9-9-2016

Grove v. State Appellant's Brief Dckt. 43537

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY GROVE, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 43537 Nez Perce Co. CV-2012-1798

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Second Judicial District of the State of Idaho
In and For the County of Nez Perce

HONORABLE CARL B. KERRICK,
Senior District Judge

Dennis Benjamin ISB #4199
Deborah Whipple, ISB # 4355
Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com
dwhipple@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
Idaho Attorney General
Kenneth K. Jorgensen
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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II. ARGUMENT IN REPLY

A. *The Court Erred in Dismissing the Confrontation Clause Claims.*

1. The court erred in dismissing the direct Confrontation Clause claim.

The State relies upon *Bias v. State*, 159 Idaho 696, 365 P.3d 1050 (Ct. App. 2015), for the proposition that "claims of trial error, even of constitutional dimensions, may not be made for the first time in post-conviction[.]" Brief of Respondent ("State's Brief") p. 6. That is not what *Bias* held. In *Bias*, the petitioner "challenged the prosecutor's trial conduct of demonstrating how his personal cell phone worked and vouching for the credibility of witnesses during closing arguments." *Bias v. State*, 159 Idaho at 703, 365 P.3d at 1057. The Court continued:

> The district court noted that even without trial counsel's contemporaneous objection to the prosecutor's conduct, Bias's appellate counsel could have raised the issue on appeal. In his petition, Bias did not present the district court with any evidence that the issue could not, in the exercise of due diligence, have been presented earlier. . . .
>
> . . . . Because Bias presented no evidence as to why the issue could not have been presented on direct appeal, Bias has waived the issue.

Id. Here, by contrast, appellate counsel did attempt to raise the confrontation clause issue on direct appeal but was told by the Court of Appeals that he could not do so. The Court of Appeals held that there was no fundamental error in admitting the evidence regarding Dr. Reichart's report and thus the issue could not be raised for the first time on appeal. It wrote, "Importantly in the context of this case, it is well established that counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions. With this i[n] mind, we conclude that we cannot ascertain from the record whether Grove's failure to object to Dr. Ross's and Dr. Harper's testimony as to Dr. Reichard's findings

and conclusions was not a tactical decision—the record simply does not eliminate the possibility that the failure to object was strategic." *State v. Grove*, 151 Idaho 483, 492, 259 P.3d 629, 638 (Ct. App. 2011). Here, as has been established, trial counsel's failure to object was not a strategic decision. He admitted in his deposition that there was no strategic reason to permit the introduction of the evidence from the neuropathology report, if it could have been excluded, because it was harmful to the defense case in that it purported to show the injuries must have occurred when K.M. was alone with Stacey. Deposition of Scott Chapman, p. 22, ln. 14-25; pg. 28, ln. 22-25. Thus, this case is easily distinguishable from *Bias*. The I.C. § 19-4901(b) bar on "issue[s] which could have been raised on direct appeal, but w[ere] not," does not apply here because the issue could not have been raised on direct appeal.

But even if the State were correct about the holding of *Bias*, that case would be in conflict with the opinions of the Supreme Court. There are many instances where the Supreme Court and Court of Appeals have considered issues which could have with proper objection been raised on direct appeal. These include the following:

> • **Violation of plea agreement:** *Berg v. State*, 131 Idaho 517, 519, 960 P.2d 738, 740 (1998) ("Berg asserted that the prosecutor breached the parties' plea agreement by recommending that he be sentenced to prison rather than recommending a retained jurisdiction."); *Short v. State*, 135 Idaho 40, 41, 13 P.3d 1253, 1254 (Ct. App. 2000).
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> • **Violation of the right to testify:** *Rossignol v. State*, 152 Idaho 700, 706, 274 P.3d 1, 7 (Ct. App. 2012), *review denied* (2012) ("[T]he issue of the failure of a defendant to testify may be viewed in post-conviction proceedings either as a claim of ineffective assistance of counsel or as a claim of a deprivation of a constitutional right."); *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996); *DeRushé v. State*, 146 Idaho 599, 603-04, 200 P.3d 1148, 1152-53 (2009) ("The district court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify on his own behalf[.]"); *Barcella v. State*, 148 Idaho 469, 224 P.3d 536 (Ct.

App. 2009).

> • **Due process right to participate in defense:** *Murillo v. State*, 144 Idaho 449, 452, 163 P.3d 238, 241 (Ct. App. 2007) ("Murillo argues that he was rendered unable to participate in his defense because he had an insufficient opportunity to confer with his trial counsel with the aid of an interpreter and was not provided with copies or oral translations of documents related to his case.")
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> • **Adequacy of plea colloquy:** *Noel v. State*, 113 Idaho 92, 94, 741 P.2d 728, 730 (Ct. App. 1987) ("Noel's petition alleged, among other things, that he was not adequately advised by his legal counsel, or by the court, of the 'requisite specific intent to commit murder, nor of the possible consequences of a guilty plea.'").
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> • **Suggestiveness of line-up and other issues:** *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975) ("He maintains the district court should have investigated through the medium of an evidentiary hearing his application wherein he raised questions as to: (1) the unfair suggestiveness of the lineup; (2) the lack of counsel at the lineup; (3) pleas induced by false statements of counsel; and (4) appellant's mental capacity during the criminal proceedings.")

Thus, the State's reading of *Bias* is in conflict with other Court of Appeals cases and cases from the Supreme Court.

It is well-established that "[s]tatutory interpretation begins with the statute's plain language." Thus, "[w]hen the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction." *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015). The plain language of I.C. § 19-4901(b) does not require a showing that "the issue could not, in the exercise of due diligence, have been presented earlier." *Bias v. State*, 159 Idaho at 703, 365 P.3d at 1057. The plain language of the statute only bars claims which could have been raised on appeal from being raised in post-conviction.[1] Therefore, all claims which

[1] "Any issue *which could have been raised on direct appeal*, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for

could not be raised on appeal may be raised in post-conviction.

