the constitution required counsel to object. (R., p. 610.)

Grove first contends that the district court erred when it did not find trial counsel ineffective for not objecting when the prosecutor "misstated the defense position" by using the phrase "long-term" in characterizing the defense position on when the injuries occurred. (Appellant's brief, p. 58.) In context, the prosecutor drew a distinction between the state's evidence showing K.M. would have immediately suffered debilitating pain and been unable to function after being injured while "the defense would have you believe" that K.M.'s symptoms

of not feeling well and vomiting the night before he was rushed to the emergency room were the "result of some long-term brain injury." (Trial Tr., vol. II, p. 1418, L. 7 – p. 1419, L. 10.) Using the phrase "long-term" in the context of distinguishing between being relatively asymptomatic for hours or even days after the infliction of severe and fatal injuries and being immediately symptomatic did not misstate the defense. Counsel was not required by constitutional standards to debate the semantics of the phrase "long-term" before the jury.

Grove next argues that the district court erred when it did not find trial counsel ineffective for not objecting when the prosecutor referenced other incidents of children being killed by caretakers. (Appellant's brief, pp. 58-60.) During closing, trial counsel argued that the state's theory "makes no sense" because the jury would

> have to believe that between 7:54 and 8:30 that morning, this young man, who loved this child, played with this child, treated him as his own, the child who thought of him as a father, no indication of any problems whatsoever at any time, decided that in that half hour, bang, I'm going to beat this kid.

(Trial Tr., vol. II, p. 1436, L. 13 – p. 1437, L. 16.) The prosecutor responded to this argument in rebuttal by asserting that the state's position was not that Grove simply decided to beat K.M., but that he beat K.M. in a "fit of [fury]." (Trial Tr., vol. II, p. 1459, Ls. 16-22.) He agreed with trial counsel that the crime was "senseless," that every crime "like this is senseless," but that "doesn't mean it does not happen." (Trial Tr., vol. II, p. 1459, L. 23 – p. 1460, L. 2.) Relying on the jurors' "life experiences," "knowledge," and "common sense," the prosecutor

argued that parents and caretakers do kill children, citing examples that had recently been in the news. (Trial Tr., vol. II, p. 1460, Ls. 2-22.)

It is clear that "decisions to object during closing arguments are tactical, and will not be second-guessed by this Court." State v. Payne, 146 Idaho 548, 566 n.8, 199 P.3d 123, 141 n.8 (2008). "[A]bsent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct." Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013). Even if some of the argument was objectionable, the prosecutor's main point—that, even though it is always senseless, parents and caretakers sometimes do kill children in their charge—was proper. The district court did not err in concluding that the lack of an objection was not proved to be other than tactical, and that there was no prejudice.

Grove's argument (Appellant's brief, p. 60) that the district court erred by finding he had failed to prove deficient performance or prejudice (R., pp. 609-10) in relation to not objecting to the prosecutor's comment in argument about Dr. Ross's "unenviable task of taking" the victim's "body apart piece by piece to determine … what had happened" (Trial Tr., vol. II, p. 1464, L. 24 – p. 1465, L. 2), fails for the same reason. The challenged statement was made in the context of pointing out that the state's experts either treated K.M. before his death or directly examined his body shortly thereafter. (Trial Tr., vol. II, p. 1464, L. 20 – p. 1465, L. 8.) An objection, if successful, would have at best required the prosecutor to substitute the following argument: "Dr. Ross had the unenviable

task of [conducting an autopsy on K.M.'s body] to determine … what had happened." With so little to gain it is unsurprising that counsel would not object, and the district court's finding that there was no prejudice proved is amply supported.

Grove next claims the district court erred in relation to a comment in closing argument about a murderer going free. (Appellant's brief, pp. 60-61.) Again, context is important. During closing argument trial counsel argued that the beyond a reasonable doubt standard protected the jury from thinking they might have convicted someone who is not guilty. (Trial Tr., vol. II, p. 1454, L. 9 – p. 1455, L. 6.) The prosecutor responded by talking about the standard and included the argument, "We do not want to convict an innocent man. But at the same time, we don't want to let a murderer go free." (Trial Tr., vol. II, p. 1466, Ls. 2-9.) Because the prosecutor was responding to a concept raised by the defense, it is at best unclear whether the argument was even objectionable. Moreover, because it was in direct response to the same argument he made to opposite effect, trial counsel had several practical reasons to not object. Finally, because the argument addressed both convicting an innocent man and letting a guilty one go free as undesirable results, and encouraged the jury to do neither, there was no showing of prejudice.

Finally, Grove argues the district court erred in denying his claim that trial counsel was ineffective for not objecting to the prosecutor's rebuttal argument regarding Grove's emotions. (Appellant's brief, pp. 61-62.) During closing argument, trial counsel argued that cross-examination of Grove "about having a

breakdown last Friday" "has nothing to do with anything, other than get at the man." (Trial Tr., vol. II, p. 1444, L. 13 – p. 1445, L. 10.) The prosecutor denied that he was "[t]rying to attack the defendant," and argued that the evidence showed two emotional breakdowns, one at the time the defendant beat K.M. and the other when he was to testify about what happened, and also an "emotional overload" when telling his family that K.M. was injured in a fall from a countertop. (Trial Tr., vol. II, p. 1458, L. 1 – p. 1459, L. 15.) Specifically, the prosecutor argued: "The reason for it is the State believes that he had an emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries to … [K.M.]" (Trial Tr., vol. II, p. 1458, Ls. 15-19.) The district court properly concluded that this argument did not rise to the level of egregious, where there was a constitutional duty to object, and did not rise to the level of showing a substantial likelihood of changing the verdict. (R., pp. 609-10.) Grove has failed to show error in the district court's determination that he failed to prove ineffective assistance of counsel in closing argument.

Finally, the district court rejected Grove's argument that there was cumulative prejudice because there was no deficient performance proved, and therefore no prejudice resulting from deficient performance to cumulate. (R., p. 610.) Even if the district court had erred in relation to the first prong of Strickland in more than one claim, Grove has failed to show that the ensuing prejudice is of a nature that it would cumulate, or that even if cumulated it would show a likelihood of a different result.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 6th day of July, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of July, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
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at the following email addresses: db@nbmlaw.com and lmiller@nbmlaw.com.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd