11-25-2015

Grove v. State Clerk's Record v. 2 Dckt. 43537

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY GROVE, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	SUPREME COURT NO. 43537

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE CARL B. KERRICK, DISTRICT JUDGE

Counsel for Respondent

Mr. Lawrence G. Wasden
Attorney General
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Counsel for Appellant

Ms. Sara B. Thomas
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PO Box 2816
Boise, ID 83701

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
9/7/2012	NCPC	KATHY	New Case Filed-Post Conviction Relief	Carl B. Kerrick
	ATTR	TERESA	Plaintiff: Grove, Stacey Lewis Attorney Retained Dennis Benjamin	Carl B. Kerrick
	PETN	TERESA	Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Stevie Grove in Support of Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Lori Stamper in Support of Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Carol Grove in Support Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Lynette Walton in Support Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Deborah Grove in Support Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Jack Grove in Support Verified Petition for post Conviction Relief	Carl B. Kerrick
9/13/2012	ORDR	TERESA	Order for Telephonic Scheduling Conference	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Telephonic Scheduling Conference 10/11/2012 10:45 AM)	Carl B. Kerrick
9/19/2012	MISC	TERESA	Request for Judicial Notice	Carl B. Kerrick
10/1/2012	AFFD	TERESA	Affidavit of Karen Stamper in Support of Verified Petition for Post Conviction Relief	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Craig Stamper in Support of Verified Petition for Post Conviction Relief	Carl B. Kerrick
	MOTN	TERESA	Motion to Declare Petitioner a Needy Person	Carl B. Kerrick
10/5/2012	MOTN	TERESA	Motion for Summary Disposition and Dismissal and to Set for Hearing	Carl B. Kerrick
10/10/2012	MISC	TERESA	Objection to State's Motion for Summary Disposition and Motion for a More Definite Statement	Carl B. Kerrick
10/11/2012	HRSC	TERESA	Hearing Scheduled (Hearing 12/18/2012 11:00 AM) TELEPHONIC Motion for Summary Disposition	Carl B. Kerrick
10/12/2012	HRHD	TERESA	Hearing result for Telephonic Scheduling Conference scheduled on 10/11/2012 10:45 AM: Hearing Held---in chambers no court reporter present	Carl B. Kerrick
		TERESA	Notice Of Hearing	Carl B. Kerrick
10/15/2012	ORDR	TERESA	Order Granting Request for Judicial Notice	Carl B. Kerrick
	ORDR	TERESA	Order Granting Motion to Declare Petitioner a Needy Person	Carl B. Kerrick
	MOTN	TERESA	Petitioner's Motion for Summary Disposition	Carl B. Kerrick
11/28/2012	AFFD	TERESA	Affidavit of Eric Fredericksen	Carl B. Kerrick
	AFFD	TERESA	Affidavit of Diane Walker	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
12/10/2012	AFFD	TERESA	Affidavit of Dennis Benjamin	Carl B. Kerrick
12/13/2012	AFFD	TERESA	Affidavit of Jonathan L. Arden MD	Carl B. Kerrick
12/18/2012	MISC	TERESA	Brief in Support of Motion for Summary Disposition---State	Carl B. Kerrick
	ATTR	TERESA	Defendant: State of Idaho Attorney Retained Nance Ceccarelli	Carl B. Kerrick
	DCHH	TERESA	Hearing result for Hearing scheduled on 12/18/2012 11:00 AM: District Court Hearing Hel Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Telephonic Status Conference 02/12/2013 11:15 AM)	Carl B. Kerrick
	MINE	TERESA	Minute Entry Hearing type: Motion for Summary Disposition/Dismissal Hearing date: 12/18/2012 Time: 11:01 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 1 Dennis Benjamin Nance Ceccarelli	Carl B. Kerrick
	ORDR	TERESA	Order for Telephonic Status Conference	Carl B. Kerrick
12/19/2012	STIP	TERESA	Stipulated Motion for Permission to Conduct Discovery	Carl B. Kerrick
	ORDR	TERESA	Order Granting Stipulated Motion for Permission to Conduct Discovery	Carl B. Kerrick
12/26/2012	MOTN	TERESA	Ex Parte Motion to Authorize Payment of Costs (FILED UNDER SEAL) Document sealed	Carl B. Kerrick
1/2/2013	ORDR	TERESA	Order Granting Ex Parte Motion to Authorize Payment of Costs (FILED UNDER SEAL) Document sealed	Carl B. Kerrick
	PETN	TERESA	Amended Verified Petition for Post Conviction Relief	Carl B. Kerrick
1/9/2013	NOTC	TERESA	Notice of Taking Deposition	Carl B. Kerrick
1/10/2013	MISC	TERESA	Amended Notice of Taking Deposition--petitioner (Scott Chapman)	Carl B. Kerrick
2/6/2013	MISC	TERESA	Answer and Amended Motion for Summary Disposition and Dismissal and to set for hearing	Carl B. Kerrick
2/11/2013	MOTN	TERESA	Petitioner's Renewed Motion for Summary Disposition	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
2/12/2013	DCHH	TERESA	Hearing result for Telephonic Status Conference scheduled on 02/12/2013 11:15 AM: District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages	Carl B. Kerrick
	MINE	TERESA	Minute Entry Hearing type: tele status conf Hearing date: 2/12/2013 Time: 11:17 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 1 Dennis Benjamin/Debra Whipple Nance Ceccarelli	Carl B. Kerrick
	ORDR	TERESA	Order Scheduling Briefs and Argument	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Oral Argument 04/30/2013 01:30 PM)	Carl B. Kerrick
2/19/2013	MOTN	TERESA	2nd Ex Parte Motion to Authorize Payment of Costs---FILED UNDER SEAL Document sealed	Carl B. Kerrick
	ORDR	TERESA	Order Granting 2nd Ex Parte Motion to Authorize Payment of Costs----FILED UNDER SEAL Document sealed	Carl B. Kerrick
3/15/2013	BRFD	JANET	Petition'ers Brief Filed in Response to State's Motion for Summary Disposition and in Support of Petitionerr's Motion	Carl B. Kerrick
3/20/2013	MOTN	TERESA	3rd Ex Parte Motion to Authorize Payment of Costs--FILED UNDER SEAL Document sealed	Carl B. Kerrick
3/22/2013	ORDR	TERESA	Order Granting Ex Parte Motion to Authorize Payment of Costs---FILED UNDER SEAL Document sealed	Carl B. Kerrick
4/1/2013	MISC	TERESA	Reply Brief in Support of State's Motion for Summary Disposition and Response to Petitioner's Brief in Support of Petitioner's Motion for Summary disposition	Carl B. Kerrick
4/12/2013	AFFD	TERESA	Affidavit of Andrew Parnes	Carl B. Kerrick
	MISC	TERESA	Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Disposition	Carl B. Kerrick
	AFFD	TERESA	2nd Affidavit of Dennis Benjamin	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
4/30/2013	MINE	TERESA	Minute Entry Hearing type: Oral Argument Hearing date: 4/30/2013 Time: 1:30 pm Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 1 Dennis Benjamin Nance Ceccarelli	Carl B. Kerrick
	ADVS	TERESA	Hearing result for Oral Argument scheduled on 04/30/2013 01:30 PM: Case Taken Under Advisement	Carl B. Kerrick
5/3/2013	AFFD	TERESA	Affidavit of Stacey Grove in Opposition to State's Motion for Summary Disposition	Carl B. Kerrick
5/8/2013	MOTN	TERESA	Motion to Strike---State	Carl B. Kerrick
	MISC	TERESA	Objection to State's Motion to Strike--Petitioner	Carl B. Kerrick
7/11/2013	OPOR	TERESA	Opinion & Order on Motions for Summary Disposition	Carl B. Kerrick
8/9/2013	MOTN	TERESA	Motion for Reconsideration---Petitioner	Carl B. Kerrick
	MISC	TERESA	Memorandum in Support of Motion for Reconsideration---Petitioner	Carl B. Kerrick
9/3/2013	MISC	TERESA	Petitioner's Reply Memorandum in Support of Motion for Reconsideration	Carl B. Kerrick
9/5/2013	NOTC	TERESA	Notice of Telephonic Hearing---Petitioner	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Hearing 10/22/2013 11:00 AM) Petitioner's Motion for Reconsideration	Carl B. Kerrick
10/9/2013	CONT	TERESA	Continued (Hearing 10/28/2013 10:00 AM) Petitioner's Motion for Reconsideration	Carl B. Kerrick
		TERESA	Amended Notice Of Hearing	Carl B. Kerrick
	MISC	BDAVENPORT	Updated Authority in Support of Motion for Reconsideration	Carl B. Kerrick
10/28/2013	MINE	TERESA	Minute Entry Hearing type: Motion to Reconsider Hearing date: 10/28/2013 Time: 10:02 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 1 Dennis Benjamin Nance Ceccarelli	Carl B. Kerrick
	ADVS	TERESA	Hearing result for Hearing scheduled on 10/28/2013 10:00 AM: Case Taken Under Advisement Petitioner's Motion for Reconsideration	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
10/28/2013	DCHH	TERESA	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages	Carl B. Kerrick
11/21/2013	OPOR	TERESA	Opinion & Order on Petitioner's Motion for Reconsideration---DENIED	Carl B. Kerrick
11/27/2013	MOTN	TERESA	Petitioner's Motion for Permission for Interlocutroy Appeal	Carl B. Kerrick
	MISC	TERESA	Petitioner's Memorandum in Support of Motion for Permission for Interlocutory Appeal	Carl B. Kerrick
12/3/2013	MOTN	TERESA	Motion Objecting to Petitioner's Motion for Permission for Interlocutory Appeal	Carl B. Kerrick
12/4/2013	HRSC	TERESA	Hearing Scheduled (Hearing 12/19/2013 10:45 AM) TELEPHONIC OBJECTION TO PETITIONER'S MOTION FOR PERMISSION FOR INTERLOCUTORY APPEAL	Carl B. Kerrick
		TERESA	Notice Of Hearing	Carl B. Kerrick
12/19/2013	ADVS	TERESA	Hearing result for Hearing scheduled on 12/19/2013 10:45 AM: Case Taken Under Advisement TELEPHONIC OBJECTION TO PETITIONER'S MOTION FOR PERMISSION FOR INTERLOCUTORY APPEAL	Carl B. Kerrick
	MINE	TERESA	Minute Entry Hearing type: Mtn Permission Interlocutory Appeal Hearing date: 12/19/2013 Time: 10:51 am Courtroom: Court reporter: Minutes Clerk: TERESA Tape Number:	Carl B. Kerrick
	ORDR	TERESA	Order Granting Motion for Permission for Interlocutory Appeal	Carl B. Kerrick
1/21/2014	ORDR	DIANE	Order Denying Motion Requesting Court to Accept Appeal By Permission	Carl B. Kerrick
	STAT	DEANNA	Case Status Changed: closed	Jay P. Gaskill DJ
3/14/2014	CHJG	SHELLIE	Change Assigned Judge (batch process)	
	ORDR	TERESA	Administrative Order Assigning Judge--GASKILL	Jay P. Gaskill DJ
4/8/2014	ORDR	TERESA	Order for Telephonic Status Conference	Jay P. Gaskill DJ
	HRSC	TERESA	Hearing Scheduled (Telephonic Status Conference 04/29/2014 02:15 PM)	Jay P. Gaskill DJ
4/14/2014	MOTN	JANET	Suggestion for Voluntary Disqualification; Alternate Motion for Disqualification With Cause; Second Alternative Motion for Disqualification Without Cause	Jay P. Gaskill DJ
	AFFD	JANET	Affidavit of Counsel in Support of Disqualification	Jay P. Gaskill DJ

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
4/29/2014	ORDR	TERESA	Order of Voluntary Disqualification for Cause---GASKILL	Jay P. Gaskill DJ
4/30/2014	ORAJ	TERESA	Order Assigning Judge--CARL KERRICK SENIOR JUDGE	Jay P. Gaskill DJ
	CHJG	TERESA	Change Assigned Judge	Carl B. Kerrick
	HRHD	TERESA	Hearing result for Telephonic Status Conference scheduled on 04/29/2014 02:15 PM: Hearing Held---IN CHAMBERS NO COURT REPORTER PRESENT	Jay P. Gaskill DJ
5/1/2014	ORDR	TERESA	Order for Telephonic Status Conference	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Status Conference 05/15/2014 10:45 AM)	Carl B. Kerrick
5/2/2014		BDAVENPORT	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Debbie M Grove Receipt number: 0007560 Dated: 5/2/2014 Amount: $3.00 (Cash)	Carl B. Kerrick
5/15/2014	HRHD	JANET	Hearing result for Status Conference scheduled on 05/15/2014 10:45 AM: Hearing Held	Carl B. Kerrick
	HRSC	JANET	Hearing Scheduled (Hearing 10/24/2014 09:00 AM) Evidentiary Hearing	Carl B. Kerrick
	CONT	JANET	Continued (Hearing 10/31/2014 09:00 AM) Evidentiary Hearing	Carl B. Kerrick
5/16/2014	MINE	JANET	Minute Entry Hearing type: Status Conference Hearing date: 5/15/2014 Time: 10:45 am Courtroom: Court reporter: Linda Carlton Minutes Clerk: JANET Tape Number: 1 Party: Stacey Grove, Attorney: Dennis Benjamin Party: State of Idaho, Attorney: Nance Ceccarelli	Carl B. Kerrick
		JANET	Notice Of Hearing	Carl B. Kerrick
5/19/2014	ORDR	JANET	Order Assigning Judge	Carl B. Kerrick
8/26/2014	PETN	TERESA	Petition for Appointment of Special Prosecutor	Carl B. Kerrick
8/29/2014	ORDR	TERESA	Order for Appointment of Special Prosecutor	Carl B. Kerrick
9/29/2014	STIP	TRISH	Stipulation to vacate hearing and reset	Carl B. Kerrick
	ATTR	TERESA	Defendant: State of Idaho Attorney Retained Jessica M Lorello	Carl B. Kerrick
10/14/2014	NOTC	TERESA	Notice of Hearing	Carl B. Kerrick
	CONT	TERESA	Continued (Hearing 03/24/2015 09:00 AM) Evidentiary Hearing--2 days	Carl B. Kerrick
11/26/2014	MOTN	TERESA	Motion for Permission to Conduct Discovery--Petitioner	Carl B. Kerrick
	MOTN	TERESA	Ex Parte Motion to Authorize Payment of Costs Document sealed	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
12/5/2014	ORDR	TERESA	Order Granting Ex Parte Motion to Authorize Payment of Costs--filed under seal Document sealed	Carl B. Kerrick
12/11/2014	ORDR	TERESA	Order Granting Motion for Permission to Conduct Discovery	Carl B. Kerrick
3/4/2015	HRSC	TERESA	Hearing Scheduled (Telephonic Status Conference 03/13/2015 09:30 AM)	Carl B. Kerrick
		TERESA	Notice Of Hearing	Carl B. Kerrick
3/9/2015	NOTC	JANET	Notice of State's Potential Trial Witnesses	Carl B. Kerrick
3/10/2015	MOTN	JANET	Motion for Order to Transport Petitioner to Hearing	Carl B. Kerrick
	MOTN	JANET	Ex-Parte Motion to Authorize Payment of Costs FILED UNDER SEAL Document sealed	Carl B. Kerrick
3/11/2015	MOTN	JANET	Motion for Discovery Pursuant to ICRP 26(b)(4)(A)	Carl B. Kerrick
3/12/2015	ORDR	BDAVENPORT	Order to Transport Petitioner to Hearing	Carl B. Kerrick
3/13/2015	HRHD	JANET	Hearing result for Telephonic Status Conference scheduled on 03/13/2015 09:30 AM: Hearing Held	Carl B. Kerrick
	HRSC	JANET	Hearing Scheduled (Hearing 03/24/2015 09:00 AM) Evidentiary Hearing--2 days	Carl B. Kerrick
	MINE	JENNY	Minute Entry Hearing type: Telephonic Status Conference Hearing date: 3/13/2015 Time: 9:33 am Courtroom: Court reporter: Minutes Clerk: JENNY Tape Number: CTRM #2 DENNIS BENJAMIN & DEBRA WHIPPLE JESSICA LARELLO & KEN JURGENSON	Carl B. Kerrick
3/23/2015	ORDR	TERESA	Order Granting Request for Petitioner to Wear Civilian Clothing at Evidentiary Hearing---GRANTED	Carl B. Kerrick
3/24/2015	MINE	TERESA	Minute Entry Hearing type: Evidentiary Hearing Hearing date: 3/24/2015 Time: 9:03 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 1 Dennis Benjamin & Debra Whipple Jessica Lorello and Ken Jurgeson	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/24/2015	DCHH	TERESA	Hearing result for Hearing scheduled on 03/24/2015 09:00 AM: District Court Hearing Held---MARCH 24 & 25, 2015 Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: 325 PAGES Evidentiary Hearing--2 days	Carl B. Kerrick
	HRSC	TERESA	Hearing Scheduled (Hearing 03/25/2015 09:00 AM) Evidentiary hearing continues	Carl B. Kerrick
	MISC	TERESA	Petitioner's Exhibit List	Carl B. Kerrick
4/3/2015	MOTN	TERESA	Ex Parte Motion to Authorize Payment of Costs filed under seal Document sealed	Carl B. Kerrick
4/6/2015	ORDR	TERESA	Order Granting Ex Parte Motion to Authorize Additional Payment of Costs Document sealed	Carl B. Kerrick
4/7/2015	MOTN	BDAVENPORT	Ex Parte Motion to Authorize Payment of Expert Fees and Costs--filed under seal Document sealed	Carl B. Kerrick
4/8/2015	TRAN	TERESA	Transcript Filed	Carl B. Kerrick
	ORDR	BDAVENPORT	Order Granting Ex Parte Motion to Authorize Payment of Expert Fees and Costs--filed under seal Document sealed	Carl B. Kerrick
4/9/2015	MOTN	TERESA	2nd Motion for Reconsideration	Carl B. Kerrick
	MISC	TERESA	Memorandum in Support of 2nd Motion for Reconsideration	Carl B. Kerrick
4/14/2015	MOTN	TERESA	Ex Parte Motion to Authorize Payment of Expenses of Counsel--filed under seal Document sealed	Carl B. Kerrick
	AFFD	TERESA	Affidavit in Support of Ex Parte Motion to Authorize Payment of Expenses of Counsel--filed under seal Document sealed	Carl B. Kerrick
	ORDR	TERESA	Order Granting Ex Parte Motion to Authorize Payment of Expenses of Counsel---filed under seal Document sealed	Carl B. Kerrick
4/16/2015	MISC	TERESA	Memorandum in Opposition to Motion for Reconsideration---Respondent	Carl B. Kerrick
4/24/2015	MISC	TERESA	Petitioner's Closing Argument	Carl B. Kerrick
5/8/2015	MISC	TERESA	Respondent's Post Evidentiary Hearing Closing Argument (fax)	Carl B. Kerrick
5/14/2015	MISC	TERESA	Respondent's Post Evidentiary Hearing Closing Argument (original)	Carl B. Kerrick
5/15/2015	MISC	TERESA	Petitioner's Rebuttal to Respondent's Closing Argument	Carl B. Kerrick

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
5/18/2015	MISC	TERESA	Request for Oral Closing Argument and Argument on 2nd Motion for Reconsideration--petitioner	Carl B. Kerrick
5/20/2015	HRSC	TERESA	Hearing Scheduled (Oral Argument 05/29/2015 10:00 AM)	Carl B. Kerrick
		TERESA	Notice Of Hearing	Carl B. Kerrick
5/29/2015	MINE	TERESA	Minute Entry Hearing type: oral argument Hearing date: 5/29/2015 Time: 10:02 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: TERESA Tape Number: CRTRM 3 Dennis Benjamin Kenneth Jorgensen	Carl B. Kerrick
8/25/2015	FFCL	TERESA	Findings Of Fact And Conclusions Of Law and Order; Order Denying Motion to Reconsider	Carl B. Kerrick
	MISC	TERESA	Final Judgment--all claims contained within the Petition for Post Conviction relief are hereby DISMISSED	Carl B. Kerrick
	CDIS	TERESA	Civil Disposition entered for: State of Idaho, Defendant; Grove, Stacey Lewis, Subject. Filing date: 8/25/2015	Carl B. Kerrick
	STAT	TERESA	Case Status Changed: Closed pending clerk action	Carl B. Kerrick
8/31/2015	NTAP	BDAVENPORT	Notice Of Appeal	Carl B. Kerrick
	APSC	BDAVENPORT	Appealed To The Supreme Court	Carl B. Kerrick
	MOTN	BDAVENPORT	Motion to Appoint State Appellate Public Defender	Carl B. Kerrick
9/1/2015	ORDR	BDAVENPORT	Order Appointing State Appellate Public Defender	Carl B. Kerrick
	ORPD	BDAVENPORT	Subject: Grove, Stacey Lewis Order Appointing Public Defender Public defender Sara B Thomas	Carl B. Kerrick
9/28/2015	NOTC	BDAVENPORT	Notice of Transcript Lodged	Carl B. Kerrick

Dennis Benjamin, ISB #4199
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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CV12-01798 CASE NO. _____ **VERIFIED PETITION FOR POST-CONVICTION RELIEF**

GENERAL ALLEGATIONS:

1. Petitioner, Stacey Grove, is currently incarcerated at the Idaho Correctional Institution in Orofino, Idaho.

2. Mr. Grove is serving a sentence imposed by the District Court of the Second Judicial District, State of Idaho, County of Nez Perce, the Honorable Carl B. Kerrick, presiding.

3. The Nez Perce County District Court Number for that case is CR-2007-768.

4. Mr. Grove was charged with the first-degree murder of [redacted] Martin (hereafter "[redacted]

5. Mr. Grove was represented at trial by attorney Scott Chapman (hereafter "defense

counsel").

6. The state was represented by the Nez Perce County Prosecuting Attorney, Daniel Spickler (hereafter "prosecutor").

7. The jury returned a guilty verdict.

7.1 A true and correct copy of the Clerk's Record in the criminal case is attached as Exhibit A.

7.2 A true and correct copy of the transcripts of the proceedings in the criminal case is attached as Exhibit B.

7.3 A copy of the exhibits introduced at trial are attached hereto as Exhibit C.

8. The district court sentenced Mr. Grove to a life sentence with 22 years fixed.

9. Mr. Grove appealed from the judgment and sentence.

10. Attorneys Diane Walker and Eric Fredericksen (hereafter "appellate counsel") represented Mr. Grove on appeal.

11. On March 25, 2011, the Idaho Court of Appeals affirmed the judgment of conviction and the sentence. *State v. Grove,* 151 Idaho 483, 259 P.3d 629 (Ct. App. 2011), *review denied* (September 12, 2011).

11.1. A copy of the opinion is attached as Exhibit D.

12. The Supreme Court denied Mr. Grove's Petition for Review on September 12, 2011.

13. The remittitur issued that same day.

14. With respect to this conviction, Mr. Grove has not filed any other petitions for post-conviction relief.

FIRST CAUSE OF ACTION: ***Petitioner was Denied the Right to Confront Witnesses Against Him in Violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article, 1, § 13 of the Idaho Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

15. Petitioner re-alleges paragraphs 1-14 above.

16. Mr. Grove's right to confront witnesses was violated when state witnesses testified at trial about neuropathology tests and examination results when those witnesses neither performed nor had personal knowledge of the neuropathology testing and examination, and when the neuropathologist who did perform the tests and examinations was not a witness at the trial.

16.1. A further confrontation clause violation occurred when the autopsy report was admitted into evidence at trial.

17. Dr. Marco Ross is a forensic pathologist. Exhibit B, pg. 892, ln. 20.

18. Dr. Ross performed the autopsy of [redacted] while he was employed at the Spokane County Medical Examiner's Office. Exhibit B, pg. 893, ln. 23.

19. Dr. Ross testified at Mr. Grove's trial. Exhibit B, pg. 892-988.

20. Dr. Ross's autopsy report was introduced as State's Exhibit 11 at the trial. Exhibit C (State's Exhibit 11); Exhibit B, pg. 902, ln. 5.

20.1. Defense counsel did not object to the introduction of the autopsy report. *Id.*

21. Dr. Ross testified that there have been occasions where the Medical Examiner's Office would send tissue samples to outside experts for examination and interpretation. Exhibit B, pg. 900, ln. 21-24.

22. In this case, Kyler's brain was sent to Dr. R. Ross Reichard, a forensic neuropathologist at the University of New Mexico for examination. Exhibit B, pg. 901, ln. 5-7; pg. 928, ln. 18-20.

23. The results of the examination were included in the autopsy report which was admitted as Exhibit 11 at trial. Exhibit B, pg. 901, ln. 1-2.

24. At trial, Dr. Ross was permitted to testify to Dr. Reichard's findings. Exhibit B, pg. 928, ln. 21 - pg. 930, ln. 23.

24.1. Dr. Ross testified that Dr. Reichard reported there were bilateral subdural hemorrhages in the brain. Exhibit B, pg. 928, ln. 21-23.

24.2. Dr. Ross also testified that Dr. Reichard reported there were bilateral subarachnoid hemorrhages in the brain. Exhibit B, pg. 929, ln. 1-2.

24.3. Dr. Ross also testified that Dr. Reichard reported that the brain was swollen. *Id.*

24.4. Dr. Ross also testified that Dr. Reichard reported there was a laceration in the corpus callosum. *Id*, ln. 3.

24.5. Dr. Ross also testified that Dr. Reichard reported there was a hypo-ischemic injury to the brain. *Id*, ln. 5-6.

24.6. Dr. Ross also testified that Dr. Reichard reported there were vascular axonal injuries to the brain. *Id*, ln. 10.

24.7. Dr. Ross also testified that Dr. Reichard reported there were autolytic changes in the brain. *Id*, ln. 11.

24.8. Dr. Ross also testified that Dr. Reichard reported that the subdural

hemorrhage and the subachnoid hemorrhages were "acute." Exhibit B, pg. 930, ln. 3-4.

24.9. Dr. Ross testified that the significance of a tear in the corpus callosum reported by Dr. Reichard is that it is indicative of a high degree of force which would render the victim unconscious or nearly unconscious at the time of impact. *Id.*, ln. 21-23.

24.10. Dr. Ross also testified that the swelling reported by Dr. Reichard indicated that the fatal injury occurred sometime immediately before death or within a day or two prior to death. *Id.*, ln. 6-9.

24.11. Dr. Ross testified that the degree of hemorrhage in the brain and the tear in the corpus callosum reported by Dr. Reichard would be inconsistent with a fall from a kitchen counter onto a linoleum floor. Exhibit B, pg. 936, ln. 3-7.