The due diligence requirement only applies when a claim could have been raised on direct appeal but was not and where the asserted basis for relief raises a substantial doubt whether the defendant is guilty of the charge. For example, a claim that the trial court erroneously denied the defendant's motion for DNA testing is a claim that could be raised upon appeal and is presumably waived if it is not. However, if later privately funded DNA testing shows the defendant is actually innocent of the crime and that testing could not have been accomplished earlier, even in the exercise of due diligence, the defendant may raise the DNA funding claim in post-conviction.

Thus, I.C. § 19-4901(b) should be read to only bar issues which were properly objected-to in the trial court but not raised on appeal. Those abandoned claims would need to be raised as part of an ineffective assistance of appellate counsel claim under *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007). As is often noted, post-conviction is not a substitute for appeal but barring issues on post-conviction which the appellate court would not (and in this case expressly did not) consider because of the failure of proper preservation of the claim does not take away from the primacy of direct appeal for the resolution of claims.

The State's argument regarding trial counsel "sandbagging" the court by deliberately not objecting is not reality-based. There is no benefit for trial counsel to lie in the weeds and forego a meritorious trial objection, which even if overruled would be reviewed on appeal under the very favorable *Chapman v. California*, 386 U.S. 16 (1967), standard of review, so that his/her

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relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." (Emphasis added.)

client years later after the direct appeal can later file a post-conviction petition.

In addition, the State's argument that such claims can be raised as aspects of ineffective assistance of trial counsel claims is inadequate. The argument does not take into account those situations where the law has changed or been clarified since the trial. In those cases, trial counsel's failure to make an objection would not be deficient performance and the defendant could not raise the claim as part of an ineffective assistance of counsel claim. For example, it was not deficient performance for defense counsel to fail to object to mandatory life sentences for juveniles prior to the issuance of *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012) (holding such sentences violate the Eighth Amendment). Nevertheless, now that *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718 (2016), has declared *Miller* retroactive to cases on collateral review, juveniles serving mandatory life without parole sentences should be able to raise an Eighth Amendment claim. Under the State's view of the statute, that defendant would be barred by I.C. § 19-4901(b) because an Eighth Amendment objection "could have been raised on direct appeal" even absent an objection by trial counsel or even any supporting authority. Thus, the juvenile serving the unconstitutional life without parole sentence would have no remedy. Luckily, the State's statutory interpretation is not supported by the plain language of the text or the case law applying the statute.

To the extent the language, "[a]ny issue which could have been raised on direct appeal," is ambiguous, the legislative history is not helpful in discerning the Legislature's intent. The relevant language was added to I.C. § 19-4901 in 1986 as part of Senate Bill 1263. The available Statement of Purpose for that Bill does not explain whether the Legislature believed that

unpreserved errors can be raised on direct appeal.[2]

Finally, *Bias* misreads *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007). *Mintun* did not hold "that the 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 at 702, 365 P.3d at 1057. *Mintun* held that it was not ineffective assistance of appellate counsel to fail to raise unpreserved trial error as fundamental error on appeal. *Mintun v. State*, 144 Idaho at 662, 168 P.3d at 46. It noted that one way to raise an unpreserved trial error in post-conviction is by alleging ineffective assistance of counsel. It did not hold that it was the only way; nor does the text and structure of the statute permit such an interpretation.

Thus, the Confrontation Clause issue can be raised on post-conviction. Since the State never argues that the evidence was not testimonial under current United States and Idaho Supreme Court case law, this Court should reverse the district court and grant relief.

2. The ineffective assistance for failing to make a Confrontation Clause objection claim.

The State concedes that Stacey may bring an IAC claim based upon trial counsel's failure to object to the evidence from the neuropathology report. State's Brief, p. 7. It defends the district court's dismissal, however, by asserting that "the law as it existed at the time of trial, in July 2008, suggested that a confrontation objection would not have been meritorious." *Id*., pg. 11. The State supports its assertion by citing to out-of-state cases, one of which suggests the

[2] The Bill's Statement of Purpose is at least two pages long. Unfortunately, the copies at both the Idaho Legislative Reference Library and the Idaho State Law Library are only of the first page.

objection would have been sustained[3], but fails to address the leading Idaho case law at the time of trial, *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007). *Hooper* synthesized *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), and held that a statement is testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, except when the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *State v. Hooper*, 145 Idaho at 144, 176 P.3d at 916.

Here, it was clear that Dr. Reichard's report was to establish or prove past events potentially relevant to later criminal prosecution. The death was being investigated as a homicide from the beginning. Detectives Birdsell and Green from the Lewiston Police Department, Nez Perce Prosecuting Attorney Dan Spickler, a representative from the Spokane Police Department, and a member of the Spokane County Sheriff's Forensic Unit were all present at the autopsy. Petitioner's Exhibit C (State's Trial Exhibit 11), pg. 12.[4] The autopsy report shows Dr. Ross prepared the brain for further examination by a forensic neuropathologist, noting that "[f]urther examination of the brain is pending formlin fixation and neuropatholgy consultation." *Id*, pg. 9. After the autopsy was completed, Dr. Ross sent Dr. Reichard the email soliciting his services "in doing neuropathology consults." Dr. Ross stated that "[w]e usually obtain neuropathology consults in just about all of our infant and child homicides (or suspected

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[3] State's Brief, p. 12, *citing State v. Johnson*, 756 N.W.2d 883 (Minn. App. 2008). *See also, State v. Davidson*, 242 S.W.3d 409,417 (Mo. Ct. App. 2007) (holding autopsy report was a testimonial statement).

[4] A copy of the trial exhibits was attached to the Petition and the court admitted copies of the Clerk's Record on appeal, trial transcripts and trial exhibits as post-conviction exhibits. Evidentiary Hearing Transcript ("EH") pg. 87, ln. 20-23.

homicides) and that the expert needed would "require his services as an expert witness in Court," especially in "the infant homicide cases." R 302. Dr. Reichard replied that he "would be interested in providing neuropathology service for your office." He discussed his fees for the examinaton and report writing noting that "[o]f course, if I have to come testify that is additional." *Id.* Shortly thereafter, the brain was shipped to Dr. Reichard from the Spokane Medical Examiner. R 303. The evidence shows that the primary purpose of Dr. Reichard's consultation was to gather evidence for use in a future criminal trial. Thus, in 2008, the evidence was testimonial per *Crawford*, *Davis* and *Hooper*, and there was favorable out of state authority finding autopsy reports to be testimonial.[5] A Confrontation Clause objection would not be based upon some "novel theory," as claimed by the State. The argument would have been a simple application of settled Idaho law under *Hooper* to the facts of this case.