24.12. Dr. Ross testified that the degree of hemorrhage in the brain and the tear in the corpus callosum reported by Dr. Reichard would be consistent with a very significant blunt force impact or impacts to the head that would be in excess of what would be expected from a fall to the floor. *Id.*, ln. 12-17.

24.13. Dr. Ross testified that the widespread vascular axonal swelling reported by Dr. Reichard was indicative of injury to the axons which could occur as a result of blunt force trauma tearing the axons. Exhibit B, pg. 941, ln. 13-18.

24.14. Dr. Ross also testified that Dr. Reichard noted in his report that there were axonal injury changes occurring in the vicinity of the corpus callosum which would be consistent with a shearing injury, in Dr. Ross's opinion. Exhibit B, pg.

942, ln. 14-23.

24.15. Dr. Ross also testified that it was not surprising for Dr. Reichard to report axonal injury given that he also reported a laceration or tear in the corpus callosum. *Id.*, at 18-23.

24.16. Dr. Ross repeated his testimony that Dr. Reichard's observation of a tear in the corpus callosum shows there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12.

24.17. Dr. Ross also testified that the brain injuries reported by Dr. Reichard did not result from a single impact. Exhibit B, pg. 947, ln. 20.

24.18. Dr. Ross also repeated his testimony that the head injuries reported by Dr. Reichard would have caused immediate or near immediate unconsciousness or near unconsciousness to [redacted] Exhibit B, pg. 948, ln. 23 - pg. 949, ln. 4.

24.19. Dr. Ross testified that [redacted] could not have been engaged in certain activities previously described by the state's witness Lisa Nash with the injuries reported by Dr. Reichard. Exhibit B, pg. 949, ln. 5 - pg. 95, ln. 15.

24.20. On redirect examination of Dr. Ross, the prosecutor stated that "in the report from New Mexico that the doctor there talked about the loss of clear distinction between gray-white junction and generalized gray discoloration." Exhibit B, pg. 984, ln. 23 - pg. 985, ln. 2.

24.21. Dr. Ross explained that finding to show that "brain death has occurred, but

there's still ongoing cardiac activity." *Id*, pg. 985, ln. 3-5.

24.22. The prosecutor asked Dr. Ross, "Is there anything in your autopsy report or in the report from Dr. Reichard that would be inconsistent with those injuries occurring approximately 48 hours prior to cardiac death?" *Id*, pg. 987, ln. 4-7.

24.23. Dr. Ross answered, "No." *Id*, ln. 8.

24.24. Dr. Ross relied upon Dr. Reichard's report in his opinions that the cause of death was brain swelling and cerebral hemorrhage due to blunt force impact to the head, that the manner of death was homicide, and that the fatal injuries could have been inflicted approximately 48 hours prior to cardiac death. *Id*, pg. 987, ln. 9 - pg. 988, ln. 8.

25. Dr. Reichard was never called to testify at trial.

26. Dr. Ross admitted that he did not do anything with the brain other than to remove it, examine its surface and have it sent to Dr. Reichard's laboratory. Exhibit B, pg. 951, ln. 23 - pg. 952, ln. 7.

27. Dr. Ross admitted he did not prepare the brain tissue slides or inspect the brain internally. Exhibit B, pg. 952, ln. 10-12.

28. Dr. Ross admitted he did not observe the corpus callosum laceration. Exhibit B, pg. 956, ln. 10-15.

29. Dr. Ross admitted that he did not observe the global hypo-ischemic brain injury. Exhibit B, pg. 956, ln. 18 - pg. 957, ln. 7.

30. Dr. Ross admitted he did not examine any of the original slides or recuts of the brain tissue. Exhibit B, pg. 959, ln. 10-15.

31. Dr. Ross testified that he did not recall whether he had seen any photographs taken of the brain by Dr. Reichard. *Id*, ln. 23-25.

32. The introduction of Dr. Reichard's report and Dr. Ross's testimony about Dr. Reichard's examination of the brain and his interpretation of the meaning of those findings violated Mr. Grove's right to confront witnesses guaranteed by the state and federal constitutions.

33. Dr. Ross also testified about hemorrhages which he did not observe but were reported "by the surgeon who did the transplant surgery," in the retroperitoneal areas and the psoas muscles. Exhibit B, pg. 938, ln. 20-23.

34. That surgeon did not testify at trial.

35. That testimony from Dr. Ross also violated Mr. Grove's right to confront witnesses.

36. The testimony of Dr. Donald Chin, which referred to the autopsy report, which in turn contained Dr. Reichard's observations, findings and conclusions, violated Mr. Grove's right to confront witnesses.

36.1. Dr. Chin testified that based "on what I've read on this autopsy report is the most brutal case . . . I've ever seen." Exhibit B, pg. 851, ln. 5-6.

37. The testimony of Dr. Jay Hunter which referred to Dr. Reichard's observations, findings and conclusions violated Mr. Grove's right to confront witnesses.

37.1. While Dr. Hunter admitted that he is "not a pathologist," he testified that, "this child on autopsy, had . . . a fair amount of subarachnoid hemorrhage" that "should have produce[d] immediate symptoms," such as "unconsciousness," given the degree of injury described by Dr. Reichard. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22.

37.2. Dr. Hunter also testified that the defense version of the events on the evening prior to Kyler's hospitalization would be "virtually impossible" given the injuries described by Dr. Reichard. Exhibit B, pg. 876, ln. 11-20.

37.3. Dr. Hunter repeated that testimony during the state's redirect examination. Exhibit B, pg. 886, ln. 18-24.

38. The testimony of Dr. Deborah Harper which referred to Dr. Reichard's observations, findings and conclusions violated Mr. Grove's right to confront witnesses.

38.1. Dr. Harper testified that she had the autopsy report from Dr. Ross, which contains the observations, findings and conclusions of Dr. Reichard, and which was introduced at trial as State's Exhibit 11. Exhibit B, pg. 1031, ln. 19-20.

38.2. Dr. Harper used that report, among other things, to reach her opinion as to the cause of death, i.e., the brain injury. Exhibit B, pg. 1032, ln. 3-10.

38.3. Dr. Harper also testified that based upon the injuries described by Dr. Reichard, [redacted] "would have been unconscious or semi-conscious." Exhibit B, pg. 1033, ln. 17-18.

38.4. Dr. Harper also testified that in her experience, the extent of the brain injury described by Dr. Reichard was unusually severe. Exhibit B, pg. 1034, ln. 2-21.

38.5. Doctor Harper also testified that the defense version of the events on the evening prior to Kyler's hospitalization would be "not consistent" given the injuries described by Dr. Reichard. Exhibit B, pg. 1036, ln. 7-20; pg. 1037, ln. 20-24.

39. Trial counsel did not object to any of this testimony.

40. The failure to object was not a strategic decision on the part of trial counsel.

41. These violations of Mr. Grove's right to confront witnesses were not harmless error.

42. The Court of Appeals did not permit Mr. Grove to raise this issue for the first time on appeal. *State v. Grove,* 151 Idaho 483, 259 P.3d 623 (Ct. App. 2011), *review denied.*

B. Why Relief Should be Granted.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him." The Supreme Court has held "that this bedrock procedural guarantee applies to both federal and state prosecutions." *Pointer v. Texas*, 380 U.S. 400, 406 (1965). Article 1, § 13 of the Idaho Constitution similarly guarantees a criminal defendant the right to "appear and defend in person."

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that testimonial statements of witnesses absent from trial are admissible only where declarant is unavailable and where defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 59. Here, the statements of Dr. Reichard and others were introduced at trial without a showing of unavailability or a prior opportunity to cross-examine.

Further, the testimony was undoubtedly testimonial in nature. The determination of whether evidence is testimonial requires the court to consider the purpose behind the Confrontation Clause. *State v. Hooper*, 145 Idaho 139, 143, 176 P.3d 911, 915 (2007). The Supreme Court noted in *Crawford, supra*, that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Hooper*, 145 Idaho at 143, 176 P.3d at 915,

quoting Crawford, 541 U.S. at 50.

The *Hooper* Court analyzed the guidelines set forth by the United States Supreme Court in determining what constitutes testimonial statements: First, the Court looked to Webster's dictionary definition of "testimony" from 1828, *i.e.*, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51. Next, the Court listed three formulations of "core" testimonial statements: (1) "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted). Dr. Reichard's report and its incorporation into Dr. Ross's autopsy report clearly fits within the definition of "core" testimonial statements. *See, Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2716-17 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

The unconstitutional admission of the evidence cannot be found to be harmless. Here, the Court of Appeals in the direct appeal noted the importance of Dr. Reichard's evidence to the state's case:

> Initially, we clarify that the crux of this issue affects the central disputed question in this case—when the injuries which ultimately caused K.M.'s death occurred and whether it was likely that K.M. would have lost consciousness and/or shown severe symptoms immediately after the injuries were inflicted. In other words, did the injuries occur on the morning that K.M. lost consciousness—and was alone

> with Grove—or several days prior, when it was undisputed that the injuries could not have been inflicted by Grove because he was not alone with K.M. In this regard, important to the state's theory of the case that Grove caused the fatal injuries on the morning of July 10 was the conclusion of Dr. Reichard, based on his microscopic examination of K.M.'s brain, that K.M. had suffered a laceration of the corpus callosum, which would have likely caused immediate loss of consciousness, thereby implicating Grove as the cause of K.M.'s injuries during the 36–45 minute period of time during which he was alone with K.M. Grove points out that both Dr. Ross and Dr. Harper recited Dr. Reichard's observations in this regard, as gleaned from the autopsy report, as neither was present during the autopsy nor conducted their own microscopic analysis, and relied on these observations in forming their respective opinions that K.M.'s injuries had been inflicted on July 10.
>
> By contrast, Grove's expert, Dr. Arden, testified that he did not agree with Dr. Reichard that a laceration was present and that the anomaly was the result of handling of the brain after death. He also offered his opinion, after examination of the microscopic slides, that K.M.'s injuries had been inflicted at least three days prior to death (thus absolving Grove of having caused them) and that they would not have necessarily resulted in immediate loss of consciousness.

State v. Grove, 151 Idaho 483, 490, 259 P.3d 629, 636 (Ct. App. 2011), *review denied* (Sept. 12, 2011). In light of the central importance of the evidence from Dr. Reichard, the state cannot meet the burden of proving its unconstitutional admission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt).

SECOND CAUSE OF ACTION: ***Petitioner was Denied a Fair Trial and Due Process of Law in Violation of Idaho Constitution Art. I, § 13 and the Fourteenth Amendment of the United States Constitution by the Multiple Instances of Prosecutorial Misconduct (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

43. Petitioner re-alleges paragraphs 1-42 above.

44. The prosecutor committed misconduct outside the presence of the Court during trial.

44.1. During the trial, but prior to the Court going on the record, the prosecutor projected family photos of [redacted] onto the court room screen while the jury entered the courtroom.

44.2. The family photos would then be interchanged with the autopsy photographs.

44.3. Affidavits of witnesses to this misconduct are being filed in support of this Petition.

44.4. The prosecutor's actions exposed the jury to evidence outside the presence of the Court, invoking sympathy for [redacted] and his biological family and arousing passion and prejudice against Mr. Grove.

44.5. Defense counsel did not draw this behavior to the attention of the Court, ask that the prosecutor be ordered to desist or move for a mistrial.

45. The prosecutor committed misconduct during the state's case-in-chief.

45.1. The prosecutor called [redacted] Bandel, the sister of [redacted] as a witness. Exhibit B, pg. 823, ln. 25 - pg. 824, ln.1.

45.2. Defense counsel objected noting that [redacted] was a child and arguing that the prosecutor's purpose in calling her was "obviously . . . just to impassion or inflame the jury" and he expected [redacted] to testify that when she last saw her brother "he was lying on his mother's bed, and she gave him a hug and kiss and he said good bye." Exhibit B, pg. 821, ln. 24 - pg. 822, ln. 8.

45.3. In response, the prosecutor told the Court that his purpose in calling [redacted]

was to elicit evidence regarding the "condition of [redacted] Martin on the morning of July 10th," and argued that he only had Lisa Nash and [redacted] to provide evidence on that topic. Exhibit B, pg. 822, ln. 17-23. He stated, "I'm entitled to ask her what she recalls that morning, what she recalls of the physical condition of her brother the last time she saw him." Exhibit B, pg. 823, ln. 1-3.

45.4. The Court overruled defense counsel's objection "based on the argument made by Mr. Spickler on behalf of the State." Exhibit B, pg. 823, ln. 8-9.

45.5. Mr. Spickler then elicited testimony from [redacted] that she was a "[p]retty strong little girl," that she said "bye" to [redacted] before she left that morning, gave him a kiss and a hug and that she never saw her "brother again after that." Exhibit B, pg. 825, ln. 22; pg. 826, ln. 15-18; pg. 827, ln. 16-17.

45.6. That testimony, elicited by the prosecutor from [redacted] went beyond what the prosecutor told the Court he would elicit and it had the effect of inflaming the passions and prejudices of the jury and encouraging the jury to convict Mr. Grove for reasons other than the relevant evidence.

45.7. Defense counsel failed to object that the prosecutor's actual questioning of [redacted] went beyond what he had represented to the Court and was inadmissible.

45.8. During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after Kyler's death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997, ln. 23; Exhibit C (State's Exhibits 4, 5 and 6).

45.9. The photos were inflammatory because they included a large display of sympathy cards sent to Lisa Nash.

45.10. These photographs were inadmissible under IRE 403 as the danger of unfair prejudice outweighed any probative value.

46. The prosecutor committed misconduct in his cross-examination of Mr. Grove where the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11.

47. In his cross-examination of Dr. Jonathan Arden, the prosecutor suggested by a question that Dr. Arden was "on a special mission here, which is to provide such evidence as you might that would support the defense's case[.]" Exhibit B, pg. 1321, ln. 18-20.

48. The prosecutor committed misconduct during the cross-examination of Mr. Grove.

48.1. The prosecutor cross-examined Mr. Grove about the fact that Mr. Grove was behind on child support to his biological son, a fact both irrelevant and unfairly prejudicial. Exhibit B, pg. 1115, ln. 21-24.

48.2. During the cross-examination of Mr. Grove, the prosecutor asked Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12.

48.3. This questioning went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg. 1067, ln. 3-5.

49. The prosecutor committed misconduct during closing and rebuttal argument.

49.1. The prosecutor misstated the defense position regarding preexisting head injury, saying that the defense was that there was "some long-term brain injury." Exhibit B, pg. 1419, ln. 6-10.

49.2. The prosecutor called Dr. Arden's testimony about the absence of a tear in the corpus callosum "a bit of smoke and mirrors to get you confused." *Id*, pg. 1426, ln. 16-18.

49.3. The prosecutor suggested without supporting evidence that Dr. Arden's "financial position" leads him to decide what cases he can take. *Id,* pg. 1429, ln. 8-9.

49.4. The prosecutor testified that a "colleague" said that Dr. Arden's answers during cross-examination were slippery as an ice cube and the prosecutor opined that the doctor "was stretching things." *Id*, pg. 1430, ln. 4-8; pg. 1461, ln. 11.

49.5. The prosecutor told the jury without supporting evidence that "[c]are takers kill little babies all the time." *Id*, pg. 1460, ln. 5-6.

49.6. The prosecutor told the jury without supporting evidence that "[p]arents kill babies all the time." *Id*, ln. 6-7.

49.7. The prosecutor told the jury without supporting evidence that "there are literally thousands of [similar] incidents in any given span of time[.]" *Id.*, ln. 8-10.

49.8. The prosecutor told the jury without supporting evidence that he believed that "our local paper has probably shown . . . probably six more of these cases since – since this one started." *Id*, ln. 11-14.

49.9. The prosecutor misstated for a second time Dr. Arden's testimony about head injuries. *Id.*, pg. 1462, ln. 18-19.

49.10. The prosecutor argued that "Dr. Ross had the unenviable task of taking Kyler's body apart piece by piece[.]" *Id*, pg. 1464, ln. 24-25.

49.11. The prosecutor implied that he had evidence not presented at trial that Mr. Grove had previously been "violent with [redacted] Exhibit B, pg. 1430, ln. 15-21.

49.12. The prosecutor argued that "we don't want to let a murderer go free." *Id*, pg. 1466, ln. 9.

49.13. The prosecutor told the jury that he did not call [redacted]s biological father as a witness "because my medical experts unanimously, to no exception, said he could not have done it." *Id*, pg. 1477, ln. 18-20.

49.14. The prosecutor argued without supporting evidence that the emotional breakdown of Mr. Grove at trial showed that Mr. Grove had a different kind of "emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries[.]" *Id*, pg. 1458, ln. 16-18.

50. Defense counsel did not object to any of the misconduct alleged in paragraphs 47-49.

51. The failure to object was not a strategic decision on defense counsel's part.

52. Had defense objected, the objections would have been sustained.

53. In addition, the Court would have given curative instructions to the jury.

54. Further, defense motions would have alerted the prosecutor that his misconduct would be challenged, which would have prevented some or all of the subsequent misconduct.

55. Had a motion for a mistrial been made based upon the totality of prosecutorial

misconduct, the motion would have been granted.

56. This prosecutorial misconduct was not harmless error.

57. The unobjected-to prosecutorial misconduct could not have been raised on appeal. *State v. Perry,* 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

B. Why Relief Should be Granted.

The due process clauses of Art. 1, § 13, of the Idaho Constitution, and the Fourteenth Amendment ensure, at a minimum, "that criminal trials shall be fundamentally fair." *Schwartzmiller v. Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978). Further, "[i]t is the *duty of a prosecuting attorney* to see that the accused has a fair and impartial trial." *State v. Spencer*, 74 Idaho 173, 183, 258 P.2d 1147, 1153 (1953) (emphasis added) (finding that the prosecutor's misconduct warranted a new trial). In this case, as demonstrated above, the prosecutor grossly violated his duty to ensure fairness at every stage of the trial proceedings.

He exposed the jury to extra-judicial evidence. He appealed to the emotions, passions and prejudices of the jury through the use of inflammatory tactics. And he elicited inadmissible evidence both in direct and cross-examination of witness.

Further, his closing and rebuttal arguments are replete with misconduct. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case .... [t]o enlighten the jury and to help the jurors remember and interpret the evidence." *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (internal quotations omitted). Therefore, "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice: Prosecution and Defense Functions § 3-5.8 (3d. ed.1993). The prosecutor is charged with the dual task of ensuring that the government's case is

presented "earnestly and vigorously, using every legitimate means to bring about a conviction, but also to see that justice is done and that every criminal defendant is accorded a fair trial." *State v. Reynolds*, 120 Idaho 445, 449, 816 P.2d 1002, 1006 (Ct. App.1991). Therefore, it is improper for a prosecutor to appeal to the emotions, passion or prejudice of the jury through the use of inflammatory tactics. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. Here, however, the prosecutor appealed to the passions and prejudices of the jury, misstated the evidence, used inflammatory language in reference to defense witnesses, argued evidence not presented at trial, and misrepresented the state's burden of proof. This was clear and repeated misconduct.

The effect of the prosecutor's misconduct requires the granting of the petition. "The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated show the absence of a fair trial in contravention of the defendant's right to due process." *State v. Gross*, 146 Idaho 15, 21, 189 P.3d 477, 483 (Ct. App.2008). Thus, it is the cumulative effect of the misconduct engaged in here that should be considered. *Id.* Considering all the misconduct, it is clear that the state cannot meet its burden of proving its misconduct was harmless beyond a reasonable doubt as required by *Chapman v. California, supra.*

THIRD CAUSE OF ACTION: ***Petitioner was Denied Due Process and the Right to Jury Trial in Violation of Idaho Constitution Art. I, §§ 7 and 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1).***

A. Facts Pertaining to Cause of Action.

58. Petitioner re-alleges paragraphs 1-57 above.

59. Petitioner was denied his state and federal constitutional rights to due process and

jury trial when jurors repeatedly slept during the presentation of evidence.

59.1. Affidavits of individuals who witnessed jurors sleeping during trial testimony are being filed in support of this Petition.

59.2. The witness's affidavits are confirmed by the trial transcript which show the Court was required to take several unplanned recesses because jurors repeatedly fell asleep during the presentation of the evidence. Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25.

60. Sleeping jurors cannot independently evaluate the evidence and function as the constitution requires.

61. This issue could not have been raised on appeal under *State v. Perry*, *supra*, because defense counsel did not object to the sleeping jurors or make a motion for mistrial.

62. This error was not harmless.

B. Why Relief Should be Granted.

A juror's inattentiveness, by sleeping during witness testimony, may constitute misconduct. *State v. Strange*, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2009). *See e.g., State v. Majid*, 914 N.E.2d 1113, 1115 (Ohio Ct. App. 2009) (Numerous instances of jurors' sleeping during murder trial, including during eyewitness testimony, violated defendant's right to due process and constituted plain error). "[A] juror who sleeps through much of the trial testimony cannot be expected to perform his duties." *Id, citing United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841 (1977); *United States v. Cameron*, 464 F.2d 333, 335 (3rd Cir. 1972).

"Due process mandates that the defendant is entitled to have a jury hear and evaluate the

evidence," *id.*, and the jurors in this case were instructed by the Court "to decide the facts from *all the evidence* in the case." Exhibit B, pg. 1399, ln. 24-25 (emphasis added). The repeated instances of sleeping by one or more jurors, especially given they were sleeping during the critical medical testimony of Drs. Ross and Arden, denied Mr. Grove his state and federal constitutional rights to a jury trial and due process.

FOURTH CAUSE OF ACTION: ***Petitioner was Denied the Effective Assistance of Counsel on Appeal in Violation of Idaho Constitution Art. I, § 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

63. Petitioner re-alleges paragraphs 1- 62 above.

64. Alternative argument: If the Court determines that the prosecutorial misconduct issue raised in the Second Cause of Action could have been raised on direct appeal, Petitioner alleges that it was therefore deficient performance for appellate counsel to fail to raise that issue.

64.1. Had appellate counsel raised the issue on appeal, the conviction would have been reversed by the appellate court.

65. Alternative argument: If the Court determines that the juror misconduct issue raised in the Third Cause of Action could have been raised on direct appeal, Petitioner alleges that it was therefore deficient performance for appellate counsel to fail to raise that issue.

65.1. Had appellate counsel raised the issue on appeal, the conviction would have been reversed by the appellate court.

B. Why Relief Should be Granted.

A defendant in a criminal case is guaranteed the effective assistance of counsel under the

Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho 656, 658, 168 P.3d 40, 42 (Ct. App. 2007).

Petitioner draws the Court's attention to the fact that *Mintun* holds that it cannot be ineffective assistance for appellate counsel to fail to raise claims of fundamental error for the first time on appeal. *Id.* (Petitioner disagrees and believes the *Mintun* bright-line rule is contrary to *Strickland* and should be overruled by the Idaho Supreme Court.) Right or wrong, the rule is based in part upon a concern that the record on appeal might not be "complete enough to allow appellate examination of all the factors that must be considered on such a claim." *Id.* Thus, the

Court of Appeals decided to leave such issues "for presentation in a post-conviction proceeding, where an adequate record could be developed." *Id.* Moreover, "the allowance of this type of claim for ineffective assistance of appellate counsel is ordinarily not necessary to protect a defendant's rights because the defendant can bring the same claim of impropriety in the trial proceedings as a claim of ineffective assistance of his trial counsel for failing to object to the alleged error in the trial court." *Mintun*, 144 Idaho at 662, 168 P.3d at 46.

In this case, Mr. Grove has raised claims of prosecutorial misconduct and the deprivation of the right to jury trial, which were not objected to below. Mr. Grove does not believe appellate counsel could have raised those issues on direct appeal under *State v. Perry*, *supra*, as was the case with his confrontation clause claim. Thus, he can raise all those issues in this Petition, both as direct claims and as aspects of the ineffective assistance of trial counsel claim alleged below. *See e.g., DeRushé v. State*, 146 Idaho 599, 603-604, 200 P.3d 1148, 1152-53 (2009) (deprivation of the right to testify raised as direct constitutional violation) *with Barcella v. State*, 148 Idaho 469, 476, 224 P.3d 536, 543 (Ct. App. 2009) (deprivation of the right to testify raised as an aspect of an ineffective assistance of trial counsel claim). If the Court disagrees and holds that Claims Two or Three could have been raised on appeal and thus cannot be raised now, it should then grant relief due to the ineffective assistance of appellate counsel as the rationale behind the *Mintun* rule would no longer be applicable. In either case, trial counsel's failure to make proper objections at trial to the errors above are all incorporated into the ineffective assistance of trial counsel claim alleged below.

FIFTH CAUSE OF ACTION: ***Petitioner was Denied the Effective Assistance of Counsel at Trial in Violation of Idaho Constitution Art. I, § 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

66. Petitioner re-alleges paragraphs 1-65 above.

67. Defense counsel rendered deficient performance in failing to present an adequate analysis to support his pretrial motion to allow the admission of alternate perpetrator evidence.

67.1. The failure to present an adequate analysis resulted in the District Court denying admission of that evidence - evidence which was crucial to the defense and the lack of which was prejudicial.

68. Defense counsel rendered deficient performance in failing to move for a mistrial or for the summoning of a new jury pool after a potential juror made statements in voir dire that polluted the entire jury pool.

68.1. The potential juror stated in front of all the potential jurors that he worked in the funeral business and he knew the police officer witnesses Greene and Petrie well, both from their work investigating cases that came through the funeral home, and through their work for his wife who was the city manager, and that they are very credible. Exhibit B, pg. 155, ln. 13-14.

68.2. He also stated he had worked in the funeral business for a long time and seen "these situations" before and did not have a lot of empathy except for the victims. *Id.*, pg. 155, ln. 21 - pg. 156, ln. 2.

68.3. The failure to object and move for a cautionary instruction or for the

summoning of a new jury pool prejudiced Petitioner.

69. Counsel rendered deficient performance in failing to challenge for cause or peremptorily challenge Juror #5 (Loetscher) after voir dire revealed that he worked at St. Joseph's Hospital and knew of "just about everyone on the [state's witness list] . . . particularly the ER doctors that was listed there." Exhibit B, pg. 144, ln. 14-19.

69.1. Juror #5 became the presiding juror. Exhibit B, pg. 1471, ln. 19-22.

70. Counsel rendered deficient performance in failing to assert Petitioner's state and federal constitutional rights to confrontation (Idaho Const. Art. I, § 13, United States Const. Amendments 6 and 14) and by failing to make proper evidentiary objections.

70.1. During trial, state's witnesses, *i.e.,* Nash, Chin, Harper, Hunter and Ross, repeatedly testified to the contents of the autopsy report which contained information from Dr. Reichard.

70.2. Dr. Reichard's information was the state's only basis of proof for the nature of head and alleged brain injuries, the only basis for testimony as to the timing of the head and alleged brain injuries, and the only basis for the state's claim that [redacted] had suffered a tear to the corpus callosum and axonal shearing.