State v. Abdullah, 158 Idaho 386, 487, 348 P.3d 1, 102 (2015), does not hold that the failure to raise a novel theory cannot be deficient performance, as suggested by the State. State's Brief, p. 12. Abdullah argued that his trial counsel's failure to move for an in camera review of a letter prior to disclosing it constituted ineffective assistance of counsel. The Supreme Court held that the argument had been waived because he had failed to cite any authority in support of his contention. *Id.* The Court went on to say, *in dicta*, that "this Court 'will generally not find deficient performance' in such circumstances." *Id*, *citing Schoger v. State*, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010). But in *Schoger*, there was Idaho case law supporting trial counsel's

[5] By 2011, when the direct appeal in this case was decided, at least two other appellate courts had decided that autopsy reports were testimonial. *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. Crim. App. 2010); *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) (per curiam) *affirmed in other part in Smith v. United States*, — U.S —, 133 S.Ct. 714 (2013). The State does not argue the evidence was not testimonial, only that the answer was unclear in 2008.

decision to not raise an argument. *Id.* By contrast here, the logic of *Hooper* compels the conclusion that Stacey's right to confront witnesses was violated.

The State next argues that it was not objectively unreasonable for trial counsel to permit the introduction of the evidence so that he could "poke holes" in it through Dr. Arden's testimony. State's Brief, p. 13; Chapman Deposition, p. 20. But, as explained in the Opening Brief, that decision was based upon shortcomings capable of objective review, the first being it is objectively unreasonable to permit the introduction of highly damaging but excludable evidence. Under the State's theory, defense counsel's "strategic decision" in a heroin trafficking case to not move to suppress the alleged controlled substances found during an illegal search so he could try and poke holes in the expert's opinion about whether the substance was actually heroin could be an objectively reasonable decision. But, of course, that argument is absurd, as there is no reason to poke holes in evidence when it can be excluded, and has been rejected by our Supreme Court. *Carter v. State*, 108 Idaho 788, 795, 702 P.2d 826, 833 (1985) ("[T]rial counsel's inexplicable failure to object to the introduction of extremely damaging testimony was an error so serious that counsel was not functioning as the counsel guaranteed by the sixth amendment, and thus the first prong of the *Strickland* test is met.") (Internal quotation marks omitted). *See also, Baldwin v. State*, 145 Idaho 148, 157, 177 P.3d 362, 371 (2008). (Evidence raising a genuine issue of material fact as to whether search and seizure violated the Fourth Amendment was sufficient to establish *prima facie* showing of trial counsel's deficient performance for failing to move to suppress.)[6]

[6] The State does not separately address the claim that trial counsel's performance was deficient for not making an I.R.E. 703 objection to this evidence. State's Brief, p. 9 ft. 2. The reasons why it was objectively unreasonable to fail to make a Confrontation Clause objection are

Stacey presented a *prima facie* case of IAC for failing to raise the Confrontation Clause issue and the order dismissing it should be reversed.

B. *The Court Erred in Dismissing the Prosecutorial Misconduct Claim*

Again, the State relies upon *Bias v. State* for its argument. However, that case does not control for the reasons already set forth above. Further, this case is distinguishable from *Bias* because appellate counsel both filed affidavits stating why the prosecutorial misconduct issue could not be raised on appeal. Appellate counsel Eric Fredericksen stated: "I did not raise the prosecutorial misconduct issue raised in the Second Cause of Action on direct appeal because trial counsel did not object to the alleged instances of misconduct and thus did not preserve the issue for appeal or the record was not sufficient to raise the issue on appeal." Further, "the issue could not have been raised under the fundamental error doctrine under *State v. Severson*, 147 Idaho 694, 215 P .3d 414 (2009), and *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010)." R 96-97. See also, R 100-101 (Affidavit of Diane Walker). Further, unlike *Bias*, here trial counsel admitted in his deposition and during his testimony at the evidentiary hearings that he did not have strategic reasons to fail to object to many of the instances of misconduct. (This is discussed in detail in the sections on the ineffective assistance of counsel claims which follow.)

C. *The Court Erred in Dismissing Multiple Claims of Ineffective Assistance of Counsel.*

Stacey argued that the trial court erred by dismissing several of his ineffective assistance of counsel claims because it dismissed upon legal theories not advanced by the State, thereby depriving him of due process notice under I.C. § 19-4906(b). In addition, many of the claims

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similar to the confrontation clause claim argument. But, this claim is actually stronger because trial counsel could not give any reason for failing to object. Chapman Depo., pg. 32, ln. 20-25. And there is no doubt as to the applicability of I.R.E. 703 to the evidence.

were dismissed without discussion. Opening Brief, pg. 24. To the latter argument, the State claims the court "was not required to set forth its findings or analysis." State's Brief, p. 20. The reason for this, says the State, is that "knowing the district court's analysis is not necessary for [appellate] purpose[s]" since this Court "reviews the ruling without deference to the lower court." *Id*. The State's argument is incorrect, however, because this Court must know the basis of the trial court ruling to determine whether it is the same as was raised by the State in its motion for summary disposition. A trial court may not summarily dismiss a claim on a different theory than raised in the motion for summary dismissal without giving twenty-days' notice. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995), *citing Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (Ct. App. 1982). *See also, Caldwell v. State*, 159 Idaho 233, 239, 358 P.3d 794, 800 (Ct. App. 2015), *review denied* (2015) (Affirming the district court's decision on a basis not raised below would be akin to the district court summarily dismissing a petition on a basis other than what the State provided him notice of and would violate petitioner's right, pursuant to I.C. § 19–4906(b), to twenty days' notice that his petition was subject to dismissal on this new basis and an opportunity to present additional evidence to meet the argument.)