70.3. However, the state did not present the testimony of Dr. Reichard in violation of the state and federal constitutional rights of confrontation.

70.4. Petitioner was prejudiced because had counsel objected on confrontation grounds, the state would have had no testimony as to any head or alleged brain injuries and the timing of those injuries and thus, could not have obtained a conviction.

70.5. In response to the defense motion for acquittal or in the alternative a new trial, the state argued that Dr. Reichard was the one person who actually examined the brain and therefore was a more credible witness than Dr. Arden. Exhibit B, pg. 1486, ln. 6-15.

70.6. Prosecutor Spickler said in discounting Dr. Arden's testimony, " . . . [Dr. Arden] was trying to contradict the findings of an expert in New Mexico who actually had the brain and actually took a look at the brain in toto, as opposed to one or more slides." Exhibit B, pg. 1486, ln. 8-12.

70.7. Defense counsel failed to object to the testimony from Dr. Chin which referred to Dr. Reichard's report.

70.8. Defense counsel failed to object to the testimony from Dr. Hunter which referred to and relied upon Dr. Reichard's report.

70.9. Defense counsel failed to object to the testimony from Dr. Harper which referred to and relied upon Dr. Reichard's report.

70.10. The testimony of Drs. Chin, Hunter, Harper and Ross which related the findings of Dr. Reichard, were inadmissible under IRE 703 as well as the confrontation clause.

71. Counsel rendered deficient performance in failing to object to hearsay testimony from Lisa Nash regarding the autopsy report contents.

71.1. At trial, Lisa Nash testified that she was told that [redacted] had blood in his brain that could not be removed. She did not identify who told her this and the testimony was admitted without limitation including for the truth of the matter

asserted. Exhibit B, p. 755, ln. 16-25.

71.2. Defense counsel did not object on hearsay grounds. Had counsel objected, the objection would have been granted.

71.3. The failure to object prejudiced Petitioner because, as noted above, had counsel asserted Petitioner's constitutional confrontation rights, the state would have had no proof of cause of death other than Ms. Nash's hearsay testimony. Without that testimony, Petitioner would not have been convicted.

72. Counsel rendered deficient performance in failing to object to the testimony of Steve Stocking, a paramedic, that Petitioner was too calm in his opinion when the paramedics arrived in response to the 911 call. Exhibit B, pg. 838, ln. 22.

72.1. Mr. Stocking was not a psychologist or psychiatrist and had no qualifications as an expert on the appropriate reactions in a crisis.

72.2. His opinion regarding Petitioner was not relevant (IRE 401 and 402) and did not fall within the scope of admissible opinion testimony by a lay witness (IRE 701) because it involved specialized knowledge of the appropriate reaction of people in crisis.

73. Defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that there was "no way we would have missed any of the[] injuries" described in the autopsy report. Exhibit B, pg. 851, ln. 5-6.

73.1. Defense counsel failed to cross-examine Dr. Chin on this claim even though, according to Dr. Ross, some of the injuries in autopsy were old enough that they did exist when he saw [redacted] specifically, Dr. Ross testified that the

injury to the left thigh and the injuries on the back were older. Exhibit B, pg. 978, ln. 23 - pg. 979, ln.17; pg. 987, ln. 9-20.

74. Defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that what he "read in this autopsy report is the most brutal case" he had ever seen. Exhibit B, pg. 851, ln. 6-7.

74.1. This testimony was not relevant under IRE 401 and 402.

74.2. This evidence was unfairly prejudicial under IRE 403.

75. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that subarachonoid hemorrhage has to have immediate symptoms. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22.

75.1. There was insufficient foundation for that testimony as Dr. Hunter admitted that he is not a pathologist. Exhibit B, pg. 874, ln. 24-25.

76. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that [redacted] was either "ejected from an automobile" or "was beaten very severely." Exhibit B, pg. 871, ln. 12-14.

76.1. There was insufficient foundation for Dr. Hunter to give this opinion.

77. Defense counsel's performance was deficient because he failed to object 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 failed to impeach that testimony. Exhibit B, pg. 888, ln. 16-20.

77.1. This evidence was inadmissible because there was no foundation for his opinion.

77.2. Dr. Hunter's opinion could have been impeached with medical research

published in peer-reviewed medical journals.

77.3. That an affidavit with medical journal articles documenting the possibility of serious head injury from short falls will be filed in support of this Petition.

78. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's opinion, stated without any qualification as an expert, that [redacted] had sure signs of shaken baby syndrome. Exhibit B, pg. 869, ln. 4-16.

79. Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that, although he did not see certain hemorrhages in the psoas and retroperitoneal areas, he was told about them by the transplant surgeon. Exhibit B, pg. 938, ln. 20-23.

79.1. That testimony is inadmissible hearsay and violates the confrontation clause.

80. Defense counsel's performance was deficient because he failed to object to the foundation for Dr. Ross's testimony regarding the head and alleged brain injuries because Dr. Ross also testified that he had never viewed any of the slides or recuts himself. Exhibit B, pg. 959, ln. 10-15.

81. Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that Dr. Reichard's observation of a tear in the corpus callosum shows there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12.

81.1. That testimony violates the confrontation clause.

81.2. That testimony is not admissible under IRE 703.

81.3. There was no foundation for Dr. Ross's opinion about the amount of force.

82. Counsel rendered deficient performance in regard to the testimony of Dr. Deborah Harper.

82.1. Counsel failed to object or move to strike when Dr. Harper vouched for the abilities of state's witness Dr. Ross. Exhibit B, pg. 1031, ln. 12-14. ("Dr. Ross, I'm sorry to say, is no longer our – in our Medical Examiner's Office, because he is a super clinician.")

82.2. Counsel failed to object to irrelevant and unfairly prejudicial testimony regarding the estimated force needed to inflict the injuries, comparing it to the force of being hit by a car, or being dragged behind a horse, or having a horse step on Kyler's abdomen, or being hit by a baseball bat, even though there was no foundation showing she could accurately make such estimates of force. Exhibit B, pg. 1034, ln. 7-21.

83. Counsel rendered deficient performance in failing to object to the admission of photographs taken a month after Kyler's death, which included many sympathy cards sent to the family.

83.1. During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after Kyler's death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997, ln. 23; Exhibit C (State's Exhibits 4, 5 and 6).

83.2. The photos were inflammatory because they included a large display of sympathy cards sent to Lisa Nash.

84.3. If counsel had objected, the photographs would have been excluded under IRE 403 as the danger of unfair prejudice outweighed any probative value.

84. Counsel rendered deficient performance in not moving to exclude any reference by any witness to the brain autopsy because no valid chain of custody for the brain was presented.

84.1. The state failed to present any evidence that the brain examined at the pathology laboratory in New Mexico was [redacted]s brain.

85. Defense counsel's performance was deficient because he failed to move to strike the prosecutor's comments after his objection to prosecutorial misconduct during cross-examination was sustained. Exhibit B, pg. 1113, ln. 12-13.

85.1. In his cross-examination of Mr. Grove, the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11.

85.2. Defense counsel's objection was sustained, but counsel did not ask that the comments be stricken or that the jury be instructed to disregard the comments. *Id.*

86. Defense counsel's performance was deficient when he failed to object to the prosecutor asking Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12.

86.1. This questioning went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg.

1067, ln. 3-5.

87. Defense counsel's performance was deficient for failing to object to the prosecutor attempting to impeach Dr. Arden with alleged "gross mismanagement" when he was the Medical Examiner in the District of Columbia. Exhibit B, pg. 1382, ln. 6 - pg. 1388, ln. 12.

87.1. These allegations of administrative errors and allegations of sexual harassment were irrelevant under IRE 401 and 402 because they did not impeach Dr. Arden's medical testimony.

87.2. The allegations' unfair prejudice outweighed any probative value and were inadmissible under IRE 403.

87.3. The allegations were not admissible under IRE 404, nor did the state give any notice of its intent to use the evidence to the extent it claims the evidence was admissible under IRE 404(b).

88. Defense counsel's performance was deficient for failing to attempt to rehabilitate Dr. Arden on re-direct examination.

89. It was deficient performance for defense counsel to fail to introduce photographs of [redacted] taken at St. Joseph's Hospital soon after he arrived in an ambulance.

89.1. The photographs show no redness or bruising and therefore are inconsistent with the state's theory that Mr. Grove had just brutally beaten [redacted]

89.2. The photographs will be filed with the Court under separate cover.

90. Defense counsel's performance was deficient because he failed to move for a mistrial after many jurors fell asleep during the testimony. See e.g., Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25.

91. Defense counsel's performance was deficient because he introduced evidence in the direct examination of Mr. Grove regarding the bad relationship between Mr. Grove and his son Alex. Exhibit B, pg. 1074, ln. 1-24.

91.1. This evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence.

92. Defense counsel's performance was deficient because he failed to object to the prosecutor questioning Mr. Grove about the fact he was behind on child support. Exhibit B, pg. 1115, ln. 21-24

92.1. This evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence.

93. Defense counsel's performance was deficient because he failed to question paramedic David Chenalt about Lisa Nash's reaction to Kyler's injury.

93.1. Mr. Chenalt could have testified that Ms. Nash's behavior was "the most bizarre reaction we've ever seen for especially a kid call." See Grand Jury Tr. p. 214, ln. 5 - pg. 217, ln. 15.

93.2. The fact that defense counsel allowed the prosecutor to elicit evidence from a paramedic that Mr. Grove's affect was "too calm," while failing to bring out evidence from a paramedic that Lisa Nash's affect was "the most bizarre reaction we've ever seen" demonstrates the absence of a strategy regarding this type of evidence.

93.3. The Grand Jury Transcript is not attached hereto as it is a confidential document.

93.4. Mr. Grove asks the Court to take judicial notice of the Grand Jury Transcript pursuant to IRE 201(d).

94. Defense counsel's performance during closing argument was deficient because he failed to argue that the state had failed to carry its burden of proof because Dr. Reichard did not testify and the other doctors had no foundation for their opinions of when the injury happened.

95. Defense counsel's performance during the state's closing and rebuttal arguments was deficient because he failed to object to multiple instances of misconduct by the prosecutor.

96. Defense counsel's performance was deficient because he failed to move for a mistrial after the prosecutor's closing and rebuttal arguments.

97. The cumulative effect of defense counsel's deficient performance prejudiced Mr. Grove.

B. Why Relief Should be Granted.

In analyzing a claim of ineffective assistance of counsel, the Court should not look to each example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *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). As the Ninth Circuit has explained, "Separate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003).

As set forth above, there is a reasonable probability of a different result had defense

counsel's performance not been deficient. Crucial state's evidence would have been excluded, exculpatory defense evidence would have been presented, and egregious prosecutorial misconduct would have been prevented or resulted in a mistrial, or a mistrial would have been granted due to juror misconduct. Accordingly, this Court should grant the Petition.

PRAYER FOR RELIEF: ***Petitioner Requests the Following Relief:***

A. That the judgment be vacated and a new trial be granted; and/or

B. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 5TH day of September, 2012.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin

Deborah Whipple

Attorneys for Stacey Grove

VERIFICATION OF PETITION

I, Stacey Grove, being duly sworn under oath, state:

I know of the contents of the foregoing Petition for Post-Conviction Relief and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

Stacey Grove

SUBSCRIBED AND SWORN TO BEFORE ME
this 5th day of September, 2012

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: July 26, 2017

STATE OF IDAHO NOTARY PUBLIC LAURA ASHFORD

CERTIFICATE OF SERVICE

I CERTIFY that on September 7th 2012, I caused a true and correct copy of the foregoing document to be:

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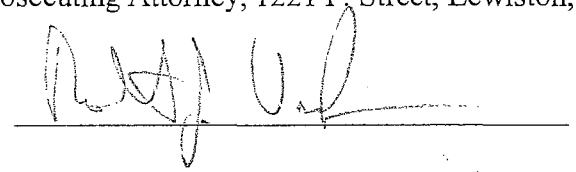
___ faxed

✓ hand delivered

to: Daniel L. Spickler, Nez Perce County Prosecuting Attorney, 1221 F. Street, Lewiston, ID 83501



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(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 ~~AFFIDAVIT OF STEVIE GROVE IN~~ **SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Stevie Grove, being duly sworn and upon oath hereby says:

1. That I was present in the courtroom during the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the trial, I observed the following five jurors sleeping during in court at various times during the proceedings: Casey Neuman; Mike Keller; Cynthia Barrett; Greg Lind; and James Yates.

3. That I observed jurors sleeping during the testimony of Dr. Marco Ross on July

22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan Arden on July 29, 2008.

4. One juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony.

5. During the trial, I witnessed prosecuting attorney Spickler repeatedly adjust his projector as the jurors were entering the courtroom prior to presentation of evidence so as to project alternating images of photographs of [redacted] during his lifetime and autopsy photos.

This ends my affidavit.

Stevie Grove

Stevie Grove

SUBSCRIBED AND SWORN TO
before me this 4 day of ~~August~~ September, 2012.

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: 5-23-13

ROBERT VAN IDOUR NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on September 7th, 2012, I caused a true and correct copy of the foregoing document to be:

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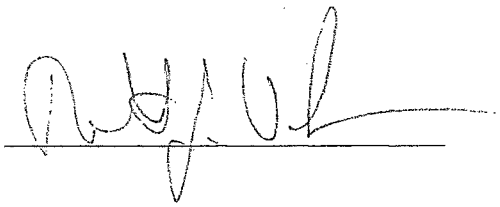
to: Daniel Spickler
Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501



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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 ~~AFFIDAVIT OF LORI STAMPER IN~~ **SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Lori Stamper, being duly sworn and upon oath hereby says:

1. That I was present on July 29, 2008, during the testimony of Dr. Jonathan Arden in the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the testimony, I observed a juror in the back row sleeping.

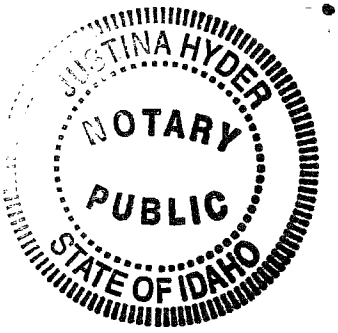
3. That juror was either Michael Keller or Kendall Loetscher.

This ends my affidavit.

Lori Stamper

SUBSCRIBED AND SWORN TO
before me this 7 day of September, 2012.

Notary Public for the State of Idaho
Residing at: Lewiston ID
My commission expires: 5/16



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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 **~~AFFIDAVIT OF CAROL GROVE IN~~ SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Carol Grove, being duly sworn and upon oath hereby says:

1. That I was present in the courtroom during the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the trial, I observed the following five jurors sleeping during in court at various times during the proceedings: Casey Neuman; Mike Keller; Cynthia Barrett; Greg Lind; and James Yates.

3. That I observed jurors sleeping during the testimony of Dr. Marco Ross on July

22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan Arden on July 29, 2008.

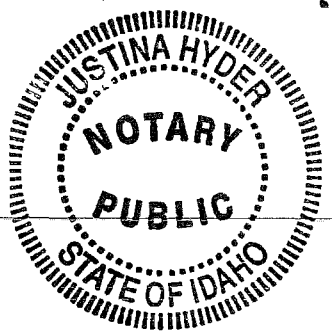
4. One juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony.

This ends my affidavit.

Carol Grove

SUBSCRIBED AND SWORN TO
before me this 4 day of ~~August~~ September, 2012.

Notary Public for the State of Idaho
Residing at: Lewiston Idaho
My commission expires: 5/16



CERTIFICATE OF SERVICE

I CERTIFY that on September 7th, 2012, I caused a true and correct copy of the foregoing document to be:

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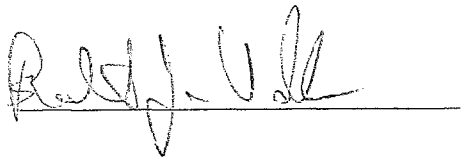

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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 **AFFIDAVIT OF LYNETTE WALTON IN SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Lynette Walton, being duly sworn and upon oath hereby says:

1. That I was present in the courtroom during the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the trial, I observed the following five jurors sleeping during in court at various times during the proceedings: Casey Neuman; Mike Keller; Cynthia Barrett; Greg Lind; and James Yates.

3. That I observed jurors sleeping during the testimony of Dr. Marco Ross on July

22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan Arden on July 29, 2008.

4. One juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony.

This ends my affidavit.

Lynette Walton

SUBSCRIBED AND SWORN TO
before me this 4 day of ~~August,~~ September 2012.

Notary Public for the State of Idaho
Residing at: Coeur d'Alene
My commission expires: 5/16

JUSTINA HYDER NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on September 7th, 2012, I caused a true and correct copy of the foregoing document to be:

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to: Daniel Spickler
Nez Perce County Prosecutor's Office
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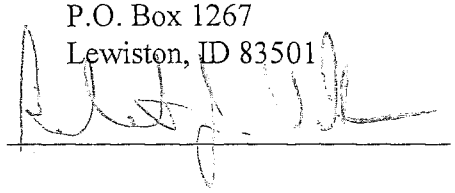

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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 **~~AFFIDAVIT OF DEBORAH GROVE~~ IN SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Deborah Grove, being duly sworn and upon oath hereby says:

1. That I was present in the courtroom during the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the trial, I observed the following five jurors sleeping during in court at various times during the proceedings: Casey Neuman; Mike Keller; Cynthia Barrett; Greg Lind; and James Yates.

3. That I observed jurors sleeping during the testimony of Dr. Marco Ross on July

22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan Arden on July 29, 2008.

4. One juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony.

5. During the trial, I witnessed prosecuting attorney Spickler repeatedly adjust his projector as the jurors were entering the courtroom prior to presentation of evidence so as to project alternating images of photographs of [redacted] during his lifetime and autopsy photos.

This ends my affidavit.

Deborah Grove

Deborah Grove

SUBSCRIBED AND SWORN TO
before me this 4th day of ~~August~~ September, 2012.

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: 5-23-12

ROBERT VAN IDOUR
NOTARY PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on September 7th, 2012, I caused a true and correct copy of the foregoing document to be:

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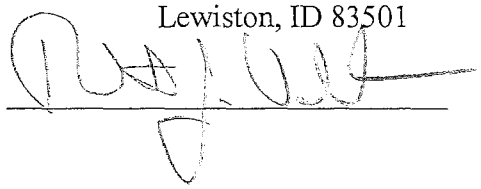

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Attorneys for Petitioner

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

STACEY GROVE,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV12-01798

~~AFFIDAVIT OF JACK GROVE IN~~ SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF

Jack Grove, being duly sworn and upon oath hereby says:

1. That I was present in the courtroom during the criminal trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the trial, I observed the following five jurors sleeping during in court at various times during the proceedings: Casey Neuman; Mike Keller; Cynthia Barrett; Greg Lind; and James Yates.

3. That I observed jurors sleeping during the testimony of Dr. Marco Ross on July

22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan Arden on July 29, 2008.

4. One juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony.

This ends my affidavit.

Jack Grove

SUBSCRIBED AND SWORN TO
before me this 4 day of ~~August~~ September, 2012.

Notary Public for the State of Idaho
Residing at: Coeur d'Alene
My commission expires: 5/16

CERTIFICATE OF SERVICE

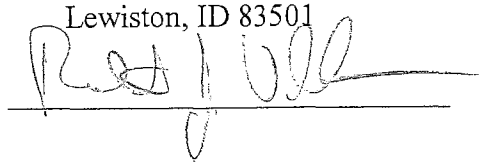
I CERTIFY that on September 7th, 2012, I caused a true and correct copy of the foregoing document to be:

___ mailed

✓ hand delivered

_____ faxed

to: Daniel Spickler
Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501



FILED

2012 SEP 13 AM 10 31

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

DEPUTY

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

STACEY GROVE,	)	
Plaintiff,	)	CASE NO. CR12-01798
vs.	)	ORDER FOR TELEPHONIC SCHEDULING CONFERENCE
STATE OF IDAHO,	)	
Defendant.	)	

IT IS HEREBY ORDERED that Thursday, the 11th day of October, 2012, at the hour of 10:45 A.M. Pacific Time in the District Court Chambers of the Nez Perce County Courthouse, Lewiston, Idaho, is the time and place set for a Telephonic Scheduling Conference in the above-entitled matter with THE COURT initiating the call.

DATED this 13th day of September, 2012.

CARL B. KERRICK- District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER FOR TELEPHONIC SCHEDULING CONFERENCE was:

___✓___ hand delivered via court basket, or

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 13th day of September, 2012, to:

Dennis Benjamin -mailed
P O Box 2772
Boise ID 83701

Nez Perce County Prosecutor
P O Box 1267
Lewiston ID 83501

PATTY O. WEEKS, Clerk

By: _____
Deputy

DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • CLERK OF BUS
EX-OFFICIO
AUDITOR AND RECORDER
STATE OF IDAHO

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 REQUEST FOR JUDICIAL NOTICE

Petitioner, Stacey Grove, asks this Court, pursuant to I.R.E. 201(d), to take judicial notice of the transcripts, files, affidavits, lodged documents, exhibits and record in the case of *State v. Stacey Grove,* Nez Perce County Case No. CR-2007-0000768, including the documents listed in the Register of Actions attached hereto as Exhibit A.

Dated this 17th day of September, 2012.

Dennis Benjamin
Attorney for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on September 17, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Daniel Spickler
Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

01/03/2012 Order for Telephonic Status Conference

01/03/2012 Hearing Scheduled (Telephonic Status Conference 01/23/2012 08:45 AM)

01/23/2012 Hearing result for Telephonic Status Conference scheduled on 01/23/2012 08:45 AM: Hearing Vacated

02/02/2012 Order for Telephonic Status Conference

02/02/2012 Hearing Scheduled (Telephonic Status Conference 02/16/2012 09:00 AM)

02/16/2012 Hearing result for Telephonic Status Conference scheduled on 02/16/2012 09:00 AM: Hearing Held

02/16/2012 Order for Telephonic Status Conference

02/16/2012 Hearing Scheduled (Telephonic Status Conference 03/13/2012 09:00 AM)

03/13/2012 Hearing result for Telephonic Status Conference scheduled on 03/13/2012 09:00 AM: Hearing Held

04/03/2012 Notice Of Service - def Nash

06/28/2012 Child Support Order Transmittal Form

08/08/2012 Stipulation to Continue Trial

08/08/2012 Notice Of Taking The Deposition of Steven Whitlock - def

08/13/2012 Order to Vacate Trial Setting

08/13/2012 Hearing result for Pretrial Conference scheduled on 08/17/2012 11:00 AM: Hearing Vacated

08/13/2012 Hearing result for Jury Trial scheduled on 08/27/2012 09:00 AM: Hearing Vacated

08/13/2012 Order For Telephonic Scheduling Conference

08/13/2012 Hearing Scheduled (Telephonic Scheduling Conference 09/14/2012 09:00 AM)

09/14/2012 Hearing result for Telephonic Scheduling Conference scheduled on 09/14/2012 09:00 AM: Hearing Held

09/14/2012 Order Setting Trial & Pre-trial Conference

09/14/2012 Hearing Scheduled (Pretrial Conference 02/15/2013 10:00 AM)

09/14/2012 Hearing Scheduled (Jury Trial 02/25/2013 09:00 AM)

State of Idaho vs. Stacey Lewis Grove
No hearings scheduled

Case: **CR-2007-0000768** **District** Judge: **Carl B. Kerrick** Amount due: **$23,450.73** **Closed pending clerk action**

Charges:	Violation Date	Charge	Citation	Disposition
	07/10/2006	**I18-4001-I Murder I Arresting Officer: Lewiston City,, LPD**		**Finding: Guilty Disposition date: 01/28/2009 Fines/fees: $97.50 Det Penitentiary: 22 years**

Register of actions:

Date	
01/26/2007	New Case Filed-Felony
01/26/2007	Prosecutor Assigned Daniel L Spickler
01/26/2007	Indictment

EXHIBIT A

01/26/2007	Warrant Issued - Arrest Bond amount: 100000.00 Defendant: Grove, Stacey Lewis
01/26/2007	Notice Of Appearance
01/26/2007	Request For Discovery-defendant
01/26/2007	Defendant: Grove, Stacey Lewis Attorney Retained Scott M Chapman
01/26/2007	Exhibits to Deanna for appeal process.
01/29/2007	Warrant Returned Defendant: Grove, Stacey Lewis
01/29/2007	Case Status Changed: Activate (previously inactive)
01/29/2007	Notification Of Rights-felony
01/29/2007	Hearing Scheduled (Arraignment 01/29/2007 04:00 PM)
01/29/2007	Request and Order to Photograph--Tribune
01/29/2007	Request to Broadcast
01/29/2007	Order To Broadcast--KLEW
01/29/2007	Hearing result for Arraignment held on 01/29/2007 04:00 PM: Hearing Held
01/29/2007	Hearing Scheduled (Arraignment 02/01/2007 02:00 PM)
01/29/2007	Notice Of Hearing
01/31/2007	Request to Broadcast--KLEW
01/31/2007	Order to Broadcast--granted---KLEW
02/01/2007	Hearing result for Arraignment held on 02/01/2007 02:00 PM: Arraignment / First Appearance
02/01/2007	Appear & Plead Not Guilty - NG (I18-4001-I Murder I)
02/01/2007	Minute Entry Hearing type: Arraignment Hearing date: 2/1/2007 Time: 2:14 pm Court reporter: Nancy Towler Audio tape number: DC# 3834
02/01/2007	Hearing Scheduled (Jury Trial 06/18/2007 09:00 AM)
02/01/2007	Hearing Scheduled (Final Pretrial 06/04/2007 10:00 AM)
02/01/2007	Hearing Scheduled (Pretrial Motions 05/11/2007 09:00 AM)
02/02/2007	Order Setting Jury Trial & Scheduling Procedings
02/02/2007	Motion for Preparation of Grand Jury Transcript and Disclosure of Vote--def
02/02/2007	Order Granting Motion
02/06/2007	Notice of Intent not to Seek the Death Penalty--state
02/06/2007	Response To Request For Discovery-plaintiff
02/08/2007	Bond Posted - Surety (Amount 50000.00)
02/08/2007	Bond Posted - Surety (Amount 50000.00)
02/13/2007	1st Supplemental Response to Request for Discovery--state
02/15/2007	Transcript Filed---Grand Jury Proceedings January 22, 23, 25 & 26, 2007
03/07/2007	2nd Supplemental Response to Request for Discovery--state
03/21/2007	Request For Discovery-plaintiff
04/12/2007	3rd Supplemental Response to Request for Discovery--state
04/16/2007	Order Setting Jury Trial and Scheduling Proceedings
04/17/2007	Continued (Jury Trial 12/03/2007 09:00 AM)
04/17/2007	Continued (Final Pretrial 11/16/2007 09:00 AM)
04/17/2007	Continued (Pretrial Motions 06/18/2007 09:00 AM)
04/17/2007	Hearing Scheduled (Status Conference 07/13/2007 09:00 AM)
04/17/2007	Hearing Scheduled (Status Conference 10/26/2007 09:00 AM)
05/11/2007	Stipulation to Continue Briefing Schedules
05/14/2007	Waiver Of Speedy Trial
05/15/2007	Order Continuing Briefing Schedules

05/18/2007	Motion in Limine to Exclude Testimony of Polygraph Results--state
05/18/2007	Motion in Limine to Exclude Testimony of Lisa Nash's Character and/or prior acts--state
05/18/2007	Motion to Allow Witnesses to Review the Transcript of Their Grand Jury Testimony--state
05/18/2007	Pretrial Motions--def
05/25/2007	Motion for Continuance of Pretrial Motion Hearing--state
05/25/2007	Order for Continuance of Pretrial Motion Hearing
05/25/2007	Order Allowing Witnesses to Review the Transcript of Their Grand Jury Testimony
05/25/2007	Continued (Pretrial Motions 07/23/2007 09:00 AM)
06/27/2007	4th Supplemental Response to Request for Discovery--state
06/27/2007	Supplemental Request for Discovery--state
07/13/2007	Hearing result for Status Conference held on 07/13/2007 09:00 AM: Hearing Held
07/13/2007	Continued (Pretrial Motions 09/07/2007 09:00 AM)
07/13/2007	Order Setting Briefing Schedule and Motion Hearing
08/14/2007	Motion to Extend Briefing Schedule and Reset Pretrial Hearing--def
08/14/2007	Affidavit of Scott Chapman--def
08/15/2007	Amended Order Setting Briefing Schedule and Motion Hearing
08/15/2007	Continued (Pretrial Motions 10/09/2007 11:00 AM)
09/24/2007	Response To Request For Discovery-defendant
09/24/2007	Brief Support Defendant's Pretrial Motions--def
10/02/2007	Stipulation and Motion for Continuance of Final Pretrial Conference
10/03/2007	Brief in Opposition to Defendant's Pretrial Motions
10/09/2007	Continued (Pretrial Motions 10/12/2007 02:00 PM)
10/09/2007	Order for Continuance of FInal Pretrial Conference
10/09/2007	Minute Entry Hearing type: Pretrial Motions Hearing date: 10/9/2007 Time: 11:20 am Court reporter: Towler Audio tape number: 3948
10/09/2007	Continued (Final Pretrial 11/20/2007 11:00 AM)
10/12/2007	Minute Entry Hearing type: Pretrial Motions Hearing date: 10/12/2007 Time: 2:00 pm Court reporter: Towler Audio tape number: 3953
10/12/2007	Hearing result for Pretrial Motions held on 10/12/2007 02:00 PM: Hearing Held
10/25/2007	Continued (Status Conference 11/02/2007 10:30 AM)
10/25/2007	Notice Of Hearing
10/25/2007	Opinion & Order on Pretrial Motions
10/30/2007	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: LANDECK WESTBERG JUDGE & GRAHAM Receipt number: 0304771 Dated: 10/30/2007 Amount: $19.00 (Check)
11/01/2007	Motion to Vacate--def
11/01/2007	Affidavit in Support of Motion to Vacate--def
11/01/2007	Motion to Reconsider--def
11/01/2007	Motion to Compel---def
11/01/2007	Motion to Allow for Juror Questionnaire--def
11/02/2007	Notice of Hearing--def
11/02/2007	Hearing result for Status Conference held on 11/02/2007 10:30 AM: Hearing Held IN CHAMBERS
11/02/2007	Hearing Scheduled (Hearing on Motions 11/07/2007 04:00 PM) Defendant's Motion to Vacate Trial Setting

11/07/2007	Hearing result for Hea...g on Motions held on 11/07/2007 04:00 PM: Motion Granted Defendant's Motion to Vacate Trial Setting
11/07/2007	Minute Entry Hearing type: Defendant's Motion to Continue Trial Hearing date: 11/7/2007 Time: 4:01 pm Court reporter: Nancy Towler Audio tape number: DC# 3938
11/15/2007	Affidavit Of Service--UNSERVED Dr. Noelle Westrum
11/15/2007	Affidavit Of Service--SERVED Valley Medical Center, Carmen Stolte PA
11/15/2007	Affidavit Of Service--SERVED Valley Medical Center, Dr. Gregory Schultz
11/15/2007	Affidavit Of Service--SERVED Valley Medical Center, keeper of the records Donna Ernsdorff
11/15/2007	Affidavit Of Service--SERVED St Joseph Medical Center, Sabrina Tschirgi records keeper
11/15/2007	Affidavit Of Service---SERVED Idaho Dept of Health & Welfare, Gaylene Strandbakke records keeper
11/16/2007	Hearing Scheduled (Hearing on Motions 12/10/2007 09:00 AM) Defendant's Motion to Reconsider
11/16/2007	Motion to Quash Subpoena
11/20/2007	Hearing result for Final Pretrial held on 11/20/2007 11:00 AM: Hearing Held
11/20/2007	Hearing result for Jury Trial held on 12/03/2007 09:00 AM: Hearing Vacated
11/20/2007	Hearing Scheduled (Jury Trial 04/21/2008 09:00 AM)
11/20/2007	Hearing Scheduled (Pretrial Conference 03/21/2008 09:00 AM)
11/20/2007	Hearing Scheduled (Hearing 02/15/2008 09:00 AM) conference to finalize juror questionnaire
11/20/2007	~~Hearing Scheduled (Hearing 04/07/2008 09:00 AM) completion of juror~~ questionnaire by jury panel
11/20/2007	Hearing Scheduled (Hearing 04/09/2008 09:00 AM) Voir dire in open court/individual voir dire
11/20/2007	Hearing Scheduled (Hearing 04/10/2008 09:00 AM) individual voir dire/jury selection
11/20/2007	Order Setting Jury Trial & Scheduling Proceedings
11/26/2007	Affidavit Of Service
11/26/2007	Affidavit Of Service
11/26/2007	Affidavit Of Service
11/26/2007	Affidavit of Service
11/26/2007	Affidavit Of Service
12/10/2007	Hearing result for Hearing on Motions held on 12/10/2007 09:00 AM: Hearing Held Defendant's Motion to Reconsider
01/04/2008	Opinion & Order on Defendant's Pretrial Motion for Discovery of Documents--Idaho Dep Health and Welfare, Family and Children's Services' Motion to Quash Subpoean--DENIED. Motion to Review Records--GRANTED, all records shall remain under seal and not be disseminated to the public consistent with the foregoing opinion
02/15/2008	Hearing result for Hearing held on 02/15/2008 09:00 AM: Hearing Held conference to finalize juror questionnaire
02/15/2008	Hearing Scheduled (Hearing 03/07/2008 09:00 AM) motion to reconsider
03/07/2008	Hearing result for Hearing held on 03/07/2008 09:00 AM: Hearing Held motion to reconsider
03/07/2008	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pgs
03/14/2008	Continued (Pretrial Conference 03/27/2008 09:00 AM)
03/14/2008	Notice Of Hearing
03/21/2008	Opinion & Order on Def's Motion for Reconsideration
03/26/2008	1st Supp Response To Request For Discovery-defendant

03/26/2008 1st Supp Response to Request For Discovery-defendant

03/26/2008 2nd Supp Response To Request For Discovery-defendant

03/27/2008 Motion in Limine to Exclude Testimony of an Alternate Perpetrator---state

03/27/2008 Hearing result for Final Pretrial held on 03/27/2008 09:00 AM: Hearing Held (in Chambers)

03/27/2008 Continued (Hearing 04/16/2008 09:00 AM) completion of juror questionnaire by jury panel

04/02/2008 Continued (Hearing 04/17/2008 09:00 AM) individual voir dire/jury selection

04/02/2008 Continued (Hearing 04/18/2008 09:00 AM) Voir dire in open court/individual voir dire

04/03/2008 Hearing Scheduled (Hearing 04/08/2008 11:00 AM) Mtn to Quash Subpoena Dr. Schultz

04/03/2008 Motion for Order to Shorten Time for Hearing

04/03/2008 Notice of Hearing re: Motion for Order to Shorten Time for Hearing

04/03/2008 Motion to Quash Subpoena

04/03/2008 Affidavit of Gregory P. Schultz in Support Motion to Quash Subpoena

04/03/2008 Notice of Hearing re: Motion to Quash Subpoena

04/04/2008 Acceptance of Service--Bryan Cridlebaugh

04/04/2008 Acceptance of Service--Donnie Stamper

04/07/2008 Order Shortening Time for Hearing

04/08/2008 Hearing result for Hearing held on 04/08/2008 11:00 AM: Case Taken Under Advisement Mtn to Quash Subpoena Dr. Schultz

04/08/2008 District Court Hearing Held Court Reporter: Number of Transcript Pages for this hearing estimated: less than 100 pgs

04/08/2008 Minute Entry Hearing type: Hearing on Motions Hearing date: 4/8/2008 Time: 11:11 am Court reporter: Towler Audio tape number: 4047

04/08/2008 3rd Supplemental Response to Request for Discovery--def

04/10/2008 Amended Order setting jury trial and scheduling

04/10/2008 Continued (Hearing 07/16/2008 09:00 AM) completion of juror questionnaire by jury panel

04/10/2008 Continued (Hearing 07/17/2008 09:00 AM) individual voir dire/jury selection

04/10/2008 Continued (Hearing 07/18/2008 09:00 AM) Voir dire in open court/individual voir dire

04/10/2008 Continued (Jury Trial 07/21/2008 09:00 AM)

04/10/2008 Hearing Scheduled (Final Pretrial 06/27/2008 10:00 AM)

04/10/2008 Affidavit Of Service---Andrea Williams 4-4-08

04/16/2008 Affidavit Of Service Andrea Williams 4-11-08

04/18/2008 5th Supplemental Response to Request for Discovery--state

04/18/2008 Motion for Release of Evidence--state

04/21/2008 Order for Release of Evidence

04/22/2008 Acceptance of Service Julie Grove

04/22/2008 Acceptance of Service Brandon Krueger

04/23/2008 Acceptance of Service DONNIE STAMPER

04/23/2008 Acceptance of Service BRYAN CRIDLEBAUGH

04/23/2008 Acceptance of Service RONNIE STAMPER

04/23/2008 Acceptance of Service LORI STAMPER

04/25/2008 Affidavit Of Service- CRYSTAL HANSON

04/25/2008 Affidavit Of Service--JOSEPHINE LIGHT

04/25/2008 Affidavit Of Service--JON PETRIE

04/25/2008 Affidavit Of Service--G[illegible]ORY SCHULTZ MD

04/25/2008 Affidavit Of Service--R. TODD PARKEY MD

04/25/2008 Affidavit Of Service--CRAIG N. AMBROSEN MD

04/25/2008 Affidavit Of Service--CRAIG BURNS

04/25/2008 Affidavit Of Service--DAVID CHENAULT

04/25/2008 Affidavit Of Service--MIKE SCHMIDT

04/25/2008 Affidavit Of Service--STEVE STOCKING

04/25/2008 Affidavit Of Service--TODD MARTIN

04/25/2008 Affidavit Of Service--JESSE JACOBS

04/25/2008 Affidavit Of Service--COURTNEY JACOBS

04/25/2008 Affidavit Of Service--JONI DRAKE

04/25/2008 Affidavit Of Service--JONI DRAKE

04/25/2008 Affidavit Of Service--JESSE JACOBS

04/25/2008 Affidavit Of Service--COURTNEY JACOBS

04/25/2008 Affidavit Of Service--TODD MARTIN

04/25/2008 Affidavit Of Service--CRAIG BURNS

04/25/2008 Affidavit Of Service--BRIAN FREI RN

04/25/2008 Affidavit Of Service--DONALD CHIN MD

04/25/2008 Affidavit Of Service--LISA BOMLEY

04/25/2008 Affidavit Of Service--CRYSTAL HANSON

04/25/2008 Affidavit Of Service--JON PETRIE

04/25/2008 Affidavit Of Service--BRIAN BIRDSELL

04/25/2008 Affidavit Of Service--JOSEPHINE LIGHT

04/25/2008 Affidavit Of Service--DAVID CHENAULT

04/25/2008 Affidavit Of Service--MIKE SCHMIDT

04/25/2008 Affidavit Of Service--STEVE STOCKING

04/25/2008 Affidavit Of Service--GREGORY SCHULTZ MD

04/25/2008 Affidavit Of Service--R TODD AMBROSEN MD

04/25/2008 Affidavit Of Service--SHARI SUMMERS RN

04/25/2008 Affidavit Of Service--CORY BLAIR

04/25/2008 Affidavit Of Service--LISA BOMLEY

06/26/2008 6th Supplemental Response to Request for Discovery--state

06/27/2008 Hearing result for Final Pretrial held on 06/27/2008 10:00 AM: Hearing Held (in Chambers)

06/27/2008 Hearing Scheduled (Hearing 07/08/2008 01:30 PM) pick names go over exhibits

06/30/2008 Rule 16(c) Supplemental Response to Request for Discovery--Defendant

07/07/2008 4th Supp Response To Request For Discovery-defendant

07/08/2008 Hearing result for Hearing held on 07/08/2008 01:30 PM: Hearing Held pick names go over exhibits (in Chambers)

07/10/2008 State's Requested Instructions

07/10/2008 Affidavit Of Service Jonathan Ockwell

07/14/2008 Supp Motion in Limine

07/16/2008 Hearing result for Hearing held on 07/16/2008 09:00 AM: Hearing Held completion of juror questionnaire by jury panel

07/16/2008 Stipulation for Authentication of Evidence at Trial

07/16/2008 Minute Entry Hearing type: Jury Trial Hearing date: 7/16/2008 Time: 9:00 am Court reporter: Nancy Towler Audio tape number: 4096-4114

07/18/2008 Hearing result for Hearing held on 07/17/2008 09:00 AM: Hearing Held

07/18/2008	individual voir dire/jury selection
07/18/2008	Hearing result for Hearing held on 07/18/2008 09:00 AM: Hearing Held Voir dire in open court/individual voir dire
07/18/2008	Order for Ahthentication of Evidence at Trial
07/18/2008	Request to Obtain Approval to Broadcast Photograph (KLEW)
07/21/2008	Continued (Jury Trial 07/22/2008 09:00 AM)
07/21/2008	Request to Obtain Approval to Broadcast Photograph (Tribune)
07/22/2008	Continued (Jury Trial 07/23/2008 09:00 AM)
07/22/2008	Affidavit Of Service Marsha Burns
07/22/2008	Affidavit Of Service Lisa Nash
07/23/2008	Continued (Jury Trial 07/24/2008 09:00 AM)
07/24/2008	Continued (Jury Trial 07/25/2008 09:00 AM)
07/25/2008	Continued (Jury Trial 07/28/2008 09:00 AM)
07/25/2008	Motion to exclude testimony of Jason Eldred and Becy Overall
07/25/2008	Response to Motion to exclude testimony of Jason Eldred and Rebecca Overall
07/25/2008	Def's Proposed Jury Instructions
07/28/2008	Continued (Jury Trial 07/29/2008 09:00 AM)
07/29/2008	Continued (Jury Trial 07/30/2008 09:00 AM)
07/30/2008	District Court Hearing Held Court Reporter:Nancy Towler Number of Transcript Pages for this hearing estimated: trial 1275
07/30/2008	Hearing result for Jury Trial held on 07/30/2008 09:00 AM: Hearing Held
07/30/2008	Hearing Scheduled (Status Conference 07/31/2008 11:00 AM)
07/30/2008	Jury Verdict
07/30/2008	Found Guilty After Trial
07/30/2008	Instructions Submitted to the Jury
07/30/2008	Estimated Reporter's Transcript Costs
07/31/2008	Hearing result for Status Conference held on 07/31/2008 11:00 AM: Hearing Vacated
08/06/2008	Hearing Scheduled (Sentencing 10/22/2008 09:00 AM)
08/06/2008	Presentence Investigation Ordered DUE 10-1-08
08/06/2008	Hearing Scheduled (Hearing 08/21/2008 11:00 AM) re: PSI
08/07/2008	PSI Order
08/12/2008	Motion for Acquital or, in the Alternative, a New Trial--def
08/21/2008	Hearing result for Hearing held on 08/21/2008 11:00 AM: District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
08/21/2008	Minute Entry Hearing type: PSI Hearing date: 8/21/2008 Time: 11:00 am Court reporter: Nancy Towler Audio tape number: DC#4123
08/27/2008	Miscellaneous Payment: Miscellaneous Fees Paid by: Justine Foster Receipt number: 0320188 Dated: 8/27/2008 Amount: $2.00 (Cash)
09/23/2008	Order for Telephonic Status Conference
09/23/2008	Hearing Scheduled (Telephonic Status Conference 09/29/2008 10:30 AM)
09/29/2008	Hearing result for Telephonic Status Conference held on 09/29/2008 10:30 AM: Hearing Held (in Chambers)
09/29/2008	Continued (Sentencing 11/24/2008 09:00 AM)
09/29/2008	Notice Of Hearing
10/29/2008	Hearing Scheduled (Hearing on Motions 11/10/2008 11:00 AM)
10/29/2008	Notice Of Hearing
10/30/2008	PSI received--copies delivered by messenger to prosecutor and Scott Chapman

[illegible]	Chapman
11/05/2008	Hearing result for Sentencing held on 11/24/2008 09:00 AM: Hearing Vacated
11/05/2008	Continued (Hearing on Motions 11/24/2008 09:00 AM)
11/06/2008	Hearing Order
11/21/2008	Brief in Support of Defendant's Pretrial Motions
11/24/2008	Minute Entry Hearing type: Defs Motion for Aquittal or New Trial Hearing date: 11/24/2008 Time: 8:58 am Court reporter: Nancy Towler Audio tape number: CRTRM 1
11/24/2008	Hearing result for Hearing on Motions held on 11/24/2008 09:00 AM: Case Taken Under Advisement
12/16/2008	Opinion & Order ON Defendant's Motion for Acquittal or, in the Alternativea New Trial--DENIED
12/29/2008	Hearing Scheduled (Sentencing 01/28/2009 09:00 AM)
12/29/2008	Notice Of Hearing
01/26/2009	Sentencing Exhibits--def
01/27/2009	Request to Broadcast--Lewiston Morning Tribune
01/27/2009	Request to Broadcast---APPROVED Lewiston Morning Tribune
01/28/2009	Request and Order to Broadcast--APPROVED--KLEW
01/28/2009	Minute Entry Hearing type: Sentencing Hearing date: 1/28/2009 Time: 9:03 am Court reporter: Nancy Towler Audio tape number: CRTRM 1
01/28/2009	Commitment
01/28/2009	Motion to Withdraw and Appoint Public Defender
01/28/2009	Affidavit of Scott Chapman
01/28/2009	Hearing result for Sentencing held on 01/28/2009 09:00 AM: District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
01/28/2009	Case Status Changed: closed pending clerk action
01/28/2009	Sentenced To Incarceration (I18-4001-I Murder I) Confinement terms: Penitentiary determinate: 22 years to life
01/28/2009	Surety Bond Converted / Exonerated (Amount 50,000.00)
01/28/2009	Surety Bond Converted / Exonerated (Amount 50,000.00)
01/28/2009	Commitment
01/28/2009	Motion to Withdraw and Appoint Public Defender
01/28/2009	Affidavit of Scott Chapman
01/28/2009	Order for Bond Release
01/28/2009	Confidential Order
01/28/2009	Judgment of Conviction
01/28/2009	Presentence Investigation Sealed In File
01/28/2009	Order for Withdrawal
01/29/2009	Order Appointing Public Defender
01/30/2009	Notice of Conviction
02/04/2009	Order For Restitution And Judgment STATE OF IDAHO MEDICAID $17,730.34 INST #766812
02/04/2009	Order For Restitution And Judgment CRIME VICTIMS FUND $622.89 INST #766813
02/04/2009	Order for Fine Pursuant to §19-5307 LISA M. NASH $2,500.00 INST #766811
02/04/2009	Order for Fine Pursuant to §19-5307 TODD D. MARTIN $2,500.00 INST #766810
02/13/2009	Appealed To The Supreme Court
02/13/2009	Notice Of Appeal

02/24/2009	Motion to Appoint SAPD and Affidavit of Counsel
02/26/2009	Order Appointing State Appellate Public Defender
02/26/2009	Defendant: Grove, Stacey Lewis Attorney Retained Molly J. Huskey
03/09/2009	Supreme Court Receipt - Clerk's Certificate filed at the SC
03/09/2009	Supreme Court Receipt - Clerk's Record and Reporter's Transcript due at SC by June 12, 2009
03/31/2009	Amended Notice of Appeal
04/13/2009	Supreme Court Receipt - Amended Notice of Appeal filed at the SC
04/30/2009	Order Granting Court Reporter's Motion for Extension of Time
05/28/2009	Motion for Release Pending Appeal--def
05/29/2009	Order
07/20/2009	Supreme Court Receipt - Court Reporter's Motion for Extension of Time
07/24/2009	Supreme Court Receipt - Clerk's Record and Reporter's Transcripbt - The Clerk's Record and Reporter's Transript must be filed at the SC by October 2, 2009
07/24/2009	Supreme Court Receipt - Order Granting Court Reporter's Second Motion for Extension of Time
07/24/2009	Affidavit of Janet Kough
07/27/2009	Order Rescinding Instrument Number 771384 INST #771860
08/19/2009	Notice Of Service of Clerk's Record and Reporter's Transcript
09/28/2009	Supreme Court Receipt - Appeal Record filed at the SC
11/02/2009	Supreme Court Reeipt - Motion to Augment - Due Dates Suspended
11/04/2009	Supreme Court Receipt - Briefing Due Dates Suspended
11/04/2009	Order Granting Motion to Augment and to Suspend the Briefing Schedule
11/05/2009	Supreme Court Receipt - Document filed at the SC
11/23/2009	Supreme Court Receipt - Briefing Resumed
11/23/2009	Supreme Court Receipt - Order to Withdraw Order to Augment Record with Requested Transcripts and Reset Briefing Schedule
01/26/2010	Supreme Court Receipt - Due Dates Suspended
02/02/2010	Supreme Court Receipt - Order to Augment the Record and Reset the Briefing Schedule
02/02/2010	Supreme Court Receipt - Briefing due dates are Suspended
02/09/2010	Affidavit of DeAnna P. Grimm
03/22/2010	Order re: Appellant's Brief
03/26/2010	Order re: Appellant's Brief
05/20/2010	Supreme Court Receipt - Order re: Appellant's Brief, due on or before June 11, 2010 - no furrther extensions of time to file appellant's brief shall be granted
10/06/2010	Supreme Court Receipt - Motion to Suspend - All Due Dates Suspended
10/07/2010	Supreme Court Receipt - Objection to Motion to Suspend filed
11/19/2010	Supreme Court Receipt - Appellant Reply Brief filed at the SC
03/11/2011	Supreme Court Receipt - Additional Authorities filed at the SC
03/28/2011	Supreme Court Receipt - Opinion - Grove's conviction of first degree felony murder, by aggravated battery of a child under twelve years old, is affirmed.
05/26/2011	Supreme Court Receipt - Brief in Support of Petition for Review filed at the SC
05/26/2011	Supreme Court Receipt - Document filed at the SC
09/20/2011	Remittitur
10/06/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Danny Radakovich Receipt number: 0016855 Dated: 10/6/2011 Amount: $28.00 (Check)

Dated: 10/6/2011 Amt . $38.00 (Check)

10/07/2011 Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Danny Radakovich Receipt number: 0016866 Dated: 10/7/2011 Amount: $4.00 (Check)

Perfection Tire of Lewiston LLC vs. Stacey Lewis Grove

Case:**CV-2002-0002402** **Magistrate** Filed: **10/24/2002** Subtype: **Small Claims** Judge: **Michael Griffin** Status: **Closed 12/19/2002**

Defendants: **Grove, Stacey Lewis**
Plaintiffs: **Perfection Tire of Lewiston LLC**

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
12/26/2002	Default Judgment			Grove, Stacey Lewis (Defendant), Perfection Tire of Lewiston LLC (Plaintiff)	Plaintiff
Comment:				Judgment amount: 289.42	

Register of actions:

Date	
10/24/2002	New Case Filed
10/24/2002	Filing: H - Small Claims Paid by: Perfection Tire (plaintiff) Receipt number: 0215195 Dated: 10/24/2002 Amount: $35.00 (Check)
10/24/2002	Claim And Complaint
10/24/2002	Summons Filed
10/28/2002	Return Of Service on 10/24/02
11/18/2002	Hearing Scheduled (Hearing 12/19/2002 11:30 AM)
11/18/2002	Notice Of Hearing
12/19/2002	Hearing result for Hearing held on 12/19/2002 11:30 AM: Hearing Held
12/19/2002	Hearing result for Hearing held on 12/19/2002 11:30 AM: Disposition With Hearing
12/19/2002	Judgment-$289.42 Default
12/19/2002	Case Status Changed: closed
12/26/2002	Perfection Tire, Plaintiff vs Stace Grove, Defendant: Final Judgement, Order Or Decree Entered
05/21/2003	Miscellaneous Payment: Writs Of Execution Paid by: Perfection Tire Receipt number: 0225035 Dated: 05/21/2003 Amount: $2.00 (Check)
05/21/2003	Application For Continuous Writ
05/21/2003	Writ Issued
08/14/2003	Satisfaction Of Judgment
08/14/2003	Writ Returned-Satisfied

Credit Bureau of Lewiston-Clarkston Inc vs. Stacey Lewis Grove

Case:**CV-2002-0002056** **Magistrate** Filed: **09/09/2002** Subtype: **Other Claims** Judge: **Greg K. Kalbfleisch** Status: **Closed 06/26/2003**

Defendants: **Grove, Stacey Lewis**
Plaintiffs: **Credit Bureau of Lewiston-Clarkston Inc**

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
06/26/2003	Dismissal of Case			Grove, Stacey Lewis (Defendant), Credit Bureau of Lewiston-Clarkston Inc (Plaintiff)	Plaintiff

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA# 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 **~~AFFIDAVIT OF KAREN STAMPER~~ IN SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Karen Stamper, being duly sworn and upon oath hereby says:

1. That I was present during the testimony of state's witness Dr. Marco Ross in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the testimony, I observed jurors sleeping.

3. That I observed the third juror in the back row sleeping.

4. That I observed a juror in the front row sleeping.

5. That I observed the prosecuting attorney showing photographs of the autopsy of [redacted] Martin on the overhead screen prior to the commencement of court.