Moreover, the cases cited by the State are to the effect that findings of facts and conclusions of law are not needed for a motion under I.R.C.P. 56. They do not address the need for a ruling. State's Brief, p. 19-20. To the contrary, I.R.C.P. 52(a)(4), presupposes the existence of a ruling. ("The court is not required to state findings or conclusions when ruling . . . on a motion . . . .") Here there were not rulings on ten instances of deficient performance, they were all simply dismissed in a single sentence. R 352. All that can be discerned is that the court concluded there was not an issue of material facts raised in those claims. *Id.* But why the Court

concluded there was not an issue of material fact or if it was the same reason argued by the State cannot be determined.

In any case, Stacey did present a *prima facie* case of deficient performance in all fourteen instances of deficient performance which were not allowed to go to evidentiary hearing, including the instances where there was no ruling by the court. These claims included counsel's deficient performance by: 1) not making an I.R.E. 703 objection to the evidence in Dr. Reichard's report which was repeated by other witnesses; 2) not cross-examining Dr. Chin's testimony that he could not have missed the injuries described in the autopsy; 3) not objecting to Dr. Chin's testimony that "this autopsy report is the most brutal case" he had ever seen; 4) not objecting to Dr. Hunter's testimony that subarachonoid hemorrhage has immediate symptoms; 5) not objecting to Dr. Hunter's testimony that K.M. was either "ejected from an automobile" or "was beaten very severely;" 6) not objecting to Dr. Hunter's testimony that a short fall "is rarely, rarely likely to produce any kind of significant head injury or bleeding" and then failing to impeach; 7) not objecting to Dr. Ross's hearsay testimony that he was told about hemorrhages in the psoas and retroperitoneal by the transplant surgeon; 8) not objecting to the foundation for Dr. Ross's testimony regarding the head and alleged brain injuries because he never viewed any of the slides or recuts himself; 9) not objecting to Dr. Ross's testimony that Dr. Reichard's observation of a tear in the corpus callosum showed "a very significant force" applied, comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma;" and 10) failing to point out the differences between Dr. Reichard's report and the State witnesses' conclusions drawn from it. See, Opening Brief, pg. 28-40.

The discussion below is limited to the four remaining instances addressed by the State.

State's Brief, p. 14

1. Deficient performance in not objecting to Lisa's hearsay testimony regarding the autopsy report.

The State does not argue that Lisa's testimony that she was told that K.M. had unremovable blood in his brain was not hearsay. Nor does it argue that trial counsel's failure to object was a legitimate strategic decision. Rather, it argues that since Stacey does not challenge that this individual piece of evidence was prejudicial under *Strickland*, the district court must be affirmed. State's Brief, p. 14. That is incorrect because Stacey argued that the cumulative effect of the deficient performance taken in whole was prejudicial. The prejudicial effect of this unchallenged instance of deficient performance must be considered along with all the other instances in order to determine whether the prejudice prong has been met. *See, Boman v. State*, 129 Idaho 520, 527, 927 P.2d 910, 917 (Ct. App. 1996) and *Reynolds v. State*, 126 Idaho 24, 32, 878 P.2d 198, 206 (Ct. App.1994).

2. Deficient performance in not objecting to the paramedic's testimony that Stacey was too calm when he arrived.

The State argues this evidence was admissible citing *State v. Erlick*, 158 Idaho 900, 923, 354 P.3d 462, 485 (2015), but that case is not apposite. There, the witness testified that the defendant's story about the missing child going to a birthday party "didn't make sense" to her because it was 10:00 p.m. and "there were no signs of a birthday party[.]" *Id*. The Court found the witness' testimony was admissible because the State had established that "she had personal knowledge of the matter on which she was rendering an opinion," *i.e.*, "she had lived in the apartment complex with her three children for six months and had spent all day, every day, of the summer in the complex's community areas and had a strong familiarity with the social norms of

the community." *Id.*, 158 Idaho 923–24, 354 P.3d 485–86. Here, by contrast, the paramedic "asked [Stacey] a few questions" which took a "[m]inute, maybe two tops," and then left the house. Ex. B, pg. 837, ln. 3 - g. 838, ln. 1. Further, the paramedic admitted that he had never met Stacey before and did not have any idea how he usually reacts. Ex. B, pg. 838, ln. 22 - pg. 839, ln. 2. So, this case is nothing like *Erlick.*

The State says that Stacey's assertion that the evidence shows that the paramedic's opinion was based on the false assumption that Stacey was K.M.'s parent "is false." State's Brief, p. 16. The State's assertion however, ignores the paramedic's testimony that he thought Stacey was too calm when compared to his experience with parents of injured children.

> Q. [Prosecutor] 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.*

Ex B, p. 839, ln. 3-6 (emphasis added). The paramedic's comparison of Stacey's behavior to that of the usual parent only makes sense if he was under the misimpression that Stacey was K.M.'s parent.

The State does not respond to Stacey's argument that the testimony was not relevant. But if the State is correct that the paramedic knew Stacey was not K.M.'s parent, his opinion that Stacey, a non-parent, was "too calm" when compared to other parents, is meaningless. In either case, the testimony was also inadmissible under I.R.E. 401 and 402.

3. Deficient performance in failing to object to or move strike to Dr. Hunter's testimony.

Dr. Hunter's testimony about Dr. Ross's clinical skills is more than a "kind word by a colleague". It was one expert vouching for the opinions of another testifying expert witness and

was improper. There was no evidence that trial counsel decided to not object as a matter of strategy. To the contrary, trial counsel testified that did not know why he failed to object to the vouching, Chapman Depo., pg. 84 ln. 9-24. He further testified that he did not object to the force testimony because of Dr. Arden's testimony. *Id*. But, as explained above, it is deficient performance to fail to exclude damaging State evidence. *Carter v. State, supra.; Baldwin v. State, supra*. Further, trial counsel's testimony that he didn't know why he failed to object puts to rest the State's speculation that counsel didn't want to draw attention to the testimony by an after-the-fact objection. See, State's Brief, pg. 18.

While the State now argues "there is no evidence that additional foundation for the testimony regarding force could not have been laid," State's Brief, p. 18, it did not present any such evidence at the summary disposition. Presumably, it would have done so if any existed. Moreover, at this point, all Stacey has to do is to establish a *prima facie* case of deficient performance with the court taking the evidence in the light most favorably to him. *Gonzales v. State,* 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991). He has done that and this claim should not have been dismissed.

4. Deficient performance in failing to object to the admission of photographs which included approximately 30 sympathy cards.

The State calls "absurd" the argument that evidence is not relevant whenever "it is inconsistent with the defense theory of the case." State's Brief, p. 19. Stacey agrees with this general proposition but notes he didn't make that argument. The State's strawman argument is of no relevance to this appeal. The photographs of the sympathy cards were not relevant because they had no probative value. It is telling that the State never argues how the photographs had any

tendency to make the existence of any fact of consequence to the case more or less probable. It can't because they didn't. Thus, the prejudicial effect of the photographs of the many sympathy cards outweighed the nonexistent probative value. The court also erred in dismissing this claim.

D. ***The Court Erred in Denying the Claim of IAC During Stacey's Testimony***

1. Deficiency in questioning Stacey about his son and child support

The State argues that it a reasonable trial tactic to not object so not to draw attention to a prejudicial matter. State's Brief, p. 28-29. In this case, however, it was defense counsel who first elicited the damaging information about the bad relationship with his son during direct examination. Ex. B, p. 1074, ln. 1-24. Counsel could not recall why he elicited this unfavorable testimony. EH p. 265, ln. 14-24. In fact, counsel filed a motion in limine to exclude this evidence and the evidence about the child support arrears, but failed to obtain a ruling on his motion. EH p. 328, ln. 6-18; Exhibit A, Vol. 1B, p. 174.

Further, trial counsel could have simply objected to the prosecutor's question about child support before the answer was given. The question could not have caught trial counsel by surprise. He was aware Stacey was behind on child support and he knew that prosecutor was aware of that fact from the motion in limine. Thus, there was no reason counsel should have allowed the prosecutor to ask the questions about the child support arrears at all. In any case, had the evidence been exclude pretrial he never would have had to decide whether to object because the question never would have been asked and the answer would not have been given.

The child support evidence was not relevant to any fact of consequence in the case. Nor did it tend to rebut evidence, some of which was elicited by the State, that Stacey was good with K.M. See Trial Tr., vol. II, p. 724, ln. 23 – p. 725, ln. 6 (testimony of Lisa Nash under

questioning by prosecutor). The failure to make support payments for the care of a different child because of financial constraints does not shed any light on whether Stacey killed K.M. Trial counsel admitted the evidence was not relevant. EH p. 266, ln. 17. Thus, there could be no strategic reason not to obtain a ruling on the motion in limine or to fail to object to the question.

2. Prosecutor's comments about "the story you need the jury to believe"

The State does not attempt to defend the prosecutor's comments in this regard, nor does it assert that a motion to strike would not have been granted. Finally, while the comment might not establish *Strickland* prejudice by itself, it is the cumulative effect of all of the deficient performance must be considered under *Strickland*.

3. Prosecutor's question about Stacey's emotional state

While trial counsel testified that he was not sure the questioning was even objectionable, EH p. 271, ln. 5-11; p. 277, ln. 9-11, the State does not contend that the prosecutor's questions about Stacey's emotional state were proper. Nor does it contend the effect of this line of questioning, and its use during closing argument was not prejudicial. All it says is that the trial court found that one particular case cited by Stacey "is inapplicable." State's Brief, p. 31. But the constitutional standard is found in *Strickland*, which was relied on by Stacey throughout the trial proceedings. And as argued in the Opening Brief, "[d]eficient performance has been found where the prosecutor used cross-examination to bring in extraneous and at times unfounded charges in order to blacken the defendant's character." That is precisely what *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986), stands for. It is of no moment that trial counsel's behavior in *Wolf* was arguably less competent than Stacey's trial counsel's performance. It is not a question of which counsel's performance was the worst. In fact, both

cases show deficient performance under *Strickland.*

E. ***The Court Erred in Denying the Claim of IAC During Dr. Arden's Testimony***.

Stacey received ineffective assistance of counsel with regard to Dr. Arden's testimony in three ways: 1) counsel failed to provide iron stain slides to the doctor prior to trial; 2) counsel failed to prepare and protect the doctor's testimony - allowing both an attack that he was on a special mission to aid the defense and improper impeachment with irrelevant, inadmissible evidence regarding Dr. Arden's departure from the Washington, D.C. medical examiner's office. The State has offered no argument sufficient to rebut Stacey's claim of error by the district court in denying these IAC claims.

1. Counsel was ineffective in failing to provide the iron stains prior to trial

The State makes three responses to Stacey's argument that trial counsel was ineffective in failing to provide the iron stain slides to Dr. Arden prior to trial: 1) that there is no constitutional requirement that counsel provide an expert with materials the expert did not request; 2) that the failure to provide the slides was not prejudicial because Dr. Arden's testimony about the iron stains would not have altered the outcome of the trial; and 3) that the failure to provide the iron stains was not prejudicial because Dr. Arden's testimony was not undermined by the State's cross-examination which pointed out to the jury that he had less material and information than did its experts. State's Brief at pp. 34-36.

The State's first argument rests upon a misunderstanding of both the facts and the law. As the State notes, Dr. Arden did testify at trial:

> Q: Did you feel like there was any information that you needed to form opinions about this that was not provided to you?

> A. No sir. And, in fact, I will tell you that along the course of reviewing materials, one of the things that I felt I needed was the recuts of the slides. They didn't come initially. And so, at that point, I requested them of you and the state arranged for them to be provided. So what I requested I was given.

Ex. B, pg. 1253, ln. 25-pg. 1254, ln. 9.