6. That while the prosecutor was showing the autopsy photographs, I observed Juror Number 4 talking with a bailiff within sight of the screen.

7. That on July 29, 2008, during the lunch recess from the trial, I was at the Taco Time in Lewiston, Idaho, with three other people.

8. That during that time, my companions and I were discussing the trial.

9. That during the discussion, my son noticed a juror sitting directly behind us in a place where he could clearly hear our conversation.

10. That we immediately stopped our conversation.

11. That the juror did not inform us of his presence, leave our vicinity, nor speak to us.

This ends my affidavit.

Karen Stamper

SUBSCRIBED AND SWORN TO
before me this 26 day of September, 2012.

JUSTINA HYDER NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: 5/16

CERTIFICATE OF SERVICE

I CERTIFY that on September 26, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Daniel Spickler
Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501

Dennis Reyna

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA# 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV12-01798 **AFFIDAVIT OF CRAIG STAMPER IN SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION RELIEF**

Craig Stamper, being duly sworn and upon oath hereby says:

1. That I was present during the trial proceedings in *State v. Grove,* No. CR-2007-0000768, held before the Honorable Carl B. Kerrick in Lewiston, Idaho.

2. That during the testimony, I twice observed a juror in the back row sleeping.

3. That this sleeping juror leaned back to rest his head on the wall as he slept.

4. That I observed the prosecutor showing slides of the autopsy of [redacted] of Martin on the screen as the jurors were entering the courtroom prior to the official commencement of

court.

This ends my affidavit.

Craig Stamper

Craig Stamper

SUBSCRIBED AND SWORN TO
before me this 26 day of September, 2012.

Notary Public for the State of Idaho
Residing at: Twin Falls
My commission expires: 5/16

JUSTINA HYDER
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on September 28, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Daniel Spickler
Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501

ORIGINAL

DANIEL L. SPICKLER
Prosecuting Attorney

NANCE CECCARELLI
Deputy Prosecutor
Nez Perce County, Idaho
Post Office Box 1267
Lewiston, Idaho 83501
Telephone (208) 799-3073
ISBN 7787

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

STACEY L. GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV2012-0001798 MOTION FOR SUMMARY DISPOSITION AND DISMISSAL AND TO SET FOR HEARING

COMES NOW, Respondent, State of Idaho, by and through its attorney of record, NANCE CECCARELLI, Deputy Prosecuting Attorney, Nez Perce County, Idaho, and moves this Court for Summary Disposition and Dismissal of Petitioner's Application for Post-Conviction Relief as it presents no genuine issue of material fact, raises issues decided in other appeals, fails to state a claim upon which relief may be granted, and, the Respondent is entitled to judgment as a matter of law pursuant to Idaho Code § 19-4906(c).

Further, that this matter be set for hearing at a time convenient for the Court.

DATED this 5th day of October, 2012.

NANCE CECCARELLI
Deputy Prosecuting Attorney

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a full, true, complete and correct copy of the foregoing MOTION FOR SUMMARY DISPOSITION AND DISMISSAL AND TO SET FOR HEARING was

(1) _____ hand delivered, or

(2) _____ hand delivered via court basket, or

(3) _____ sent via facsimile, or

(4) ✓ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Deborah Whipple
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

DATED this 5th day of October, 2012.

Joan C. Way

JOAN C. WAY
Civil Legal Assistant

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **OBJECTION TO STATE'S MOTION FOR SUMMARY DISPOSITION AND MOTION FOR A MORE DEFINITE STATEMENT** (Oral Argument Requested)

Petitioner, Stacey Grove, objects to the State's Motion for Summary Disposition and Dismissal because it fails to adequately set forth the basis for the motion. Petitioner also moves, pursuant to I.R.C.P. 12(e), for a more definite statement before he is required to interpose a responsive pleading.

Post-conviction relief proceedings are governed by the Idaho Rules of Civil Procedure, *Stuart v. State*, 127 Idaho 806, 813, 907 P.2d 783, 790 (1995), and Rule 7(b)(1) requires that "[a]n application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor[.]" *See Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d

795, 798 (1995) (applying rule to post-conviction proceedings). The Court of Appeals wrote in *Martinez v. State*, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995):

> It is clear that in summary judgment proceedings the nonmovant is required to respond only to alleged grounds for summary judgment asserted by the moving party. The nonmovant need not address any aspect of the nonmovant's case that has not been challenged by the opposing party's motion. . . . In *Mason* [*v. Tucker and Associates*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994)], we emphasized the necessity of notice of the grounds for a motion in order to afford the nonmovant an opportunity to address the issues raised and present evidence and legal argument directed to those issues.

See also, DeRushé v. State, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) (Rule 7(b)(1) requires grounds be stated with "reasonable particularity"), *citing Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264–65 (1965).

Rule 12(e) gives the Court authority to order a more definite statement in cases where a pleading "is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading[.]"

Here, the state's motion consists of a single desultory paragraph consisting of nothing more than timeworn boilerplate allegations which are not linked to particular claims in the Petition and do not provide notice to the Court or Petitioner of an actual reason to grant the state relief. The motion fails to even mention any of the claims raised in the thirty-five page long Petition and it fails to address any of Petitioner's arguments made in support of those claims. See Verified Petition, p. 10-12 (argument regarding confrontation clause claim); p. 18-19 (argument regarding prosecutorial misconduct claim); p. 20-21 (argument regarding juror misconduct claim); p. 20-23 (argument regarding ineffective assistance of appellate counsel claim); and p. 34-35 (argument regarding the ineffective assistance of trial counsel claim). It also

fails to mention any of the eight affidavits filed in support of the Petition. Mr. Grove is not able to respond to the state's motion because there are no actual arguments advanced in support of its request.

Therefore, the Court pursuant to I.C.R. 12(e) should order the state to file a motion compliant with Rule 7(b)(1) before Mr. Grove should be expected to respond.

Oral argument is requested.

Respectfully submitted this 10TH day of October, 2012.

Dennis Benjamin for
Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on October 10, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

X faxed to (208) 799-3080

X emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
Deputy Nez Perce County Prosecutor
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Dennis Benjamin

FILED

2012 OCT 15 PM 2 01

PATTY O. WEEKS
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **ORDER GRANTING REQUEST FOR JUDICIAL NOTICE**

THE COURT, having considered Petitioner's Motion, pursuant to I.R.E. 201(d), to take judicial notice of the transcripts, files, affidavits, lodged documents, exhibits and record in the case of *State v. Stacey Grove,* Nez Perce County Case No. CR-2007-0000768, including the documents listed in the Register of Actions attached as Exhibit A to this Order, and the State stipulating to the granting thereof, HEREBY TAKES JUDICIAL NOTICE OF THE ABOVE MENTIONED MATERIALS.

Dated this 15th day of October, 2012.

Carl B. Kerrick
District Judge

FILED

2012 OCT 15 AM 11 12

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE

CLERK OF THE DISTRICT COURT

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

DEPUTY

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	)	CASE NO. CV-12-01798 **ORDER GRANTING MOTION TO DECLARE PETITIONER A NEEDY PERSON**

THE COURT, having considered Petitioner's Motion, pursuant to I.C. §§ 19-851(c) and 19-852, to declare that he is a "needy person" for purposes of obtaining necessary services and facilities of representation in this case, finds he is a needy person and eligible for such services at county expense. Counsel for Petitioner shall direct any specific requests for services to this Court for prior approval. Any specific request may be made on an ex parte basis with the moving papers and orders to be sealed.

Dated this 15th day of October, 2012.

Carl B. Kerrick
District Judge

ORIGINAL

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **PETITIONER'S MOTION FOR SUMMARY DISPOSITION**

Petitioner, Stacey Grove, asks the Court to grant summary disposition in his favor and grant the relief requested in his Petition. There is good cause to grant the motion because the Respondent has not answered the Petition and the allegations therein, even construed most favorably to the state, establish that the Petitioner is entitled to relief as a matter of law.

This Motion is made pursuant to I.C. § 19-4906(c). It is supported by the affidavits already filed herein as well as the allegations and arguments made in the Petition. See Verified Petition, p. 10-12 (argument regarding confrontation clause claim); p. 18-19 (argument regarding prosecutorial misconduct claim); p. 20-21 (argument regarding juror misconduct claim); p. 20-23

(argument regarding ineffective assistance of appellate counsel claim); and p. 34-35 (argument regarding the ineffective assistance of trial counsel claim).

Respectfully submitted this 15th day of October, 2012.

Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on October 15, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

X emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Dennis Benjamin, ISB #4199
Deborah Whipple, ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
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303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AFFIDAVIT OF ERIC FREDERICKSEN**

Eric Fredericksen, being duly sworn and upon oath, hereby says:

1. I am an attorney duly licensed to practice law in the State of Idaho.

2. That I represented the Petitioner herein, Stacey Grove, during the appeal in *State v. Stacey Grove*, Supreme Court Docket No. 36211 (Nez Perce County District Court Number CR-2007-768).

3. Attorney Diane Walker was my co-counsel in the appeal.

4. That I have read the post-conviction petition filed in this case.

5. That 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.

6. 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).

7. The juror misconduct issue raised in the Third Cause of Action could not have been raised on direct appeal because trial counsel did not draw the misconduct to the Court's attention or ask the Court to take any action about it, and there was no definitive evidence in the record that jurors had been sleeping during trial testimony.

8. 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).

9. That attached hereto as Exhibit A is a true and correct copy of an email exchange between me and trial counsel.

This ends my affidavit.

Eric Fredericksen

SUBSCRIBED AND SWORN TO
before me this 28th day of November, 2012.

Notary Public for the State of Idaho
Residing at: Boise, ID
My commission expires: 9/22/2017

JAMIE HESS NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on November 27, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Eric Fredericksen

From: Scott Chapman [Scott@rbcox.com]
Sent: Tuesday, April 06, 2010 9:37 AM
To: Eric Fredericksen
Cc: Diane Walker
Subject: RE: State v. Grove

As best as I can recall it was not discussed. Please do not hesitate to contact me regarding any questions you might have and good luck.

From: Eric Fredericksen [mailto:efredericksen@sapd.state.id.us]
Sent: Tuesday, April 06, 2010 8:26 AM
To: Scott Chapman
Cc: Diane Walker
Subject: State v. Grove

Scott:

I am working on Stacey's direct appeal and have a quick question for you. One of the issues I will be raising is whether the district court committed fundamental error by allowing Dr. Ross to testify as to the Dr. Reichard's report based upon his autopsy of the brain (Confrontation clause violation – *Melendez-Diaz v. Mass*, 129 S.Ct. 2527). Based upon your cross-examination of Dr. Ross, it appears as though the issue was likely addressed at some point in the case, but I can't find anything in the pretrial rulings. I know there was a bunch of in-chambers discussions that were not recorded, can you tell me if Dr. Reichard's report was addressed in any of those unrecorded hearings.

Diane Walker is co-counsel on appeal, so I cc'ed her to this e-mail.

Thanks, feel free to reply to this e-mail or call Diane or me at your convenience.

Eric D. Fredericksen
Deputy State Appellate Public Defender
3647 Lake Harbor Lane
Boise, ID 83703
(208) 334-2712
Fax: 334-2985

EXHIBIT A

Dennis Benjamin, ISB #4199
Deborah Whipple, ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AFFIDAVIT OF DIANE WALKER**

Diane Walker, being duly sworn and upon oath, hereby says:

1. I am an attorney duly licensed to practice law in the State of Idaho.

2. That I represented the Petitioner herein, Stacey Grove, during the appeal in *State v. Stacey Grove*, Supreme Court Docket No. 36211 (Nez Perce County District Court Number CR-2007-768).

3. Attorney Eric Fredericksen was my co-counsel in the appeal.

4. That I have read the post-conviction petition filed in this case.

5. That 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.

6. 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).

7. The juror misconduct issue raised in the Third Cause of Action could not have been raised on direct appeal because trial counsel did not draw the misconduct to the Court's attention or ask the Court to take any action about it, and there was no definitive evidence in the record that jurors had been sleeping during trial testimony.

8. 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).

This ends my affidavit.

Diane Walker

SUBSCRIBED AND SWORN TO
before me this 28th day of November, 2012.

Notary Public for the State of Idaho
Residing at: Boise, ID
My commission expires: 9/22/17

JAMIE HESS NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on November 27, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Dennis Benjamin, ISB #4199
Deborah Whipple, ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AFFIDAVIT OF DENNIS BENJAMIN**

Dennis Benjamin, being duly sworn and upon oath, hereby says:

1. I am an attorney duly licensed to practice law in the State of Idaho.

2. That I, along with co-counsel Deborah Whipple, represent the Petitioner herein.

3. That the petition alleges at Paragraph 77 that defense counsel's performance was deficient because he failed to object 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 failed to impeach that testimony.

3.1. That attached hereto as Exhibit A is a medical journal article wherein the author, John Plunkett, M.D., a forensic pathologist, documented 18 cases of fatal

head injuries where an infant had fallen 3 meters or less. "The author concludes that an infant or child may suffer a fatal head injury from a fall of less than three meters (10 feet). The injury may be associated with a lucid interval and bilateral retinal hemorrhages." Exhibit A, pg. 1.

3.2. In this case, there was testimony that [redacted] had both bilateral retinal hemorrhages and a possible lucid interval.

3.3. This study was readily available to defense counsel at the time of the trial.

4. That the petition alleges at Paragraph 89 that it was deficient performance for defense counsel to fail to introduce photographs of [redacted] taken at St. Joseph's Hospital soon after he arrived in an ambulance.

4.1. True and correct copies of those photographs are attached hereto as Exhibit B-1 to B-6, filed under seal.

4.2. The absence of serious bruising in the photographs rebuts the state's theory that Mr. Grove beat [redacted] causing massive internal injuries just prior to [redacted]s admission to St. Joseph's.

This ends my affidavit.

Dennis Benjamin

SUBSCRIBED AND SWORN TO
before me this 6th day of December, 2012.

Notary Public for the State of Idaho
Residing at: Nampa, Id
My commission expires: 12/4/15

KRISTIN M. BROWN NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on December 6, 2012, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

The American Journal of Forensic Medicine and Pathology 22(1):1–12, 2001.

Fatal Pediatric Head Injuries Caused by Short-Distance Falls

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Physicians disagree on several issues regarding head injury in infants and children, including the potential lethality of a short-distance fall, a lucid interval in an ultimately fatal head injury, and the specificity of retinal hemorrhage for inflicted trauma. There is scant objective evidence to resolve these questions, and more information is needed. The objective of this study was to determine whether there are witnessed or investigated fatal short-distance falls that were concluded to be accidental. The author reviewed the January 1, 1988 through June 30, 1999 United States Consumer Product Safety Commission database for head injury associated with the use of playground equipment. The author obtained and reviewed the primary source data (hospital and emergency medical services' records, law enforcement reports; and coroner or medical examiner records) for all fatalities involving a fall.

The results revealed 18 fall-related head injury fatalities in the database. The youngest child was 12 months old, the oldest 13 years. The falls were from 0.6 to 3 meters (2–10 feet). A noncaretaker witnessed 12 of the 18, and 12 had a lucid interval. Four of the six children in whom funduscopic examination was documented in the medical record had bilateral retinal hemorrhage. The author concludes that an infant or child may suffer a fatal head injury from a fall of less than 3 meters (10 feet). The injury may be associated with a lucid interval and bilateral retinal hemorrhage.

Key Words: Child abuse—Head injury—Lucid interval—Retinal hemorrhage—Subdural hematoma.

Many physicians believe that a simple fall cannot cause serious injury or death (1–9), that a lucid interval does not exist in an ultimately fatal pediatric head injury (7–13), and that retinal hemorrhage is highly suggestive if not diagnostic for inflicted trauma (7,12,14–21). However, several have questioned these conclusions or urged caution when interpreting head injury in a child (15,22–28). This controversy exists because most infant injuries occur in the home (29,30), and if there is history of a fall, it is usually not witnessed or is seen only by the caretaker. Objective data are needed to resolve this dispute. It would be helpful if there were a database of fatal falls that were witnessed or wherein medical and law enforcement investigation unequivocally concluded that the death was an accident.

The United States Consumer Product Safety Commission (CPSC) National Injury Information Clearinghouse uses four computerized data sources (31). The National Electronic Injury Surveillance System (NEISS) file collects current injury data associated with 15,000 categories of consumer products from 101 U.S. hospital emergency departments, including 9 pediatric hospitals. The file is a probability sample and is used to estimate the number and types of consumer product–related injuries each year (32). The Death Certificate (DC) file is a demographic summary created by information provided to the CPSC by selected U.S. State Health Departments. The Injury/Potential Injury Incident (IR) file contains summaries, indexed by consumer product, of reports to the CPSC from consumers, medical examiners and coroners (Medical Examiner and Coroner Alert Project [MECAP]), and newspaper accounts of product-related incidents discovered by local or regional CPSC staff (33). The In-Depth Investigations (AI) file contains summaries of investigations performed by CPSC staff based on reports received from the NEISS, DC, or IR files (34). The AI files provide details about the incident from victim and witness interviews, accident reconstruction, and review of law enforcement

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ment, health care facility, and coroner or medical examiner records (if a death occurred).

METHODS

I reviewed the CPSC, DC, IR, and AI files for all head and neck injuries involving playground equipment recorded by the CPSC from January 1, 1988 through June 30, 1999. There are 323 entries in the playground equipment IR file, 262 in the AI file, 47 in the DC file, and more than 75,000 in the NEISS file. All deaths in the NEISS file generated an IR or AI file. If the file indicated that a death had occurred from a fall, I obtained and reviewed each original source record from law enforcement, hospitals, emergency medical services (EMS), and coroner or medical examiner offices except for one autopsy report. However, I discussed the autopsy findings with the pathologist in this case.

RESULTS

There are 114 deaths in the Clearinghouse database, 18 of which were due to head injury from a fall. The following deaths were excluded from this study: those that involved equipment that broke or collapsed, striking a person on the head or neck (41); those in which a person became entangled in the equipment and suffocated or was strangled (45), those that involved equipment or incidents other than playground (6 [including a 13.7-meter fall from a homemade Ferris wheel and a 3-meter fall from a cyclone fence adjacent to a playground]); and falls in which the death was caused exclusively by neck (carotid vessel, airway, or cervical spinal cord) injury (4).

The falls were from horizontal ladders (4), swings (7), stationary platforms (3), a ladder attached to a slide, a "see-saw", a slide, and a retaining wall. Thirteen occurred on a school or public playground, and five occurred at home. The database is not limited to infants and children, but a 13-year-old was the oldest fatality (range, 12 months–13 years; mean, 5.2 years; median, 4.5 years). The distance of the fall, defined as the distance of the closest body part from the ground at the beginning of the fall, could be determined from CPSC or law enforcement reconstruction and actual measurement in 10 cases and was 0.6 to 3.0 meters (mean, 1.3 ± 0.77; median, 0.9). The distance could not be accurately determined in the seven fatalities involving swings and one of the falls from a horizontal ladder, and may have been from as little as 0.6 meters to as much as 2.4 meters. The maximum height for a fall from a swing was assumed to be the highest point of the arc. Twelve of the 18 falls were witnessed by a noncaretaker or were videotaped; 12 of the children had a lucid interval (5 minutes–48 hours); and 4 of the 6 in whom funduscopic examination was performed had bilateral retinal hemorrhage (Table 1).

CASES

Case 1

This 12-month-old was seated on a porch swing between her mother and father when the chain on her mother's side broke and all three fell sideways and backwards 1.5 to 1.8 meters (5–6 feet) onto decorative rocks in front of the porch. The mother fell first, then the child, then her father. It is not known if her father landed on top of her or if she struck only the ground. She was unconscious immediately. EMS was called; she was taken to a local hospital; and was ictal and had decerebrate posturing in the emergency room. She was intubated, hyperventilated, and treated with mannitol. A computed tomography (CT) scan indicated a subgaleal hematoma at the vertex of the skull, a comminuted fracture of the vault, parafalcine subdural hemorrhage, and right parietal subarachnoid hemorrhage. There was also acute cerebral edema with effacement of the right frontal horn and compression of the basal cisterns. She had a cardiopulmonary arrest while the CT scan was being done and could not be resuscitated.

Case 2

A 14-month-old was on a backyard "see-saw" and was being held in place by his grandmother. The grandmother said that she was distracted for a moment and he fell backward, striking the grass-covered ground 0.6 meters (22.5 inches) below the plastic seat. He was conscious but crying, and she carried him into the house. Within 10 to 15 minutes he became lethargic and limp, vomited, and was taken to the local hospital by EMS personnel. He was unconscious but purposefully moving all extremities when evaluated, and results of funduscopic examination were normal. A CT scan indicated an occipital subgaleal hematoma, left-sided cerebral edema with complete obliteration of the left frontal horn, and small punctate hemorrhages in the left frontal lobe. There was no fracture or subdural hematoma. He was treated with mannitol; his level of consciousness rapidly improved; and he was extubated. However, approximately 7 hours after admission he began to have difficulty breathing, both pupils suddenly dilated, and he was rein-

TABLE 1. *Summary of cases*

No.	CPSC No.	Age	Sex	Fall from	Distance M/F	Witnessed	Lucid interval	Retinal hemorrhage	Subdural hemorrhage	Autopsy	Cause of death	FP
1	DC 9108013330	12 mos	F	Swing	1.5–1.8/5.0–6.0	No	No	N/R	Yes +IHF	No	Complex calvarial fracture with edema and contusions	No
2	AI 890208HBC3088	14 mos	M	See-saw	0.6/2.0	No	10–15 minutes	No	No	No	Malignant cerebral edema with herniation	No
3	IR F810388A	17 mos	F	Swing	1.5–1.8/5.0–6.0	No	No	N/R	Yes +IHF	Yes	Acute subdural hematoma with secondary cerebral edema	Yes
4	AI 921001HCC2263	20 mos	F	Platform	1.1/3.5	No	5–10 minutes	Bilateral multilayered	Yes +IHF	Limited	Occipital fracture with subdural/subarachnoid hemorrhage progressing to cerebral edema and herniation	Yes
5*	DC 9312060661	23 mos	F	Platform	0.70/2.3	Yes	10 minutes	Bilateral, NOS	Yes	Yes	Acute subdural hematoma	Yes
6	DC 9451016513	26 mos	M	Swing	0.9–1.8/3.0–6.0	Yes	No	Bilateral multilayered	Yes +IHF	Yes	Subdural hematoma with associated cerebral edema	Yes
7*	AI 891215HcC2094	3 yrs	M	Platform	0.9/3.0	Yes	10 minutes	N/R	Yes	No	Acute cerebral edema with herniation	No
8	AI 910515HCC2182	3 yrs	F	Ladder	0.6/2.0	yes	15 minutes	N/R	Yes (autopsy only)	Yes	Complex calvarial fracture, contusions, cerebral edema with herniation	Yes
9	DC 9253024577	4 yrs	M	Slide	2.1/7.0	Yes	3 hours	N/R	No	Yes	Epidural hematoma	Yes
10	AI 920710HWE4014	5 yrs	M	Horizontal ladder	2.1/7.0	No	No	N/R	Yes	No	Acute subdural hematoma with acute cerebral edema	Yes
11	AI 960517HCC5175	6 yrs	M	Swing	0.6–2.4/2.0–8.0	No	10 minutes	No	Yes +IHF	No	Acute subdural hematoma	Yes
12	AI 970324HCC3040	6 yrs	M	Horizontal ladder	3.0/10.0	Yes	45 minutes	N/R	No	No	Malignant cerebral edema with herniation	Yes
13	AI 881229HCC3070	6 yrs	F	Horizontal ladder	0.9/3.0	Yes	1+ hour	N/R	Yes +IHF	Yes	Subdural and subarachnoid hemorrhage, cerebral infarct, and edema	Yes
14	AI 930930HWE5025	7 yrs	M	Horizontal ladder	1.2–2.4/4.0–8.0	Yes	48 hours	N/R	No	Yes	Cerebral infarct secondary to carotid/vertebral artery thrombosis	Yes
15	AI 970409HCC1088	8 yrs	F	Retaining wall	0.9/3.0	Yes	12+ hours	N/R	Yes (autopsy only)	Yes	Acute subdural hematoma	Yes
16	AI 890621HCC3195	10 yrs	M	Swing	0.9–1.5/3.0–6.0	Yes	10 minutes	Bilateral multilayered	Yes	Yes	Acute subdural hematoma contiguous with an AV malformation	No
17	AI 920428HCC1671	12 yrs	F	Swing	0.9–1.8/3.0–6.0	Yes	No	N/R	No	Yes	Occipital fracture with extensive contra-coup contusions	Yes
18	AI 891016HCC1511	13 yrs	F	Swing	0.6–1.8/2.0–6.0	Yes	No	N/R	Yes +IHF	Yes	Occipital fracture, subdural hemorrhage, cerebral edema	Yes

*The original CT scan for case #7 and the soft tissue CT windows for case #5 could not be located and were unavailable for review.

CPSC, Consumer Products Safety Commission; AI, accident investigation; IR, incident report; DC, death certificate; M, male; F, female; Distance, the distance of the closest body part from the ground at the start of the fall (see text); M/F, meters/feet; Witnessed, witnessed by a noncaretaker or videotaped; N/R, not recorded; IHF, including interhemispheric or falx; FP, forensic pathologist–directed death investigation system.

tubated. A second CT scan demonstrated progression of the left hemispheric edema despite medical management, and he was removed from life support 22 hours after admission.

Case 3

This 17-month-old had been placed in a baby carrier–type swing attached to an overhead tree limb at a daycare provider's home. A restraining bar held in place by a snap was across her waist. She was being pushed by the daycare provider to an estimated height of 1.5 to 1.8 meters (5–6 feet) when the snap came loose. The child fell from the swing on its downstroke, striking her back and head on the grassy surface. She was immediately unconscious and apneic but then started to breathe spontaneously. EMS took her to a pediatric hospital. A CT scan indicated a large left-sided subdural hematoma with extension to the interhemispheric fissure anteriorly and throughout the length of the falx. The hematoma was surgically evacuated, but she developed malignant cerebral edema and died the following day. A postmortem examination indicated symmetrical contusions on the buttock and midline posterior thorax, consistent with impact against a flat surface; a small residual left-sided subdural hematoma; cerebral edema with anoxic encephalopathy; and uncal and cerebellar tonsillar herniation. There were no cortical contusions.

Case 4

A 20-month-old was with other family members for a reunion at a public park. She was on the platform portion of a jungle gym when she fell from the side and struck her head on one of the support posts. The platform was 1.7 meters (67 inches) above the ground and 1.1 meters (42 inches) above the top of the support post that she struck. Only her father saw the actual fall, although there were a number of other people in the immediate area. She was initially conscious and talking, but within 5 to 10 minutes became comatose. She was taken to a nearby hospital, then transferred to a tertiary-care facility. A CT scan indicated a right occipital skull fracture with approximately 4-mm of depression and subarachnoid and subdural hemorrhage along the tentorium and posterior falx. Funduscopic examination indicated extensive bilateral retinal and preretinal hemorrhage. She died 2 days later because of uncontrollable increased intracranial pressure. A limited postmortem examination indicated an impact subgaleal hematoma overlying the fracture in the mid occiput.