This answer though must be taken in context – earlier Dr. Arden explained that trial counsel told him what was to be reviewed and provided the materials to review. "You [trial counsel] told me what you wanted to have me review." Ex. B, pg. 1251, ln. 5-6. Dr. Arden then listed the materials counsel had sent him. Ex. B, pg. 1252, ln. 9-20.

In addition, Dr. Arden testified at the evidentiary hearing that he had in fact asked Mr. Chapman to send him all the miscroscopic slides that had been made by the medical examiner who performed the autopsy. EH pg. 134, ln. 8-11. Those slides included the iron stains. EH pg. 216, ln. 3-10.

In context, trial counsel and not Dr. Arden made the initial decision of what materials to send to the doctor. And, in making that decision, counsel was ineffective.

The State argues that there is no requirement in law that trial counsel is required to determine what materials an expert needs to review. State's Brief pg. 34. The State does not cite any case law or other authority for this proposition. And, in fact, there is case law to the contrary. *See, Sturgeon v. Quarterman,* 615 F.Supp.2d 546, 572 (S.D. Tex. 2009) (failure to provide expert with available documents and records from earlier trial deficient performance even without reference to any request by expert for the documents and records); *Sochor v. State*, 883 So.2d 766, 772 (Florida 2004) (failure to provide experts with any information about defendant's background deficient performance even without proof that experts requested the

information); *Dillon v. Weber*, 737 N.W.2d 420, 426 (S.D. 2007) (failure to prepare expert witnesses deficient performance).

Moreover, the ABA Standards for Criminal Justice place the onus on counsel, not the expert, for provision of all materials relevant to the expert's testimony. "Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion." ABA Criminal Justice Standards for the Defense Function 4-4.4(g) (4th ed.) . It is defense counsel's duty, not the duty of the expert to procure the evidence in the state's possession and to provide it to the expert. *See also,* ABA Criminal Justice Standards for the Defense Function 4-4.1 (c) (4th ed.) stating, "Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others . . ." "Moreover, counsel is bound to make reasonable efforts to obtain and review material that the prosecution will probably rely on as evidence." *Murphy v. State*, 143 Idaho 139, 146, 139 P.3d 741, 748 (Ct. App. 2006), citing *Rompilla v. Beard*, 545 U.S. 374 (2005).

And, lastly of import to this case, defense counsel testified that he was aware of the iron stains, but did not request them for Dr. Arden's review. EH pg. 280, ln. 13-p. 281, ln. 14.

The State's argument that the expert has the duty to ascertain what evidence is available and ask for it rather than counsel having the duty to supply all relevant evidence to the expert confuses the roles of counsel and the expert and should be rejected by this Court. In this case, this Court should find that counsel was deficient in failing to provide the iron stains to Dr. Arden.

And, even if this Court finds that it is the duty of the expert and not defense counsel to request what materials are given to the expert, in this case Dr. Arden did request the iron stains

and counsel did not obtain them. EH. pg. 134, ln. 8-11; EH pg. 216, ln. 3-10. So, in any event, counsel was deficient.

The State's second argument that any deficiency was not prejudicial is contrary to the record.

Dr. Arden testified at the evidentiary hearing that in viewing the iron stains he was able to conclude that there were even older injuries to the mesentery, some weeks or months old. EH pg. 245, ln. 8-pg. 246, ln. 11. Likewise, after viewing the iron stains, Dr. Arden could testify that part of the hemorrhage in the optic nerve was older than a period of days. EH pg. 246, ln. 19-pg. 247, ln. 15.

There is a reasonable probability that a different result would have been obtained at trial had Dr. Arden been able to present this testimony to the jury; thus the deficient performance was prejudicial. *Strickland v. Washington,* 466 U.S. at 689.

Dr. Hunter testified that there were "extensive injuries to the intestines" and that K.M. would have been in "absolute agony." Ex. B pg. 873, ln. 3-21. Dr. Ross testified that the abdominal injuries were very debilitating and would have been very painful. Ex. B, p. 949, ln. 18-22. Dr. Harper testified that the abdominal injuries were "quite awful" and "major, major" trauma which would have been fatal if K.M. had not died from the head injury. Ex. B, pg. 1033, ln. 20-pg. 1034, ln. 11; pg. 1059, ln. 1-8. She opined that the abdominal injuries were so major that K.M. would not have been able to talk or sit up or watch cartoons after he received them. Ex. B, pg. 1037, ln. 12-19.

In addition, Dr. Ross testified that the hemorrhages around the optic nerve could have directly descended from the brain hemorrhage. Ex. B, pg. 928, ln. 14-20.

Dr. Arden's testimony that the abdominal injuries and optic nerve injuries were weeks old, not days old, rebutted the other doctors' testimony that K.M. would have been immediately incapacitated and thus could only have sustained the fatal injuries during the few minutes he was alone with Stacey. Had the jury known that K.M. had been active for over a week, even for weeks, with retinal, mesentery, and pancreas injuries, there is a reasonable probability that at least one would have concluded that K.M. remained active for some time after receiving the fatal injuries and so those injuries could not have been inflicted by Stacey.

But, even if Dr. Arden had not found anything new in the iron stains, the failure to provide them was prejudicial because the State used that failure to undermine the credibility of his trial testimony. The prosecutor questioned Dr. Arden extensively about the iron stains at trial. Ex. B, pg. 1355, ln. 9-p. 1365, ln. 4. And, all Dr. Arden could do was respond that he could only rely upon the autopsy report because he had never seen the stains. Ex. B, pg. 1355, ln. 9-19. This cross-examination undermined Dr. Arden's credibility with the jury because the jury could conclude that he had not seen all the evidence that the State's experts had seen and therefore his opinion could not be as accurate as their opinions.

In conclusion, as set out in the Opening Brief, counsel was ineffective in not providing Dr. Arden the iron stain slides prior to trial.