Case 5

A 23-month-old was playing on a plastic gym set in the garage at her home with her older brother. She had climbed the attached ladder to the top rail above the platform and was straddling the rail, with her feet 0.70 meters (28 inches) above the floor. She lost her balance and fell headfirst onto a 1-cm (⅜-inch) thick piece of plush carpet remnant covering the concrete floor. She struck the carpet first with her outstretched hands, then with the right front side of her forehead, followed by her right shoulder. Her grandmother had been watching the children play and videotaped the fall. She cried after the fall but was alert and talking. Her grandmother walked/carried her into the kitchen, where her mother gave her a baby analgesic with some water, which she drank. However, approximately 5 minutes later she vomited and became stuporous. EMS personnel airlifted her to a tertiary-care university hospital. A CT scan indicated a large right-sided subdural hematoma with effacement of the right lateral ventricle and minimal subfalcine herniation. (The soft tissue windows for the scan could not be located and were unavailable for review.) The hematoma was immediately evacuated. She remained comatose postoperatively, developed cerebral edema with herniation, and was removed from life support 36 hours after the fall. Bilateral retinal hemorrhage, not further described, was documented in a funduscopic examination performed 24 hours after admission. A postmortem examination confirmed the right frontal scalp impact injury. There was a small residual right subdural hematoma, a right parietal lobe contusion (secondary to the surgical intervention), and cerebral edema with cerebellar tonsillar herniation.

Case 6

A 26-month-old was on a playground swing being pushed by a 13-year-old cousin when he fell backward 0.9 to 1.8 meters (3–6 feet), striking his head on hard-packed soil. The 13-year-old and several other children saw the fall. He was immediately unconscious and was taken to a local emergency room, then transferred to a pediatric hospital. A CT scan indicated acute cerebral edema and a small subdural hematoma adjacent to the anterior interhemispheric falx. A funduscopic examination performed 4 hours after admission indicated extensive bilateral retinal hemorrhage, vitreous hemorrhage in the left eye, and papilledema. He had a subsequent cardiopulmonary arrest and could not be resuscitated. A postmortem examination confirmed the retinal hemorrhage and indicated a right parietal scalp impact injury but no calvarial frac-

ture, a "film" of bilateral subdural hemorrhage, cerebral edema with herniation, and focal hemorrhage in the right posterior midbrain and pons.

Case 7

This 3-year-old with a history of TAR (thrombocytopenia–absent radius) syndrome was playing with other children on playground equipment at his school when he stepped through an opening in a platform. He fell 0.9 meters (3 feet) to the hard-packed ground, striking his face. A teacher witnessed the incident. He was initially conscious and able to walk. However, approximately 10 minutes later he had projectile vomiting and became comatose, was taken to a local hospital, and subsequently transferred to a pediatric hospital. A CT scan indicated a small subdural hematoma and diffuse cerebral edema with uncal herniation, according to the admission history and physical examination. (The original CT report and scan could not be located and were unavailable for review.) His platelet count was 24,000/mm^3, and he was treated empirically with platelet transfusions, although he had no evidence for an expanding extra-axial mass. Resuscitation was discontinued in the emergency room.

Case 8

This 3-year-old was at a city park with an adult neighbor and four other children, ages 6 to 10. She was standing on the third step of a slide ladder 0.6 meters (22 inches) above the ground when she fell forward onto compact dirt, striking her head. The other children but not the adult saw the fall. She was crying but did not appear to be seriously injured, and the neighbor picked her up and brought her to her parents' home. Approximately 15 minutes later she began to vomit, and her mother called EMS. She was taken to a local emergency room, then transferred to a pediatric hospital. She was initially lethargic but responded to hyperventilation and mannitol; she began to open her eyes with stimulation and to spontaneously move all extremities and was extubated. However, she developed malignant cerebral edema on the second hospital day and was reintubated and hyperventilated but died the following day. A postmortem examination indicated a subgaleal hematoma at the vertex of the skull associated with a complex fracture involving the left frontal bone and bilateral temporal bones. There were small epidural and subdural hematomas (not identifiable on the CT scan), bilateral "contra-coup" contusions of the inferior surfaces of the frontal and temporal lobes, and marked cerebral edema with uncal herniation.

Case 9

A 4-year-old fell approximately 2.1 meters (7 feet) from a playground slide at a state park, landing on the dirt ground on his buttock, then falling to his left side, striking his head. There was no loss of consciousness, but his family took him to a local emergency facility, where an evaluation was normal. However, he began vomiting and complained of left neck and head pain approximately 3 hours later. He was taken to a second hospital, where a CT scan indicated a large left parietal epidural hematoma with a midline shift. He was transferred to a pediatric hospital and the hematoma was evacuated, but he developed malignant cerebral edema with right occipital and left parietal infarcts and was removed from the respirator 10 days later. A postmortem examination indicated a small residual epidural hematoma, marked cerebral edema, bilateral cerebellar tonsillar and uncal herniation, and hypoxic encephalopathy. There was no identifiable skull fracture.

Case 10

A 5-year-old was apparently walking across the horizontal ladder of a "monkey bar," part of an interconnecting system of homemade playground equipment in his front yard, when his mother looked out one of the windows and saw him laying face down on the ground and not moving. The horizontal ladder was 2.1 meters (7 feet) above compacted dirt. EMS were called, he was taken to a local hospital, and then transferred to a pediatric hospital. A CT scan indicated a right posterior temporal linear fracture with a small underlying epidural hematoma, a 5-mm thick acute subdural hematoma along the right temporal and parietal lobes, and marked right-sided edema with a 10-mm midline shift. He was hyperventilated and treated with mannitol, but the hematoma continued to enlarge and was surgically evacuated. However, he developed uncontrollable cerebral edema and was removed from life support 10 days after the fall.

Case 11

A 6-year-old was on a playground swing at a private lodge with his 14-year-old sister. His sister heard a "thump," turned around, and saw him on the grass-covered packed earth beneath the swing. The actual fall was not witnessed. The seat of the swing was 0.6 meters (2 feet) above the ground, and the fall distance could have been from as high as 2.4 meters (8 feet). He was initially conscious and talking but within 10 minutes became comatose and was taken to a local emergency room, then transferred to a tertiary-care hospital. A CT

scan indicated a large left frontoparietal subdural hematoma with extension into the anterior interhemispheric fissure and a significant midline shift with obliteration of the left lateral ventricle. There were no retinal hemorrhages. He was treated aggressively with dexamethasone and hyperventilation, but there was no surgical intervention. He died the following day.

Case 12

This 6-year-old was at school and was sitting on the top crossbar of a "monkey bar" approximately 3 meters (10 feet) above compacted clay soil when an unrelated noncaretaker adult saw him fall from the crossbar to the ground. He landed flat on his back and initially appeared to have the wind knocked out of him but was conscious and alert. He was taken to the school nurse who applied an ice pack to a contusion on the back of his head. He rested for approximately 30 minutes in the nurse's office and was being escorted back to class when he suddenly collapsed. EMS was called, and he was transported to a pediatric hospital. He was comatose on admission, the fundi could not be visualized, and a head CT scan was interpreted as normal. However, a CT scan performed the following morning approximately 20 hours after the fall indicated diffuse cerebral edema with effacement of the basilar cisterns and fourth ventricle. There was no identifiable subdural hemorrhage or calvarial fracture. He developed transtentorial herniation and died 48 hours after the fall.

Case 13

This 6-year-old was playing on a school playground with a 5th grade student/friend. She was hand-over-hand traversing the crossbar of a "monkey bar" 2.4 meters (7 feet 10 inches) above the ground with her feet approximately 1 meter (40 inches) above the surface. She attempted to slide down the pole when she reached the end of the crossbar but lost her grip and slid quickly to the ground, striking the compacted dirt first with her feet, then her buttock and back, and finally her head. The friend informed the school principal of the incident, but the child seemed fine and there was no intervention. She went to a relative's home for after-school care approximately 30 minutes after the fall, watched TV for a while, then complained of a headache and laid down for a nap. When her parents arrived at the home later that evening, 6 hours after the incident, they discovered that she was incoherent and "drooling." EMS transported her to a tertiary-care medical center. A CT scan indicated a right parieto-occipital skull fracture, subdural and subarachnoid hemorrhage, and a right cerebral hemisphere infarct. The infarct included the posterior cerebral territory and was thought most consistent with thrombosis or dissection of a right carotid artery that had a persistent fetal origin of the posterior cerebral artery. She remained comatose and was removed from the respirator 6 days after admission. A postmortem examination indicated superficial abrasions and contusions over the scapula, a prominent right parietotemporal subgaleal hematoma, and a right parietal skull fracture. She had a 50-ml subdural hematoma and cerebral edema with global hypoxic or ischemic injury ("respirator brain"), but the carotid vessels were normal.

Case 14

A 7-year-old was on the playground during school hours playing on the horizontal ladder of a "monkey bar" when he slipped and fell 1.2 to 2.4 meters (4–8 feet). According to one witness, he struck his forehead on the bars of the vertical ladder; according to another eyewitness he struck the rubber pad covering of the asphalt ground. There are conflicting stories as to whether he had an initial loss of consciousness. However, he walked back to the school, and EMS was called because of the history of the fall. He was taken to a local hospital, where evaluation indicated a Glasgow coma score of 15 and a normal CT scan except for an occipital subgaleal hematoma. He was kept overnight for observation because of the possible loss of consciousness but was released the following day. He was doing homework at home 2 days after the fall when his grandmother noticed that he was stumbling and had slurred speech, and she took him back to the hospital. A second CT scan indicated a left carotid artery occlusion and left temporal and parietal lobe infarcts. The infarcts and subsequent edema progressed; he had brainstem herniation; and he was removed from life support 3 days later (5 days after the initial fall). A postmortem examination indicated ischemic infarcts of the left parietal, temporal, and occipital lobes, acute cerebral edema with herniation, and thrombosis of the left vertebral artery. Occlusion of the carotid artery, suspected premortem, could not be confirmed.

Case 15

This 8-year-old was at a public playground near her home with several friends her age. She was hanging by her hands from the horizontal ladder of a "monkey bar" with her feet approximately 1.1 meters (3.5 feet) above the ground when she attempted to swing from the bars to a nearby 0.9-

meter (34-inch) retaining wall. She landed on the top of the wall but then lost her balance and fell to the ground, either to a hard-packed surface (one witness) or to a 5.1-cm (2-inch) thick resilient rubber mat (a second witness), striking her back and head. She initially cried and complained of a headache but continued playing, then later went home. Her mother said that she seemed normal and went to bed at her usual time. However, when her mother tried to awaken her at approximately 8:30 the following morning (12 hours after the fall) she complained of a headache and went back to sleep. She awoke at 11 a.m. and complained of a severe headache then became unresponsive and had a seizure. EMS took her to a nearby hospital, but she died in the emergency room. A postmortem examination indicated a right temporoparietal subdural hematoma, extending to the base of the brain in the middle and posterior fossae, with flattening of the gyri and narrowing of the sulci. (The presence or absence of herniation is not described in the autopsy report.) There was no calvarial fracture, and there was no identifiable injury in the scalp or galea.

Case 16

A 10-year-old was swinging on a swing at his school's playground during recess when the seat detached from the chain and he fell 0.9 to 1.5 meters (3–5 feet) to the asphalt surface, striking the back of his head. The other students but not the three adult playground supervisors saw him fall. He remained conscious although groggy and was carried to the school nurse's office, where an ice pack was placed on an occipital contusion. He suddenly lost consciousness approximately 10 minutes later, and EMS took him to a local hospital. He had decerebrate posturing when initially evaluated. Funduscopic examination indicated extensive bilateral confluent and stellate, posterior and peripheral preretinal and subhyaloid hemorrhage. A CT scan showed a large acute right frontoparietal subdural hematoma with transtentorial herniation. The hematoma was surgically removed, but he developed malignant cerebral edema and died 6 days later. A postmortem examination indicated a right parietal subarachnoid AV malformation, contiguous with a small amount of residual subdural hemorrhage, and cerebral edema with anoxic encephalopathy and herniation. There was no calvarial fracture.

Case 17

A 12-year-old was at a public playground with a sister and another friend and was standing on the seat of a swing when the swing began to twist. She lost her balance and fell 0.9 to 1.8 meters (3–6 feet) to the asphalt surface, striking her posterior thorax and occipital scalp. She was immediately unconscious and was taken to a tertiary-care hospital emergency room, where she was pronounced dead. A postmortem examination indicated an occipital impact injury associated with an extensive comminuted occipital fracture extending into both middle cranial fossa and "contra-coup" contusions of both inferior frontal and temporal lobes.

Case 18

This 13-year-old was at a public playground with a friend. She was standing on the seat of a swing with her friend seated between her legs when she lost her grip and fell backwards 0.6 to 1.8 meters (2–6 feet), striking either a concrete retaining wall adjacent to the playground or a resilient 5.1-cm (2 inch) thick rubber mat covering the ground. She was immediately unconscious and was given emergency first aid by a physician who was nearby when the fall occurred. She was taken to a nearby hospital and was purposefully moving all extremities and had reactive pupils when initially evaluated. A CT scan indicated interhemispheric subdural hemorrhage and generalized cerebral edema, which progressed rapidly to brain death. A postmortem examination indicated a linear nondepressed midline occipital skull fracture, subdural hemorrhage extending to the occiput, contusion of the left cerebellar hemisphere, bifrontal "contra-coup" contusions, and cerebral edema.

DISCUSSION

General

Traumatic brain injury (TBI) is caused by a force resulting in either strain (deformation/unit length) or stress (force/original cross-sectional area) of the scalp, skull, and brain (35–37). The extent of injury depends not only on the level and duration of force but also on the specific mechanical and geometric properties of the cranial system under loading (38–40). Different parts of the skull and brain have distinct biophysical characteristics, and calculating deformation and stress is complex. However, an applied force causes the skull and brain to move, and acceleration, the time required to reach peak acceleration, and the duration of acceleration may be measured at specific locations (36,41). These kinematic parameters do not cause the actual brain damage but are useful for analyzing TBI because they are easy to quantify. Research in TBI using physical models and animal experiments has shown that a force resulting in angular acceleration pro-

duces primarily diffuse brain damage, whereas a force causing exclusively translational acceleration produces only focal brain damage (36). A fall from a countertop or table is often considered to be exclusively translational and therefore assumed incapable of producing serious injury (3,7–9). However, sudden impact deceleration *must* have an angular vector unless the force is applied only through the center of mass (COM), and deformation of the skull during impact *must* be accompanied by a volume change (cavitation) in the subdural "space" tangential to the applied force (41). The angular and deformation factors produce tensile strains on the surface veins and mechanical distortions of the brain during impact and may cause a subdural hematoma without deep white matter injury or even unconsciousness (42–44).

Many authors state that a fall from less than 3 meters (10 feet) is rarely if ever fatal, especially if the distance is less than 1.5 meters (5 feet) (1–6,8,9). The few studies concluding that a short-distance fall may be fatal (22–24,26,27) have been criticized because the fall was not witnessed or was seen only by the caretaker. However, isolated reports of observed fatal falls and biomechanical analysis using experimental animals, adult human volunteers, and models indicate the potential for serious head injury or death from as little as a 0.6-meter (2-foot) fall (48–52). There are limited experimental studies on infants (cadaver skull fracture) (53,54) and none on living subadult nonhuman primates, but the adult data have been extrapolated to youngsters and used to develop the Hybrid II/III and Child Restraint–Air Bag Interaction (CRABI) models (55) and to propose standards for playground equipment (56,63). We simply do *not know* either kinematic or nonkinematic limits in the pediatric population (57,58).

Each of the falls in this study exceeded established adult kinematic thresholds for traumatic brain injury (41,48–52). Casual analysis of the falls suggests that most were primarily translational. However, deformation and *internal* angular acceleration of the skull and brain *caused by the impact* produce the injury. What happens during the impact, not during the fall, determines the outcome.

Subdural Hemorrhage

A "high strain" impact (short pulse duration and high rate for deceleration onset) typical for a fall is more likely to cause subdural hemorrhage than a "low strain" impact (long pulse duration and low rate for deceleration onset) that is typical of a motor vehicle accident (42,61). The duration of deceleration for a head-impact fall against a nonyielding surface is usually less than 5 milliseconds (39,59–61). Experimentally, impact duration longer than 5 milliseconds will not cause a subdural hematoma unless the level of angular acceleration is above 1.75×10^5 rad/s^2 (61). A body in motion with an angular acceleration of 1.75×10^5 rad/s^2 has a tangential acceleration of 17,500 m/s^2 at 0.1 meters (the distance from the midneck axis of rotation to the midbrain COM in the Duhaime model). A human cannot produce this level of acceleration by impulse ("shake") loading (62).

An injury resulting in a subdural hematoma in an infant may be caused by an accidental fall (43,44,64). A recent report documented the findings in seven children seen in a pediatric hospital emergency room after an accidental fall of 0.6 to 1.5 meters who had subdural hemorrhage, no loss of consciousness, and no symptoms (44). The characteristics of the hemorrhage, especially extension into the posterior interhemispheric fissure, have been used to suggest if not confirm that the injury was nonaccidental (9,62,65–68). The hemorrhage extended into the posterior interhemispheric fissure in 5 of the 10 children in this study (in whom the blood was identifiable on CT or magnetic resonance scans and the scans were available for review) and along the anterior falx or anterior interhemispheric fissure in an additional 2 of the 10.

Lucid Interval

Disruption of the diencephalic and midbrain portions of the reticular activating system (RAS) causes unconsciousness (36,69,70). "Shearing" or "diffuse axonal" injury (DAI) is thought to be the primary biophysical mechanism for immediate traumatic unconsciousness (36,71). Axonal injury has been confirmed at autopsy in persons who had a brief loss of consciousness after a head injury and who later died from other causes, such as coronary artery disease (72). However, if unconsciousness is momentary or brief ("concussion") subsequent deterioration *must* be due to a mechanism other than DAI. Apnea and catecholamine release have been suggested as significant factors in the outcome following head injury (73,74). In addition, the centripetal theory of traumatic unconsciousness states that primary disruption of the RAS will not occur in isolation and that structural brainstem damage from inertial (impulse) or impact (contact) loading *must* be accompanied by evidence for cortical and subcortical damage (36). This theory has been validated by magnetic resonance imaging and CT scans in adults and children (75,76). Only one of the children in this study (case 6) had evidence for any component of DAI. This child had focal hemor-

rhage in the posterior midbrain and pons, thought by the pathologist to be primary, although there was no skull fracture, only "a film" of subdural hemorrhage, no tears in the corpus callosum, and no lacerations of the cerebral white matter (grossly or microscopically).

The usual cause for delayed deterioration in infants and children is cerebral edema, whereas in adults it is an expanding extra-axial hematoma (77). If the mechanism for delayed deterioration (except for an expanding extra-axial mass) is venospasm, cerebral edema may be the only morphologic marker. The "talk and die or deteriorate (TADD)" syndrome is well characterized in adults (78). Two reports in the pediatric literature discuss TADD, documenting 4 fatalities among 105 children who had a lucid interval after head injury and subsequently deteriorated (77,79). Many physicians believe that a lucid interval in an ultimately fatal pediatric head injury is extremely unlikely or does not occur unless there is an epidural hematoma (7,8,11). Twelve children in this study had a lucid interval. A noncaretaker witnessed 9 of these 12 falls. One child had an epidural hematoma.

Retinal Hemorrhage

The majority of published studies conclude that retinal hemorrhage, especially if bilateral and posterior or associated with retinoschisis, is highly suggestive of, if not diagnostic for, nonaccidental injury (9,14–21). Rarely, retinal hemorrhage has been associated with an accidental head injury, but in these cases the bleeding was unilateral (80). It is also stated that traumatic retinal hemorrhage may be the direct mechanical effect of violent shaking (15). However, retinal hemorrhage may be caused experimentally either by ligating the central retinal vein or its tributaries or by suddenly increasing intracranial pressure (81,82); retinoschisis is the result of breakthrough bleeding and venous stasis not "violent shaking" (15,83). Any sudden increase in intracranial pressure may cause retinal hemorrhage (84–87). Deformation of the skull coincident to an impact nonselectively increases intracranial pressure. Venospasm secondary to traumatic brain injury selectively increases venous pressure. Either mechanism may cause retinal hemorrhage irrespective of whether the trauma was accidental or inflicted. Further, retinal and optic nerve sheath hemorrhages associated with a ruptured vascular malformation are due to an increase in venous pressure not extension of blood along extravascular spaces (81–83,88). Dilated eye examination with an indirect ophthalmoscope is thought to be more sensitive for detecting retinal bleeding than routine examination and has been recommended as part of the evaluation of any pediatric patient with head trauma (89). None of the children in this study had a formal retinal evaluation, and only six had funduscopic examination documented in the medical record. Four of the six had bilateral retinal hemorrhage.

Pre-existing Conditions

One of these children (case 16) had a subarachnoid AV malformation that contributed to development of the subdural hematoma, causing his death. One (case 7) had TAR syndrome (90), but his death was thought to be caused by malignant cerebral edema not an expanding extra-axial mass.

Cerebrovascular Thrombosis

Thrombosis or dissection of carotid or vertebral arteries as a cause of delayed deterioration after head or neck injuries is documented in both adults and children (91,92). Case 14 is the first report of a death due to traumatic cerebrovascular thrombosis in an infant or child. Internal carotid artery thrombosis was suggested radiographically in an additional death (case 13) but could not be confirmed at autopsy. However, this child died 6 days after admission to the hospital, and fibrinolysis may have removed any evidence for thrombosis at the time the autopsy was performed.

Limitations

1. Six of the 18 falls were not witnessed or were seen only by the adult caretaker, and it is possible that another person caused the nonobserved injuries.
2. The exact height of the fall could be determined in only 10 cases. The others (7 swing and 1 stationary platform) could have been from as little as 0.6 meters (2 feet) to as much as 2.4 meters (8 feet).
3. A minimum impact velocity sufficient to cause fatal brain injury cannot be inferred from this study. Likewise, the probability that an individual fall will have a fatal outcome cannot be stated because the database depends on voluntary reporting and contractual agreements with selected U.S. state agencies. The NEISS summaries for the study years estimated that there were more than 250 deaths due to head and neck injuries associated with playground equipment, but there are only 114 in the files. Further, this study does not include other nonplayground equipment–related fatal falls, witnessed or not witnessed, in the CPSC database (32).

CONCLUSIONS

1. Every fall is a complex event. There must be a biomechanical analysis for any incident in which the severity of the injury appears to be inconsistent with the history. The question is not "Can an infant or child be seriously injured or killed from a short-distance fall?" but rather "If a child falls (x) meters and strikes his or her head on a nonyielding surface, what will happen?"
2. Retinal hemorrhage may occur whenever intracranial pressure exceeds venous pressure or whenever there is venous obstruction. The characteristic of the bleeding cannot be used to determine the ultimate cause.
3. Axonal damage is unlikely to be the mechanism for lethal injury in a low-velocity impact such as from a fall.
4. Cerebrovascular thrombosis or dissection must be considered in any injury with apparent delayed deterioration, and especially in one with a cerebral infarct or an unusual distribution for cerebral edema.
5. A fall from less than 3 meters (10 feet) in an infant or child may cause fatal head injury and may not cause immediate symptoms. The injury may be associated with bilateral retinal hemorrhage, and an associated subdural hematoma may extend into the interhemispheric fissure. A history by the caretaker that the child may have fallen cannot be dismissed.

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APPENDIX

Newtonian mechanics involving constant acceleration may be used to determine the impact velocity in a gravitational fall. However, constant acceleration formulas cannot be used to calculate the relations among velocity, acceleration, and distance traveled *during* an impact because the deceleration is not uniform (45). This analysis requires awareness of the shape of the deceleration curve, knowledge of the mechanical properties and geometry of the cranial system, and comprehension of the stress and strain characteristics for the specific part of the skull and brain that strikes the ground. A purely translational fall requires that the body is rigid and that the external forces acting on the body pass only through the COM, i.e., there is no rotational component. A 1-meter-tall 3-year-old hanging by her knees from a horizontal ladder with the vertex of her skull 0.5 meters above hard-packed earth approximates this model. If she looses her grip and falls, striking the occipital scalp, her impact velocity is 3.1 m/second. An exclusively angular fall also requires that the body is rigid. In addition, the rotation must be about a fixed axis or a given point internal or external to the body, and the applied moment and the inertial moment must be at the identical point or axis. If this same child has a 0.5-meter COM and has a "matchstick" fall while standing on the ground, again striking her occiput, her angular velocity is 5.42 rad/second and tangential velocity 5.42 m/second at impact. The impact velocity is higher than predicted for an exclusively translational or external-axis angular fall when the applied moment and the inertial moment are at a different fixed point (slip and fall) or when the initial velocity is not zero (walking or running, then trip and fall), and the vectors are additive. However, the head, neck, limbs, and torso do not move uniformly during a fall because relative motion occurs with different velocities and accelerations for each component. Calculation of the impact velocity for an actual fall requires solutions of differential equations for each simultaneous translational and rotational motion (45). Further, inertial or impulse loading (whiplash) may cause head acceleration more than twice that of the midbody input force and may be important in a fall where the initial impact is to the feet, buttock, back, or shoulder, and the final impact is to the head (46,47).

The translational motion of a rigid body at constant gravitational acceleration (9.8 m/s^2) is calculated from:

$$F = ma \qquad v^2 = 2as \qquad v = at$$

where F = the sum of all forces acting on the body (newton), m = mass (kg), a = acceleration (m/s^2), v = velocity (m/s), s = distance (m), and t = time (s).

The angular motion of a rigid body about a fixed axis at a given point of the body under constant gravitational acceleration (9.8 m/s^2) is calculated from:

$$M = I\alpha \qquad \omega = v^1/r \qquad \alpha = a^1/r$$

where M = the applied moment about the COM or about the fixed point where the axis of rotation is located, I = the inertial moment about this same COM or fixed point, α = angular acceleration (rad/s^2), ω = angular velocity (rad/s), r = radius (m), v^t = tangential velocity (m/s), and a^t = tangential acceleration (m/s^2).

The angular velocity ω for a rigid body of length L rotating about a fixed point is calculated from:

$$\frac{1}{2}I_0\omega^2 = maL/2 \qquad I_0 = (1/3)\,mL^2$$

where I_0 = the initial inertial moment, ω = angular velocity (rad/s), m = mass (kg), a = gravitational acceleration (9.8 m/s^2), and L = length.

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AFFIDAVIT OF JONATHAN L. ARDEN, MD**

Jonathan L. Arden, MD, being duly sworn and upon oath, hereby says:

1. That I am an MD certified in both anatomic and forensic pathology by the American Board of Pathology and licensed to practice medicine in five states.

2. That I am President of Arden Forensics, PC, a consulting practice in forensic pathology and medicine.

3. That I also hold a part-time appointment as a Forensic Pathologist in the Office of the Chief Medical Examiner for the State of West Virginia.

4 That I have testified more than 700 times, including in this Court in *State v. Grove*, No. CR-2007-768, as an expert in child abuse, neglect, and issues relating to pediatric deaths.

5. That I was requested to review materials and to provide consultation in this post-conviction proceeding, *Grove v. State*, No. CV-12-01798.

9. That I prepared a Report of Consultation dated December 4, 2012.

10. That the Report of Consultation is attached as an exhibit to this affidavit.

11. That by this affidavit, I affirm that all the factual statements and conclusions in the report are true to the best of my knowledge.

This ends my affidavit.

Jonathan L. Arden, MD

SUBSCRIBED AND SWORN TO
before me this 13th day of December, 2012.

Notary Public for the State of Virginia
Residing at: 1369 Chain Bridge Rd
My commission expires: 10/31/15

VALERIA VARGAS SEJAS
NOTARY PUBLIC
REG. #7503023
MY COMMISSION EXPIRES
10/31/15
COMMONWEALTH OF VIRGINIA

CERTIFICATE OF SERVICE

I CERTIFY that on December 13, 2012, I caused a true and correct copy of the foregoing document including all attachments to be:

___ mailed

___ hand delivered

X faxed to 208-799-3073

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
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Report of Consultation
Re: Stace Grove, Post-Conviction Relief

Dear Mr. Benjamin:

Introduction

You have asked me to review materials and to provide consultation in the field of forensic pathology, which I have practiced for more than twenty five years. After receiving my MD degree from the University of Michigan in 1980, I completed training in anatomic pathology at the New York University Medical Center (1980-1983) and in forensic pathology at the Office of the Chief Medical Examiner for the State of Maryland (1983-1984); I was certified in both anatomic and forensic pathology by the American Board of Pathology in 1985. I am currently licensed to practice medicine in five states. I spent most of my career as a government-employed medical examiner, including nine years with the Office of Chief Medical Examiner for the City of New York where I finished as First Deputy Chief Medical Examiner, and more than five years as the Chief Medical Examiner of Washington, DC. I am currently president of Arden Forensics, PC, a consulting practice in forensic pathology and medicine, and I hold a part-time appointment as a Forensic Pathologist in the Office of the Chief Medical Examiner for the State of West Virginia. (Full curriculum vitae is attached.)

I have pursued a special interest in pediatric forensic pathology throughout my career. In addition to my own casework investigating deaths of and performing autopsies on children and infants, I have lectured extensively on child abuse and neglect, the sudden infant death syndrome as well as on other aspects of pediatric deaths. I served as Program Chair for the Interim Meeting of the National Association of Medical Examiners in February, 1997; the topic of the program that I arranged and presented in was child abuse fatalities. I was appointed by Governor Pataki to the New York State Domestic Violence Fatality Commission in 1996-1997. I was a member of child fatality review teams in New York City and Washington, DC for a total of approximately 14 years, and I was a member of the SIDS Community Advisory Council for New York City. I have testified in family courts and criminal courts as an expert in child abuse and neglect, including issues concerning injuries of living children.

Re: Stace Grove, Post-Conviction Relief, Report of Dr. Arden, 12/4/2012

I have testified as an expert witness in various state and federal courts, as well as in grand juries and depositions, a total of more than 700 times. My fees are not contingent upon the outcome of any case in which I consult.

Case Background and Issues to be Addressed

I was originally retained in 2008 as a consultant to the defense in ID v. Stace Grove, and I was called to testify at trial. In that capacity, I was provided and reviewed materials that included the autopsy report for [redacted] Martin with neuropathology consultation (i.e., brain examination), autopsy photographs, microscopic slides from the autopsy, medical records of [redacted] Martin including some imaging studies, organ donation records, police investigation reports, narrative of Stace Grove, Grand Jury transcript and various interviews. In 2012, I was engaged to consult with you regarding the post-conviction relief efforts for Stace Grove. For this current consultation, I have again reviewed the materials related to the autopsy and medical care including receiving another set of microscopic slides for examination, and I have been provided transcripts of my trial testimony and of other medical expert witnesses.

During all of my consultation in these matters I have also relied upon my education, training and experience as a physician, forensic pathologist and a medical examiner.

The majority of my testimony and opinions offered at trial addressed timing or aging of various injuries, especially in relation to the day the child presented clinically and the timing of when Mr. Grove had exclusive custody of him. Another pertinent aspect of my testimony was related to the assessment of brain injuries. In this report, I shall discuss various aspects of the autopsy examination, the materials that were not made available to me for examination prior to offering testimony, my current opinions after reviewing the records again with additional materials that were not provided to me before trial, and aspects of the presentation of expert testimony and medical evidence by the prosecution.

Analysis and Opinions

The most critical area of my testimony at trial involved estimating ages of various injuries found at autopsy, which held serious implications regarding when Mr. Grove had custody of the child and exclusive opportunity to have inflicted those injuries. The single most important method I employed to arrive at opinions regarding the ages of injuries was microscopic examination. I was provided a set of routine microscopic slides from the autopsy including the brain examination prior to trial, which did contribute to reaching my opinions and providing testimony. However, in addition to the routinely stained slides, selected slides were subjected to special stains that highlight specific features that may not be visible (or fully appreciable) in the routine stain. One of these is called an iron stain, which primarily stains certain iron-containing chemicals that are formed during the process of healing hemorrhage; positive iron staining permits determination of minimal age intervals for injuries, and may also identify older areas of healed injury. The other special stain that was applied to the brain slides was the beta amyloid precursor protein (APP) stain, which may assist in the identification and characterization of certain types of brain injury (see below). No special stain slides were provided to me for examination prior to trial to permit me to examine them independently, such that I could arrive at my own analysis and opinions based (in part) on that evidence. Instead, I was forced to rely on the recorded observations of these slides in the autopsy and neuropathology reports, although I did request that all of the existing microscopic slides be provided to me for examination at the time. In the course of this post-conviction review, I was provided slides from the general autopsy in the routine stain and the iron stain, but no slides from the brain examination were available to me for this examination.

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The iron stains are useful at minimum to establish that the process of response to hemorrhage has begun, including chemical breakdown of the oxygen-carrying protein in the red blood cells, hemoglobin. In most circumstances, it requires at least 2-3 days of inflammation and response for positive iron staining to become visible microscopically (although in some circumstances it may take longer), and the positive iron staining may persist for much longer (in some instances months or even years). The medical examiner who performed the autopsy and authored the autopsy report (Dr. Ross) did report that he found positive iron staining in some of the injuries examined microscopically. I was able to rely on his reported observations as a basis for some of my opinions that these were injuries older than the day of clinical presentation of the child with his injuries. However, I have now examined the iron stains myself. Aside from confirming some of the findings recorded by Dr. Ross, I have made additional observations that support and extend my opinions on the ages of the injuries. Some of the iron staining that I see is co-existent with the fresher-appearing hemorrhage; this, in conjunction with the inflammatory response, indicates that the hemorrhage is in the early stages of response, consistent with the opinions I expressed at trial (generally in the ranges of several to five days). Dr. Ross offered testimony that the fresher hemorrhage was coincidentally located with the positive iron staining, thus representing older and newer injury in the same locations. I disagree with this interpretation, which relies on coincidence and fails to synthesize the totality of the findings into a unified diagnosis. Moreover, by my recent examination of the iron stains that were not made available to me prior to trial, I have now also found positive iron staining trapped within connective tissue (i.e., separate from the visible hemorrhage), which represents the remnants of much older, healed bleeding. In other words, the autopsy slides contained evidence not only of significant aging of the more recent injuries such that they were not particularly consistent with having been incurred just prior to clinical presentation (i.e., when Mr. Grove had custody of the child) but also of much older bleeding, reflective of older injuries; this child had been injured at some much earlier time or times, unrelated to when he was with Mr. Grove.

Another important area of my analysis and testimony was the interpretation of the neuropathology examination of the brain. This examination was performed by a consulting neuropathologist, Dr. Reichard, in a separate institution (in New Mexico). Dr. Reichard authored a separate neuropathology report that was appended to the autopsy report, and his results were incorporated into the final autopsy diagnoses by Dr. Ross. Dr. Reichard missed certain findings in his slides, such as the inflammation and early healing in the subdural hemorrhage, that I identified and demonstrated photographically at trial; these findings also demonstrated that the subdural hemorrhage was actually older than the day of presentation to the hospital (on the order of having occurred 3-5 days before death, with some features suggesting as much as 7 days). Dr. Reichard microscopically identified a laceration of a brain structure (the corpus callosum), which I was able to demonstrate photographically at trial (using his routine microscopic slides) to be an artifact, i.e., not a real injury. One of the features noted by Dr. Ross was a pattern of positive APP staining in the tissue surrounding this purported laceration; such positive staining would be supportive of his interpretation, the other features that I showed consistent with it being an artifact notwithstanding. This pattern of APP staining surrounding a localized brain lesion has been termed "penumbral axonal injury" (PAI), and Dr. Reichard was first author on a paper describing APP staining of different forms of axonal injury (including PAI) in non-accidental head trauma of children, published in 2003 (see below). I did not have the opportunity to examine APP stained slides from the neuropathology examination either prior to trial or in the course of this current review. Performing my own independent examination of those slides would afford me the opportunity to assess all of the evidence relevant to this critical question, and potentially would have allowed me to have rebutted those findings and that opinion further at trial, but absent being provided those slides I could not do so.

The APP staining also bears on the broader interpretation by the medical experts in this case of the type and severity of brain injury that [redacted] Martin did or did not sustain. Positive APP staining of brain tissue identifies a type of damage called axonal injury which may occur in several different patterns. These patterns have implications for the mechanisms of causation of the axonal injury, including: traumatic axonal injury (as may be seen in non-accidental head trauma in children); vascular axonal injury (typically caused by inadequate blood supply and oxygen resulting from brain swelling, which may be secondary to many underlying processes, both traumatic and not); and the above-mentioned PAI (seen adjacent to localized brain lesions). If axonal injury is present, then its type and severity also relate to the expected clinical manifestations, including the rapidity of developing symptoms (a factor in alleged child abuse that frequently relates to which person or persons had opportunity to have inflicted the injuries). The PAI identified by Dr. Reichard (assuming for discussion that it was present) is a localized phenomenon, and by his own publication does not imply that more diffuse or widespread axonal injury is present. This is significant in this case because diffuse axonal injury does imply a severe brain injury that typically becomes severely symptomatic very rapidly. (On the contrary, the type of head injury that [redacted] Martin did have, subdural hemorrhage, may take time to accumulate before it presses on the brain, resulting in an interval between injury and clinical presentation during which clinical manifestations are minor or absent.) In fact, Dr. Reichard, the specialized neuropathologist, did not diagnose diffuse traumatic axonal injury in the brain of [redacted] Martin. However, Dr. Ross, the medical examiner who had the ultimate responsibility for the autopsy, opined at trial that the child did have traumatic axonal injury, effectively contradicting (and overruling) the neuropathologist who examined the brain. (Note that Dr. Ross did not personally examine the slides from the brain, either the routine or APP stains.) Similarly, Dr. Harper, the child abuse pediatrician, testified (well beyond her area of expertise) not only about the cause of death, but specifically that the child did indeed have an intrinsic brain injury (suggestive of axonal injury), an opinion contrary to the clinical CT scan and to the neuropathology examination. Dr. Harper also dismissed the importance of microscopic examination in her testimony, not only straying outside her expertise to mislead the jury, but also relying on much less accurate clinical indicators, some of which were clearly contradicted by the autopsy findings (both gross and microscopic).

Some of the issues raised above involve evidence that was not provided to me pretrial as the defense medical expert (e.g., iron stains) that would have had a material effect on my opinions regarding ages of injuries. Some relate to the misrepresentation of medical evidence to the jury, in particular the diagnoses of brain injuries, that held significant implications for the mechanism of causation (e.g., axonal injury versus subdural hemorrhage) of head injuries and timing of clinical manifestations. The presentation of the interpretation of the neuropathologic findings is another issue of concern in this case, given that Dr. Reichard, who actually performed that examination and authored that consultation report, was never called to testify to those findings and opinions. Had Dr. Reichard provided testimony at trial, several major issues could have been explored by the defense. These include the significance of the APP staining, in which he would likely have testified consistent with his report that the vascular axonal injury pattern precluded a diagnosis of traumatic axonal injury, and consistent with his own publication that the PAI pattern did not indicate the presence of more diffuse axonal injury; this area would also have opened the door to cross-examination that would have exposed the inconsistencies between his opinions and those expressed by both Dr. Ross and Dr. Harper. He could have been confronted with the photographic evidence that I produced which was disclosed before trial regarding the laceration being an artifact, which would have countered the only positive evidence of a primary brain injury. He could have been further confronted with the evidence I produced concerning the age of the subdural hemorrhage, which contradicted his report. Since

he did not appear at trial, none of these issues was available for exploration by the defense at trial.

Conclusion

All opinions are expressed with reasonable medical certainty. I reserve the right to amend any statements or opinions if presented with additional significant information, as well as the right to rebut opinions expressed within my areas of expertise.

Yours truly,
Arden Forensics, PC

By: Jonathan L. Arden, MD
President

ORIGINAL

FILED
2012 DEC 18 AM 9 15
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CLERK OF THE DIST. COURT
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE

Petitioner,

v.

STATE OF IDAHO

Respondent

CASE NO. CV- 12-01798

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

FACTS

Petitioner was convicted of first-degree felony murder and received a life sentence with 22 years fixed. Petitioner appealed the conviction; on March 25, 2011, the Idaho Court of Appeals affirmed the conviction and sentence. On September 12, 2011, the Idaho Supreme Court denied Petitioner's Petition for Review. Petitioner filed a Petition for Post-Conviction Relief and accompanying Affidavits in Support of the Petition for Post-Conviction Relief on September 7, 2012. This brief is in response to that petition and in support of a motion for summary disposition filed by Nez Perce County.

APPLICABLE STANDARDS

An application for post-conviction relief is a special proceeding, civil in nature, which allows a person to seek relief from a criminal conviction. *Matthews v. State*, 130 Idaho 39, 41 (Ct.App.1997); *Peltier v. State*, 119 Idaho 454, 456 (1991). A post-conviction proceeding is commenced by filing an application in the district court in which the conviction occurred. I.C. § 19-4902. An application must be filed within one year after the time for appeal has expired or after a decision on appeal has been issued. *Id.* Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

(1) That the conviction of the sentence was in violation of the constitution of the United State or the constitution or laws of this state;
(2) That the court was without jurisdiction to impose sentence;
(3) That the sentence exceeds the maximum authorized by law;
(4) That there exists evidence of material fact, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(5) That his sentence has expired, his probation or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
(6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
(7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

Furthermore, an application for post-conviction relief must contain more than a short and plain statement. The application "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Fenstermaker v. State*, 128 Idaho 285, 287 (Ct.App.1995). In other

words, the petition must present, or be accompanied by, admissible evidence supporting its allegations, or the petition will be dismissed. *Hoffman v. State*, 277 P.3d 1050, 1054 (Ct.App.2012).

The Petitioner bears the burden of proving, by a preponderance of the evidence, the allegations upon which his request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869 (1990); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002). Idaho Code § 19-4906 permits summary dismissal of a petition for post-conviction relief upon motion of a party or upon the court's own initiative. "Summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted." *State v. Payne*, 146 Idaho 548, 561 (2008); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002). Petitions that are unverified and conclusory may be dismissed by motion for summary disposition. I.C. § 29-4906. Conclusory or unverified allegations are "insufficient to entitle petitioner to an evidentiary hearing." *King v. State*, 114 Idaho 442, 446 (Ct.App.1988).

ARGUMENTS

Petitioner fails to meet the requirements of I.C. §19-4901(a) for Post-Conviction Relief because he fails to assert claims that are valid under The Uniform Post-Conviction Procedure Act, he has failed to support his claims with affidavits or evidence sufficient to provide an issue of material fact, and he raises issues that could have been raised on direct appeal but were not. Therefore, the petition fails to raise a claim for relief and should be summarily dismissed.

Petitioner alleges five causes of actions for post-conviction relief. Each cause of action addressed individually.

1. **Whether Petitioner was denied the right to confront witnesses against him when State's witnesses testified at trial about tests and results they personally did not perform nor had personal knowledge.**

Petitioner asserts that his right to confront witnesses against him was violated when State's witnesses testified at trial about neuropathology tests and examination results in which they neither performed nor had personal knowledge; and, the neuropathologist, Dr. Reichard, who performed the tests and examination, was not a witness at trial. However, the State's witnesses, Dr. Ross and Dr. Harper, were testifying to facts and data of which they were made aware through Dr. Reichard's report. The Idaho Rules of Evidence (I.R.E) provide that an expert witness is one "who is qualified as an expert by knowledge, skill, experience training, or education" and "may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." I.R.E. 702. Furthermore, an expert may base his or her opinion testimony on "facts or data in the case that the expert has been *made aware* of . . . ". I.R.E 703 (*emphasis added*).

In this case, Dr. Ross and Dr. Harper testified as expert witnesses. Furthermore, Dr. Ross and Dr. Harper based their respective opinions and testimony on facts and data, about which they were *made aware* from Dr. Reichard's report.

Petitioner's claim that his Sixth Amendment rights were violated because he did not have an opportunity to confront Dr. Reichard is incorrect and Petitioner's claim should be summarily dismissed.

2. Whether the prosecutor committed misconduct (a) outside the presence of the Court during trial, (b) during the state's case-in-chief, (c) during the cross-examination of Petitioner and (d) during closing and rebuttal argument.

Petitioner asserts that the prosecutor committed misconduct in multiple ways:

- first, he projected family photos of the victim prior to the Court going on record, thus exposing the jury to extra-judicial evidence;
- second, he appealed to the emotions, passions, and prejudices of the jury through the use of inflammatory tactics by eliciting testimony of the victim's sister;
- third, he elicited inadmissible evidence during cross-examination of Petitioner and Dr. Arden; and,
- finally, comments during his closing and rebuttal arguments constitute conduct sufficiently egregious as to result in fundamental error.

It is generally held that "a conviction will be set aside for prosecutorial misconduct only when conduct is sufficiently egregious to result in fundamental error." *State v. Porter*, 130 Idaho 772, 785 (1997). "Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of the jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *Id.* (citing, *State v. Babb*, 125 Idaho 934, 942 (1994)).

In the first instance cited by the petitioner, the prosecutor was merely setting up the projector screen and preparing for his presentation. In the second instance, Petitioner's counsel objected to the elicitation of the victim's sister's testimony and the District Court overruled the objection allowing the prosecutor's questioning to continue. The act of setting up a presentation is perhaps untimely in preparation but cannot be deemed to be calculated to influence the jury. The prosecutor had no knowledge that the jury was entering at that exact time. Eliciting testimony from the victim's sister following the objections of Counsel and subsequent ruling of the Court is not egregious conduct, and does not support a claim of fundamental error resulting from prosecutorial misconduct and thus, should be summarily dismissed.

As previously stated. a petition for post conviction relief must be supported by affidavits, records, or other evidence supporting its allegations. I.C. § 19-4903. Petitions that are conclusory or unverified may be summarily dismissed. In this instance, Petitioner fails to include any supporting evidence that the prosecutor's conduct during cross-examination of Petitioner and Dr. Arden was so egregious as to result in fundamental error and are simply conclusory allegations. Therefore, Petitioner's claims of prosecutorial misconduct should be summarily dismissed.

Furthermore, "prosecutorial misconduct during closing argument will be deemed fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a timely objection and a ruling from the trial court informing the jury that the comments should be disregarded." *State v. Priest*, 128 Idaho 6, 9 (Ct.App.1995). During his closing argument at trial, the prosecutor's comments to the jury and his comments regarding Dr. Arden's testimony were not so egregious nor inflammatory that any prejudice arising therefrom could not have been remedied by the trial court directing the jury to disregard the comments in a timely fashion. Consequently, Petitioner's alleged claims of prosecutorial misconduct during closing argument do not rise to a level of fundamental error and thus should be summarily dismissed.

Finally, Petitioner is precluded from raising issues in a post-conviction petition that could have been raised on direct appeal but that Petitioner failed to raise previously. Furthermore, issues that could have been raised on direct appeal but were not are precluded and cannot be raised in post-conviction proceedings. I.C. § 19-4901(b). Petitioner's allegations of prosecutorial misconduct should have been raised on direct appeal. Therefore, Petitioner's claims of prosecutorial misconduct are not valid claims for post-conviction relief under I.C. § 19-4901(a) and should be summarily dismissed.

3. Whether Petitioner was denied due process when jurors engaged in misconduct by allegedly sleeping during the presentation of evidence.

Petitioner asserts that jurors engaged in misconduct when they were allegedly sleeping during the presentation of evidence as various points throughout the trial. A similar issue was presented in *Murphy v. State*, 143 Idaho 139 (Ct.App.2006).

> Murphy did not identify which day of the five-day jury trial the juror allegedly slept, describe the length of time the juror allegedly slept, or explain what testimony or evidence the juror allegedly slept through. In the absence of such evidence, there was no showing of deficient performance or prejudice. Therefore, it was proper for the court to dismiss this claim.

Id. at 150. Petitioner faces similar circumstances in this case. Although Petitioner presents affidavits that identify days in which jurors allegedly slept, Petitioner has not presented affidavits, records, or other evidence indicating the length of time the jurors allegedly slept nor has Petitioner explained what testimony or evidence the jurors allegedly slept through. Additionally, one of Petitioner's affidavits cannot clearly name the juror that was allegedly sleeping. Lastly, five of the six affidavits in support of Petitioner's petition for relief generally allege that jurors were sleeping during "various times during the proceedings" and do not indicate specifically which day these jurors allegedly slept or what testimony was allegedly slept through. While there is some indication in some of the affidavits that reference which testimony jurors allegedly slept through, the allegation does not also indicate which jurors were allegedly sleeping through the reference testimony. The affidavits are not evidence and are simply non-specific conclusions by audience members watching the trial offered in support of Petitioner's allegations. Thus, there is no showing of juror misconduct, the allegations are conclusory in nature and without verification. Petitioner's allegations of juror misconduct should be summarily dismissed.

4. Whether appellate counsel was ineffective for deficient performance for either failing to raise the issue of prosecutorial misconduct or juror misconduct.

Next, Petitioner asserts appellate counsel was ineffective for either failing to raise on appeal the alleged issue of prosecutorial misconduct or the alleged issue of juror misconduct. "To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate both that his attorney's performance was deficient, and that he was thereby prejudiced in the defense of the criminal charge." *Murphy v. State*, 143 Idaho 139, 145 (Ct.App.2006); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In addition, to show the attorney's performance was deficient "a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman v. State*, 125 Idaho 644, 648 (Ct.App.1994). Furthermore, if counsel's performance is proven to be deficient, 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." *Strickland*, 446 U.S. at 694.

Nothing in Petitioner's petition supports an argument that appellate counsel's representation fell below an objective standard of reasonableness. Appellate counsel is a respected member of the Idaho State bar with no other sustained or substantiated complaints for ineffective assistance of counsel.

Petitioner's argument that *Mintun* (*holding that it cannot be ineffective assistance for appellate counsel to fail to raise claims of fundamental error for the first time on appeal*) is contrary to *Strickland* and should be overruled by the Idaho Supreme Court is dispositive. Petitioner is arguing for a rule that does not exist. Simply believing that the *Mintun* decision should be overruled because it is contrary to *Strickland* is not sufficient to establish a claim for relief. Therefore, Petitioner's claim of ineffective appellate counsel should be summarily dismissed.

5. Whether trial counsel was ineffective for numerous actions such as failing to present an adequate analysis, failing to move for a mistrial, failing to challenge for cause a juror, and for rendering deficient performance.

Petitioner offers a laundry list of claims that trial counsel was ineffective. However, Petitioner fails to support this laundry list of claims with affidavits, records, or other evidence. Conclusory allegations unsubstantiated by fact, are insufficient to entitle the Petitioner to an evidentiary hearing. I.C. § 19-4903. In this instance, Petitioner offers no facts to support his bare and conclusory allegations. Therefore, Petitioner's claims that trial counsel was ineffective should be summarily dismissed.

Furthermore, Petitioner fails to meet the standards set forth in *Strickland v. Washington* for purposes of determining whether counsel was ineffective. A court will "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..." *State v. Payne*, 146 Idaho 548, 561 (2008); *Pratt v. State*, 134 Idaho 581, 584 (2000). In addition, "[t]here is a strong presumption that counsel's performance fell within the wide range of professional assistance." *Aragon v. State*, 114 Idaho 758, 760 (1988).

Petitioner has not shown that any of trial counsel's strategic decisions (e.g., summoning a new jury pool, or peremptory challenge of a juror) resulted from inadequate preparation or ignorance of the relevant law. Therefore, Petitioner's claims of ineffective trial counsel cannot be the basis for his relief and should be summarily dismissed.

CONCLUSION

Petitioner fails to meet the requirements of I.C. §19-4901(a) for Post-Conviction Relief because he has failed to support his claims with affidavits or evidence, he fails to assert claims that are valid under The Uniform Post-Conviction Procedure Act, and he raises issues that could have been raised on direct appeal but were not.

The State respectfully requests that this Court grant the State's Motion for Summary Dismissal because the Petitioner has failed to demonstrate any genuine issue of material fact and therefore, the petition fails to raise any claims for relief that may be granted under The Uniform Post-Conviction Procedure Act.

Nanee Ceccarelli
Deputy County Prosecutor

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing, BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION, was hand delivered via court basket to:

(1) _____ hand delivered, or
(2) _____ hand delivered via court basket, or
(3) _____ sent via facsimile, or
(4) _X_ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Deborah Whipple
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

DATED this 18th day of December, 2012.

Joan C. Way
Civil Legal Assistant

FILED

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PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

DEPUTY

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

STACEY L. GROVE,	)	
Plaintiff,	)	CASE NO. CV12-01798
vs.	)	ORDER FOR TELEPHONIC STATUS CONFERENCE
STATE OF IDAHO,	)	
Defendant.	)	

Amended Petition for Post Conviction Relief due: January 4, 2013; and,

State's response due: February 12, 2013; and,

IT IS HEREBY ORDERED that Tuesday, the 12th day of February, 2013, at the hour of 11:15 A.M. Pacific Time in the District Court of the Nez Perce County Courthouse, Lewiston, Idaho, is the time and place set for a Telephonic Status Conference in the above-entitled matter with THE COURT initiating the call.