2. Counsel was ineffective in not preventing the improper impeachment

As set out in Stacey's Opening Brief, he established by a preponderance of the evidence that trial counsel was deficient in not objecting to the prosecutor's impeachment of Dr. Arden with the theory that Dr. Arden was on a mission for the defense or with the irrelevant evidence regarding Dr. Arden's departure from the Washington, D.C. medical examiner's office. The

State has argued that trial counsel made a tactical choice to allow the improper impeachment and argument because the evidence regarding the departure from the medical examiner's office was relevant and the special mission questioning and argument were not objectionable. State's Brief pg. 39-40.

Missing from the State's Brief is any explanation of how the evidence regarding Dr. Arden's departure from the D.C. office was relevant to any issue at trial. *Id.* The State makes no argument that the evidence had any tendency to make the existence of any fact that was of consequence to the determination of the case more probable or less probable than it would be without the evidence. IRE 401. In fact, the State notes that defense counsel's response to the irrelevant evidence was to argue to the jury that the evidence was irrelevant. As argued by the State, "[Defense counsel] also argued that although the circumstances under which Dr. Arden left the Washington, DC, medical examiner's officer 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. 144, Ls. 1-12)." State's Brief pg. 38.

The State makes no argument that defense counsel's argument to the jury regarding the relevancy of the impeachment evidence was improper – in fact, the State holds this argument up as a valid tactical choice. State's Brief pg. 39. However, there can be no objectively reasonable tactical choice to decide to make the relevancy argument to the jury after it had heard the prejudicial evidence instead of arguing relevancy to the judge prior to the admission of the evidence. *See, McKay v. State*, 148 Idaho 567, 571, 225 P.3d 700, 704 (2010), finding deficient performance when there was no conceivable tactical justification for counsel's failure to object. *See also, State v. Palin*, 106 Idaho 70, 74, 675 P.2d 49, 53 (Ct. App. 1983), noting that prior

sexual misconduct alone is not a proper basis to impeach a witness' general credibility.

The State also fails to make any argument that the evidence was admissible under IRE 404, including admissibility in light of its failure to give notice as required by IRE 404(b). State's Brief pg. 36-40.

In summary, Stacey did demonstrate deficient performance. He further demonstrated prejudice as set out in his Opening Brief at pages 53-57. The State has chosen to focus its argument only on the question of deficiency. State's Brief pg. 36-40. With regard to prejudice, it merely asserts that "there was neither deficient performance nor prejudice in trial counsel's decision to address this impeachment through closing argument." State's Brief pg. 40. Given the lack of argument by the State, Stacey relies upon the prejudice argument set out in his Opening Brief.

With regard to the special mission questioning and argument, the State asserts that 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.'" State's Brief pg. 40. The State offers no case law to support its assertion that the questioning and argument were proper. And, in fact, the law is to the contrary. In *State v. Smith*, 770 A.2d 255, 270-272 (N.J. 2001), the New Jersey Supreme Court held that a prosecutor's closing argument that defense experts who charged hefty fees might have shaded their testimony in hope of future employment was improper and violated the defendant's right to a fair trial. In *State v. Lundbom*, 773 P.2d 11, 12-13 (Or. App. 1989), a DUI conviction was reversed because the prosecutor in closing referred to the defendant's expert as a pimp who was paid to testify. The court held the remark was inappropriate and calculated to elicit an emotional response from the jury which impugns the integrity of the judicial system and

unfairly overshadows what the defendant's case is about. In *Sipsas v. State,* 716 P.2d 231, 234-235 (Nev. 1986), the court found error so great the that the trial court should have intervened even without an objection by the defense when the prosecutor characterized the defense expert as a "hired gun from hot tub country. . . . have stethoscope, will travel." In *Commonwealth v. Shelley,* 373 N.E.2d 951, 953-954 (Mass. 1978), a murder conviction was reversed because the prosecutor, while stating he did not mean to imply that the defense experts were a "mercenary soldier" and a "prostitute," did note that they were paid by the defendant's family. The court found that the elements of irrationality and irrelevance in this argument made it less likely that the jury would return a verdict based on fair, calm consideration of the evidence. And, in *People v. Talle,* 245 P.2d 633, 648 (Cal. App. 1952), the court found that reference to the expert witnesses as fraudulent and corrupt "hirelings" was improper and along with other misconduct required a new trial.

Again, the State has not argued that the failure to object to the prosecutor's improper questioning and argument was not prejudicial, relying only on its argument that the failure to object was not deficient performance. State's Brief pg. 40.

Stacey has demonstrated error in the district court's failure to grant post-conviction relief on the basis of ineffective assistance of counsel with regard to the testimony of Dr. Arden. On this basis, he asks relief from this Court.

F. ***The Court Erred in Denying the Claim of IAC During Closing and Rebuttal.***

1. The prosecutor misstated the defense position saying that there was a claim of "some long-term brain injury." Exhibit B, pg. 1419, ln. 6-10.

The State takes the prosecutor's argument out of context when it claims the prosecutor

was merely drawing a distinction between the State's theory of immediate symptoms with the defense theory of the injury being sustained within a few days before K.M. became unresponsive. State's Brief, p. 42. The record shows it was a misrepresentation of the defense's theory. The phrase "long-term brain injury" is not the equivalent to the defense argument of an injury occurring within a few days of death. The failure to object was not strategic as trial counsel agreed the State should not be allowed to misrepresent the defense and could not say why he did not object to the argument. EH p. 302, ln. 5- pg. 303, ln. 4. While the decision to refrain from objecting to particular instances of misconduct during argument can be a strategic decision in the abstract, in this case and in this particular instance trial counsel never testified he had a strategic reason. To the contrary, he stated that he did not "have a hard and fast rule against objecting to statements by the prosecutor" he deemed to be improper and that he objects as he deems appropriate. EH p. 270, ln. 7-12.

> 2. The prosecutor told the jury without supporting evidence that "[c]are takers kill little babies all the time"; "[p]arents kill babies all the time"; "there are literally thousands of [similar] incidents in any given span of time"; and that he believed that "our local paper has probably shown . . . probably six more of these cases since – since this one started."

This argument was not a fair response by the prosecutor to Stacey's closing argument that it didn't make sense for Stacey to kill K.M. because it was a series of gross exaggerations if not outright lies based upon purported evidence outside of the evidence at trial. The prosecutor cannot respond to a proper argument by defense counsel by referring to alleged evidence outside the record. *See, State v. Troutman*, 148 Idaho 904, 911, 231 P.3d 549, 556 (Ct. App. 2010). The danger of unfair prejudice is especially high in case like this one where the prosecutor uses unproved evidence to paint a picture of a widespread social ill and urges the jury to take a stand

against it by convicting in this case. EH p. 349, ln. 23 - p. 350, ln. 8. Trial counsel admitted this entire line of argument was improper and also admitted he could not say why he failed to object. EH p. 303, ln. 17 - p. 305, ln. 1. Thus, it was not a strategic decision by counsel to fail to object.

3. The prosecutor argued that "Dr. Ross had the unenviable task of taking [K.M.]'s body apart piece by piece[.]" Exhibit B, p. 1464, ln. 24-25.

All the State argues with regard to this misconduct is that it, by itself, is not prejudicial. State's Brief, p. 43-44. But, again, it is part of the cumulative effect of all the deficient performance which is to be considered under *Strickland*.

4. The prosecutor argued that "we don't want to let a murderer go free." Exhibit B, p. 1466, ln. 9.

The prosecutor's argument that "we don't want to let a murderer go free" is not a proper response to Stacey's argument about why the State's burden of proof is so high. In fact the opposite is true: By requiring such a high standard of proof we accept the fact that some murderers will go free because the State will not be able to produce sufficient evidence to convict. *See, In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). By suggesting there should be a lower standard in murder cases (as opposed to the argument "we don't want the guilty to go free"), the prosecutor's misconduct is beyond dispute. While trial counsel said he was unsure whether the comment was objectionable, that only shows the failure to object was based upon an inadequate understanding of the law. Thus, the decision to not object is not entitled to any deference as strategic decision because it was based upon a "shortcoming[] capable of objective review." *State v. Abdullah*, 158 Idaho 386, 418, 348 P.3d 1, 34 (2015).

5. The prosecutor argued without supporting evidence that Stacey's emotional breakdown at trial showed that he had a different kind of "emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries[.]" Exhibit B, p. 1458, ln. 16-18.

The State argues that the prosecutor's rebuttal argument about Stacey's alleged emotional background was a fair response to trial counsel's closing argument. State's Brief, p. 44-45. But it should be remembered that trial counsel's argument is itself a response to the prosecutor's misconduct during the cross-examination of Stacey.

> Q. [By Mr. Spickler] Let's go -- let's go to the morning of July 10th. Actually, let me ask you, are you currently on any medications?
>
> A. Ativan.
>
> Q. And when was that prescribed for you?
>
> A. Friday.
>
> Q. And that was a result of your emotional state Friday?
>
> A. Just -- yeah. I mean, it's -- it's just lack of sleep. It's just the whole thing. I mean, you know, this is pretty...

Exhibit B, p. 1120, ln. 9-12. Defense counsel at the evidentiary hearing explained that the phrase "emotional state Friday" was a reference to the previous Friday when he wanted Mr. Grove to testify. Mr. Grove told counsel that morning that "he was unable to do so because of lack of sleep, and he just wasn't ready to do it." EH p. 197, ln. 25 - p. 198, ln. 1. (This is part of the prosecutorial misconduct claim discussed above. It is also part of the ineffective assistance counsel claim because trial counsel failed to object to that cross-examination.) Since trial counsel failed to object to the improper cross-examination he needed to address it in closing argument. He did so by arguing that it was an *ad hominem* attack: "[I]f you can't get at the

testimony, get at the man. What does that have to do with anything?" Exhibit B, p. 1445, ln. 2-4. The prosecutor then sprang his trap during rebuttal:

> So, [defense counsel] talked about, well, why bring up the emotional breakdown of the defendant? Trying to attack the defendant. No, there's a reason for it. 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 the kids -- to the kid, to Kyler.

Exhibit B, p. 1458, ln. 13-19. So it is defense counsel's previous errors which gave the prosecutor the opportunity to make this improper argument.

That being said, it does not excuse the prosecutor's exploitation of his original misconduct because that evidence should never have been elicited. Further counsel's failure to object to the argument was objectively unreasonable. Trial counsel never testified that he had a strategic reason for failing to object. At the same time case law clearly holds that it is improper for a prosecutor to misrepresent or mischaracterize the evidence. *State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Troutman*, 148 Idaho 904, 911, 231 P.3d 549, 556 (Ct. App. 2010). Here there was no evidence that Stacey had an "emotional breakdown" while caring for K.M. and the prosecutor's assertion had one based upon Stacey's health problems during trial is pure fantasy.

Mr. Parnes testified that there should have been an objection to Mr. Spickler's questioning about the emotional breakdown. "[T]hat was irrelevant evidence and should have been excluded." EH p. 345, ln. 7-11. He also noted that the reference in closing argument was prejudicial to Mr. Grove because it was "the only evidence that they have, in essence, that there was some reason why [the alleged event] occurred." EH p. 347, ln. 15.

This Court should reverse the decision denying this claim and remand with an order that

relief be granted.

G. *The Cumulative Effect of the Totality of the Deficient Performance was Prejudicial*.

As shown in the Opening Brief and above, the court erred in not finding deficient performance of counsel in several respects. Stacey was prejudiced by the admission of inadmissible evidence, from the improper impeachment, and by prosecutorial misconduct. Taken together, he has shown that there was a reasonable probability of a different result had he been adequately represented and that he is entitled to relief under *Strickland*.

III. CONCLUSION

The district court erred in partially granting the State's motion for summary disposition and then later in denying the petition. For the set forth in the Opening Brief and above, this Court should reverse both orders and remand with directions that the petition be granted or alternatively that an evidentiary hearing be held.

Respectfully submitted this 9th of September, 2016.

/s/Deborah Whipple
Deborah Whipple
Attorneys for Stacey Grove

/s/ Dennis Benjamin
Dennis Benjamin

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 9th day of September, 2016.

/s/Dennis Benjamin
Dennis Benjamin