DATED this 18th day of December, 2012.

CARL B. KERRICK- District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER FOR TELEPHONIC STATUS CONFERENCE was:

✓ hand delivered via court basket, or

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 18th day of December, 2012, to:

Dennis Benjamin -mailed
P O Box 2772
Boise ID 83701

Nance Ceccarelli
P O Box 1267
Lewiston ID 83501

PATTY O. WEEKS, Clerk

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

FILED
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PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **ORDER GRANTING STIPULATED MOTION FOR PERMISSION TO CONDUCT DISCOVERY**

Pursuant to the stipulated motion filed by Petitioner Stacey Grove and the State of Idaho for permission to take the deposition of Scott Chapman and in accord with IRCP 27(c), permission is granted to Mr. Grove to depose Scott Chapman.

Ordered this 19th day of December, 2012.

Carl B. Kerrick
District Judge

Dennis Benjamin, ISB #4199
Deborah Whipple, ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
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Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AMENDED VERIFIED PETITION FOR POST-CONVICTION RELIEF**

GENERAL ALLEGATIONS:

1. Petitioner, Stacey Grove, is currently incarcerated at the Idaho Correctional Institution in Orofino, Idaho.

2. Mr. Grove is serving a sentence imposed by the District Court of the Second Judicial District, State of Idaho, County of Nez Perce, the Honorable Carl B. Kerrick, presiding.

3. The Nez Perce County District Court Number for that case is CR-2007-768.

4. Mr. Grove was charged with the first-degree murder of [redacted] Martin (hereafter "[redacted]

5. Mr. Grove was represented at trial by attorney Scott Chapman (hereafter "defense

counsel").

6. The state was represented by the Nez Perce County Prosecuting Attorney, Daniel Spickler (hereafter "prosecutor").

7. The jury returned a guilty verdict.

7.1 A true and correct copy of the Clerk's Record in the criminal case is attached as Exhibit A.

7.2 A true and correct copy of the transcripts of the proceedings in the criminal case is attached as Exhibit B.

7.3 A copy of the exhibits introduced at trial are attached hereto as Exhibit C.

8. The district court sentenced Mr. Grove to a life sentence with 22 years fixed.

9. Mr. Grove appealed from the judgment and sentence.

10. Attorneys Diane Walker and Eric Fredericksen (hereafter "appellate counsel") represented Mr. Grove on appeal.

11. On March 25, 2011, the Idaho Court of Appeals affirmed the judgment of conviction and the sentence. *State v. Grove,* 151 Idaho 483, 259 P.3d 629 (Ct. App. 2011), *review denied* (September 12, 2011).

11.1. A copy of the opinion is attached as Exhibit D.

12. The Supreme Court denied Mr. Grove's Petition for Review on September 12, 2011.

13. The remittitur issued that same day.

14. With respect to this conviction, Mr. Grove has not filed any other petitions for post-conviction relief.

FIRST CAUSE OF ACTION: ***Petitioner was Denied the Right to Confront Witnesses Against Him in Violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article, 1, § 13 of the Idaho Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

15. Petitioner re-alleges paragraphs 1-14 above.

16. Mr. Grove's right to confront witnesses was violated when state witnesses testified at trial about neuropathology tests and examination results when those witnesses neither performed nor had personal knowledge of the neuropathology testing and examination, and when the neuropathologist who did perform the tests and examinations was not a witness at the trial.

16.1. A further confrontation clause violation occurred when the autopsy report was admitted into evidence at trial.

17. Dr. Marco Ross is a forensic pathologist. Exhibit B, pg. 892, ln. 20.

18. Dr. Ross performed the autopsy of [redacted] while he was employed at the Spokane County Medical Examiner's Office. Exhibit B, pg. 893, ln. 23.

19. Dr. Ross testified at Mr. Grove's trial. Exhibit B, pg. 892-988.

20. Dr. Ross's autopsy report was introduced as State's Exhibit 11 at the trial. Exhibit C (State's Exhibit 11); Exhibit B, pg. 902, ln. 5.

20.1. Defense counsel did not object to the introduction of the autopsy report. *Id.*

21. Dr. Ross testified that there have been occasions where the Medical Examiner's Office would send tissue samples to outside experts for examination and interpretation. Exhibit B, pg. 900, ln. 21-24.

22. In this case, Kyler's brain was sent to Dr. R. Ross Reichard, a forensic neuropathologist at the University of New Mexico for examination. Exhibit B, pg. 901, ln. 5-7; pg. 928, ln. 18-20.

23. The results of the examination were included in the autopsy report which was admitted as Exhibit 11 at trial. Exhibit B, pg. 901, ln. 1-2.

24. At trial, Dr. Ross was permitted to testify to Dr. Reichard's findings. Exhibit B, pg. 928, ln. 21 - pg. 930, ln. 23.

24.1. Dr. Ross testified that Dr. Reichard reported there were bilateral subdural hemorrhages in the brain. Exhibit B, pg. 928, ln. 21-23.

24.2. Dr. Ross also testified that Dr. Reichard reported there were bilateral subarachnoid hemorrhages in the brain. Exhibit B, pg. 929, ln. 1-2.

24.3. Dr. Ross also testified that Dr. Reichard reported that the brain was swollen. *Id.*

24.4. Dr. Ross also testified that Dr. Reichard reported there was a laceration in the corpus callosum. *Id*, ln. 3.

24.5. Dr. Ross also testified that Dr. Reichard reported there was a hypo-ischemic injury to the brain. *Id*, ln. 5-6.

24.6. Dr. Ross also testified that Dr. Reichard reported there were vascular axonal injuries to the brain. *Id*, ln. 10.

24.7. Dr. Ross also testified that Dr. Reichard reported there were autolytic changes in the brain. *Id*, ln. 11.

24.8. Dr. Ross also testified that Dr. Reichard reported that the subdural

hemorrhage and the subachnoid hemorrhages were "acute." Exhibit B, pg. 930, ln. 3-4.

24.9. Dr. Ross testified that the significance of a tear in the corpus callosum reported by Dr. Reichard is that it is indicative of a high degree of force which would render the victim unconscious or nearly unconscious at the time of impact. *Id.*, ln. 21-23.

24.10. Dr. Ross also testified that the swelling reported by Dr. Reichard indicated that the fatal injury occurred sometime immediately before death or within a day or two prior to death. *Id.*, ln. 6-9.

24.11. Dr. Ross testified that the degree of hemorrhage in the brain and the tear in the corpus callosum reported by Dr. Reichard would be inconsistent with a fall from a kitchen counter onto a linoleum floor. Exhibit B, pg. 936, ln. 3-7.

24.12. Dr. Ross testified that the degree of hemorrhage in the brain and the tear in the corpus callosum reported by Dr. Reichard would be consistent with a very significant blunt force impact or impacts to the head that would be in excess of what would be expected from a fall to the floor. *Id.*, ln. 12-17.

24.13. Dr. Ross testified that the widespread vascular axonal swelling reported by Dr. Reichard was indicative of injury to the axons which could occur as a result of blunt force trauma tearing the axons. Exhibit B, pg. 941, ln. 13-18.

24.14. Dr. Ross also testified that Dr. Reichard noted in his report that there were axonal injury changes occurring in the vicinity of the corpus callosum which would be consistent with a shearing injury, in Dr. Ross's opinion. Exhibit B, pg.

942, ln. 14-23.

24.15. Dr. Ross also testified that it was not surprising for Dr. Reichard to report axonal injury given that he also reported a laceration or tear in the corpus callosum. *Id.*, at 18-23.

24.16. Dr. Ross repeated his testimony that Dr. Reichard's observation of a tear in the corpus callosum shows there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12.

24.17. Dr. Ross also testified that the brain injuries reported by Dr. Reichard did not result from a single impact. Exhibit B, pg. 947, ln. 20.

24.18. Dr. Ross also repeated his testimony that the head injuries reported by Dr. Reichard would have caused immediate or near immediate unconsciousness or near unconsciousness to [redacted] Exhibit B, pg. 948, ln. 23 - pg. 949, ln. 4.

24.19. Dr. Ross testified that [redacted] could not have been engaged in certain activities previously described by the state's witness Lisa Nash with the injuries reported by Dr. Reichard. Exhibit B, pg. 949, ln. 5 - pg. 95, ln. 15.

24.20. On redirect examination of Dr. Ross, the prosecutor stated that "in the report from New Mexico that the doctor there talked about the loss of clear distinction between gray-white junction and generalized gray discoloration." Exhibit B, pg. 984, ln. 23 - pg. 985, ln. 2.

24.21. Dr. Ross explained that finding to show that "brain death has occurred, but

there's still ongoing cardiac activity." *Id*, pg. 985, ln. 3-5.

24.22. The prosecutor asked Dr. Ross, "Is there anything in your autopsy report or in the report from Dr. Reichard that would be inconsistent with those injuries occurring approximately 48 hours prior to cardiac death?" *Id*, pg. 987, ln. 4-7.

24.23. Dr. Ross answered, "No." *Id*, ln. 8.

24.24. Dr. Ross relied upon Dr. Reichard's report in his opinions that the cause of death was brain swelling and cerebral hemorrhage due to blunt force impact to the head, that the manner of death was homicide, and that the fatal injuries could have been inflicted approximately 48 hours prior to cardiac death. *Id*, pg. 987, ln. 9 - pg. 988, ln. 8.

25. Dr. Reichard was never called to testify at trial.

26. Dr. Ross admitted that he did not do anything with the brain other than to remove it, examine its surface and have it sent to Dr. Reichard's laboratory. Exhibit B, pg. 951, ln. 23 - pg. 952, ln. 7.

27. Dr. Ross admitted he did not prepare the brain tissue slides or inspect the brain internally. Exhibit B, pg. 952, ln. 10-12.

28. Dr. Ross admitted he did not observe the corpus callosum laceration. Exhibit B, pg. 956, ln. 10-15.

29. Dr. Ross admitted that he did not observe the global hypo-ischemic brain injury. Exhibit B, pg. 956, ln. 18 - pg. 957, ln. 7.

30. Dr. Ross admitted he did not examine any of the original slides or recuts of the brain tissue. Exhibit B, pg. 959, ln. 10-15.

31. Dr. Ross testified that he did not recall whether he had seen any photographs taken of the brain by Dr. Reichard. *Id*, ln. 23-25.

32. The introduction of Dr. Reichard's report and Dr. Ross's testimony about Dr. Reichard's examination of the brain and his interpretation of the meaning of those findings violated Mr. Grove's right to confront witnesses guaranteed by the state and federal constitutions.

33. Dr. Ross also testified about hemorrhages which he did not observe but were reported "by the surgeon who did the transplant surgery," in the retroperitoneal areas and the psoas muscles. Exhibit B, pg. 938, ln. 20-23.

34. That surgeon did not testify at trial.

35. That testimony from Dr. Ross also violated Mr. Grove's right to confront witnesses.

36. The testimony of Dr. Donald Chin, which referred to the autopsy report, which in turn contained Dr. Reichard's observations, findings and conclusions, violated Mr. Grove's right to confront witnesses.

36.1. Dr. Chin testified that based "on what I've read on this autopsy report is the most brutal case . . . I've ever seen." Exhibit B, pg. 851, ln. 5-6.

37. The testimony of Dr. Jay Hunter which referred to Dr. Reichard's observations, findings and conclusions violated Mr. Grove's right to confront witnesses.

37.1. While Dr. Hunter admitted that he is "not a pathologist," he testified that, "this child on autopsy, had . . . a fair amount of subarachnoid hemorrhage" that "should have produce[d] immediate symptoms," such as "unconsciousness," given the degree of injury described by Dr. Reichard. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22.

37.2. Dr. Hunter also testified that the defense version of the events on the evening prior to Kyler's hospitalization would be "virtually impossible" given the injuries described by Dr. Reichard. Exhibit B, pg. 876, ln. 11-20.

37.3. Dr. Hunter repeated that testimony during the state's redirect examination. Exhibit B, pg. 886, ln. 18-24.

38. The testimony of Dr. Deborah Harper which referred to Dr. Reichard's observations, findings and conclusions violated Mr. Grove's right to confront witnesses.

38.1. Dr. Harper testified that she had the autopsy report from Dr. Ross, which contains the observations, findings and conclusions of Dr. Reichard, and which was introduced at trial as State's Exhibit 11. Exhibit B, pg. 1031, ln. 19-20.

38.2. Dr. Harper used that report, among other things, to reach her opinion as to the cause of death, i.e., the brain injury. Exhibit B, pg. 1032, ln. 3-10.

38.3. Dr. Harper also testified that based upon the injuries described by Dr. Reichard, [redacted] "would have been unconscious or semi-conscious." Exhibit B, pg. 1033, ln. 17-18.

38.4. Dr. Harper also testified that in her experience, the extent of the brain injury described by Dr. Reichard was unusually severe. Exhibit B, pg. 1034, ln. 2-21.

38.5. Doctor Harper also testified that the defense version of the events on the evening prior to Kyler's hospitalization would be "not consistent" given the injuries described by Dr. Reichard. Exhibit B, pg. 1036, ln. 7-20; pg. 1037, ln. 20-24.

39. Trial counsel did not object to any of this testimony.

40. The failure to object was not a strategic decision on the part of trial counsel.

41. These violations of Mr. Grove's right to confront witnesses were not harmless error.

42. The Court of Appeals did not permit Mr. Grove to raise this issue for the first time on appeal. *State v. Grove,* 151 Idaho 483, 259 P.3d 623 (Ct. App. 2011), *review denied.*

B. Why Relief Should be Granted.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him." The Supreme Court has held "that this bedrock procedural guarantee applies to both federal and state prosecutions." *Pointer v. Texas*, 380 U.S. 400, 406 (1965). Article 1, § 13 of the Idaho Constitution similarly guarantees a criminal defendant the right to "appear and defend in person."

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that testimonial statements of witnesses absent from trial are admissible only where declarant is unavailable and where defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 59. Here, the statements of Dr. Reichard and others were introduced at trial without a showing of unavailability or a prior opportunity to cross-examine.

Further, the testimony was undoubtedly testimonial in nature. The determination of whether evidence is testimonial requires the court to consider the purpose behind the Confrontation Clause. *State v. Hooper*, 145 Idaho 139, 143, 176 P.3d 911, 915 (2007). The Supreme Court noted in *Crawford, supra*, that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Hooper*, 145 Idaho at 143, 176 P.3d at 915,

quoting Crawford, 541 U.S. at 50.

The *Hooper* Court analyzed the guidelines set forth by the United States Supreme Court in determining what constitutes testimonial statements: First, the Court looked to Webster's dictionary definition of "testimony" from 1828, *i.e.*, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51. Next, the Court listed three formulations of "core" testimonial statements: (1) "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted). Dr. Reichard's report and its incorporation into Dr. Ross's autopsy report clearly fits within the definition of "core" testimonial statements. *See, Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2716-17 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

The unconstitutional admission of the evidence cannot be found to be harmless. Here, the Court of Appeals in the direct appeal noted the importance of Dr. Reichard's evidence to the state's case:

> Initially, we clarify that the crux of this issue affects the central disputed question in this case—when the injuries which ultimately caused K.M.'s death occurred and whether it was likely that K.M. would have lost consciousness and/or shown severe symptoms immediately after the injuries were inflicted. In other words, did the injuries occur on the morning that K.M. lost consciousness—and was alone

> with Grove—or several days prior, when it was undisputed that the injuries could not have been inflicted by Grove because he was not alone with K.M. In this regard, important to the state's theory of the case that Grove caused the fatal injuries on the morning of July 10 was the conclusion of Dr. Reichard, based on his microscopic examination of K.M.'s brain, that K.M. had suffered a laceration of the corpus callosum, which would have likely caused immediate loss of consciousness, thereby implicating Grove as the cause of K.M.'s injuries during the 36–45 minute period of time during which he was alone with K.M. Grove points out that both Dr. Ross and Dr. Harper recited Dr. Reichard's observations in this regard, as gleaned from the autopsy report, as neither was present during the autopsy nor conducted their own microscopic analysis, and relied on these observations in forming their respective opinions that K.M.'s injuries had been inflicted on July 10.
>
> By contrast, Grove's expert, Dr. Arden, testified that he did not agree with Dr. Reichard that a laceration was present and that the anomaly was the result of handling of the brain after death. He also offered his opinion, after examination of the microscopic slides, that K.M.'s injuries had been inflicted at least three days prior to death (thus absolving Grove of having caused them) and that they would not have necessarily resulted in immediate loss of consciousness.

State v. Grove, 151 Idaho 483, 490, 259 P.3d 629, 636 (Ct. App. 2011), *review denied* (Sept. 12, 2011). In light of the central importance of the evidence from Dr. Reichard, the state cannot meet the burden of proving its unconstitutional admission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt).

SECOND CAUSE OF ACTION: ***Petitioner was Denied a Fair Trial and Due Process of Law in Violation of Idaho Constitution Art. I, § 13 and the Fourteenth Amendment of the United States Constitution by the Multiple Instances of Prosecutorial Misconduct (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

43. Petitioner re-alleges paragraphs 1-42 above.

44. The prosecutor committed misconduct outside the presence of the Court during trial.

44.1. During the trial, but prior to the Court going on the record, the prosecutor projected family photos of [redacted] onto the court room screen while the jury entered the courtroom.

44.2. The family photos would then be interchanged with the autopsy photographs.

44.3. Affidavits of witnesses to this misconduct are being filed in support of this Petition.

44.4. The prosecutor's actions exposed the jury to evidence outside the presence of the Court, invoking sympathy for [redacted] and his biological family and arousing passion and prejudice against Mr. Grove.

44.5. Defense counsel did not draw this behavior to the attention of the Court, ask that the prosecutor be ordered to desist or move for a mistrial.

45. The prosecutor committed misconduct during the state's case-in-chief.

45.1. The prosecutor called [redacted] Bandel, the sister of [redacted] as a witness. Exhibit B, pg. 823, ln. 25 - pg. 824, ln.1.

45.2. Defense counsel objected noting that [redacted] was a child and arguing that the prosecutor's purpose in calling her was "obviously . . . just to impassion or inflame the jury" and he expected [redacted] to testify that when she last saw her brother "he was lying on his mother's bed, and she gave him a hug and kiss and he said good bye." Exhibit B, pg. 821, ln. 24 - pg. 822, ln. 8.

45.3. In response, the prosecutor told the Court that his purpose in calling [redacted]

was to elicit evidence regarding the "condition of [redacted] Martin on the morning of July 10th," and argued that he only had Lisa Nash and [redacted] to provide evidence on that topic. Exhibit B, pg. 822, ln. 17-23. He stated, "I'm entitled to ask her what she recalls that morning, what she recalls of the physical condition of her brother the last time she saw him." Exhibit B, pg. 823, ln. 1-3.

45.4. The Court overruled defense counsel's objection "based on the argument made by Mr. Spickler on behalf of the State." Exhibit B, pg. 823, ln. 8-9.

45.5. Mr. Spickler then elicited testimony from [redacted] that she was a "[p]retty strong little girl," that she said "bye" to [redacted] before she left that morning, gave him a kiss and a hug and that she never saw her "brother again after that." Exhibit B, pg. 825, ln. 22; pg. 826, ln. 15-18; pg. 827, ln. 16-17.

45.6. That testimony, elicited by the prosecutor from [redacted] went beyond what the prosecutor told the Court he would elicit and it had the effect of inflaming the passions and prejudices of the jury and encouraging the jury to convict Mr. Grove for reasons other than the relevant evidence.

45.7. Defense counsel failed to object that the prosecutor's actual questioning of [redacted] went beyond what he had represented to the Court and was inadmissible.

45.8. During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after [redacted]'s death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997, ln. 23; Exhibit C (State's Exhibits 4, 5 and 6).

45.9. The photos were inflammatory because they included a large display of sympathy cards sent to Lisa Nash.

45.10. These photographs were inadmissible under IRE 403 as the danger of unfair prejudice outweighed any probative value.

46. The prosecutor committed misconduct in his cross-examination of Mr. Grove where the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11.

47. In his cross-examination of Dr. Jonathan Arden, the prosecutor suggested by a question that Dr. Arden was "on a special mission here, which is to provide such evidence as you might that would support the defense's case[.]" Exhibit B, pg. 1321, ln. 18-20.

48. The prosecutor committed misconduct during the cross-examination of Mr. Grove.

48.1. The prosecutor cross-examined Mr. Grove about the fact that Mr. Grove was behind on child support to his biological son, a fact both irrelevant and unfairly prejudicial. Exhibit B, pg. 1115, ln. 21-24.

48.2. During the cross-examination of Mr. Grove, the prosecutor asked Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12.

48.3. This questioning went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg. 1067, ln. 3-5.

49. The prosecutor committed misconduct during closing and rebuttal argument.

49.1. The prosecutor misstated the defense position regarding preexisting head injury, saying that the defense was that there was "some long-term brain injury." Exhibit B, pg. 1419, ln. 6-10.

49.2. The prosecutor called Dr. Arden's testimony about the absence of a tear in the corpus callosum "a bit of smoke and mirrors to get you confused." *Id*, pg. 1426, ln. 16-18.

49.3. The prosecutor suggested without supporting evidence that Dr. Arden's "financial position" leads him to decide what cases he can take. *Id,* pg. 1429, ln. 8-9.

49.4. The prosecutor testified that a "colleague" said that Dr. Arden's answers during cross-examination were slippery as an ice cube and the prosecutor opined that the doctor "was stretching things." *Id*, pg. 1430, ln. 4-8; pg. 1461, ln. 11.

49.5. The prosecutor told the jury without supporting evidence that "[c]are takers kill little babies all the time." *Id*, pg. 1460, ln. 5-6.

49.6. The prosecutor told the jury without supporting evidence that "[p]arents kill babies all the time." *Id*, ln. 6-7.

49.7. The prosecutor told the jury without supporting evidence that "there are literally thousands of [similar] incidents in any given span of time[.]" *Id.*, ln. 8-10.

49.8. The prosecutor told the jury without supporting evidence that he believed that "our local paper has probably shown . . . probably six more of these cases since – since this one started." *Id*, ln. 11-14.

49.9. The prosecutor misstated for a second time Dr. Arden's testimony about head injuries. *Id.*, pg. 1462, ln. 18-19.

49.10. The prosecutor argued that "Dr. Ross had the unenviable task of taking Kyler's body apart piece by piece[.]" *Id*, pg. 1464, ln. 24-25.

49.11. The prosecutor implied that he had evidence not presented at trial that Mr. Grove had previously been "violent with [redacted] Exhibit B, pg. 1430, ln. 15-21.

49.12. The prosecutor argued that "we don't want to let a murderer go free." *Id*, pg. 1466, ln. 9.

49.13. The prosecutor told the jury that he did not call [redacted]s biological father as a witness "because my medical experts unanimously, to no exception, said he could not have done it." *Id*, pg. 1477, ln. 18-20.

49.14. The prosecutor argued without supporting evidence that the emotional breakdown of Mr. Grove at trial showed that Mr. Grove had a different kind of "emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries[.]" *Id*, pg. 1458, ln. 16-18.

50. Defense counsel did not object to any of the misconduct alleged in paragraphs 47-49.

51. The failure to object was not a strategic decision on defense counsel's part.

52. Had defense objected, the objections would have been sustained.

53. In addition, the Court would have given curative instructions to the jury.

54. Further, defense motions would have alerted the prosecutor that his misconduct would be challenged, which would have prevented some or all of the subsequent misconduct.

55. Had a motion for a mistrial been made based upon the totality of prosecutorial

misconduct, the motion would have been granted.

56. This prosecutorial misconduct was not harmless error.

57. The unobjected-to prosecutorial misconduct could not have been raised on appeal. *State v. Perry,* 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

B. Why Relief Should be Granted.

The due process clauses of Art. 1, § 13, of the Idaho Constitution, and the Fourteenth Amendment ensure, at a minimum, "that criminal trials shall be fundamentally fair." *Schwartzmiller v. Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978). Further, "[i]t is the *duty of a prosecuting attorney* to see that the accused has a fair and impartial trial." *State v. Spencer*, 74 Idaho 173, 183, 258 P.2d 1147, 1153 (1953) (emphasis added) (finding that the prosecutor's misconduct warranted a new trial). In this case, as demonstrated above, the prosecutor grossly violated his duty to ensure fairness at every stage of the trial proceedings.

He exposed the jury to extra-judicial evidence. He appealed to the emotions, passions and prejudices of the jury through the use of inflammatory tactics. And he elicited inadmissible evidence both in direct and cross-examination of witness.

Further, his closing and rebuttal arguments are replete with misconduct. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case .... [t]o enlighten the jury and to help the jurors remember and interpret the evidence." *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (internal quotations omitted). Therefore, "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice: Prosecution and Defense Functions § 3-5.8 (3d. ed.1993). The prosecutor is charged with the dual task of ensuring that the government's case is

presented "earnestly and vigorously, using every legitimate means to bring about a conviction, but also to see that justice is done and that every criminal defendant is accorded a fair trial." *State v. Reynolds*, 120 Idaho 445, 449, 816 P.2d 1002, 1006 (Ct. App.1991). Therefore, it is improper for a prosecutor to appeal to the emotions, passion or prejudice of the jury through the use of inflammatory tactics. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. Here, however, the prosecutor appealed to the passions and prejudices of the jury, misstated the evidence, used inflammatory language in reference to defense witnesses, argued evidence not presented at trial, and misrepresented the state's burden of proof. This was clear and repeated misconduct.

The effect of the prosecutor's misconduct requires the granting of the petition. "The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated show the absence of a fair trial in contravention of the defendant's right to due process." *State v. Gross*, 146 Idaho 15, 21, 189 P.3d 477, 483 (Ct. App.2008). Thus, it is the cumulative effect of the misconduct engaged in here that should be considered. *Id.* Considering all the misconduct, it is clear that the state cannot meet its burden of proving its misconduct was harmless beyond a reasonable doubt as required by *Chapman v. California, supra.*

THIRD CAUSE OF ACTION: ***Petitioner was Denied Due Process and the Right to Jury Trial in Violation of Idaho Constitution Art. I, §§ 7 and 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1).***

A. Facts Pertaining to Cause of Action.

58. Petitioner re-alleges paragraphs 1-57 above.

59. Petitioner was denied his state and federal constitutional rights to due process and

jury trial when jurors repeatedly slept during the presentation of evidence.

59.1. Affidavits of individuals who witnessed jurors sleeping during trial testimony are being filed in support of this Petition.

59.2. The witness's affidavits are confirmed by the trial transcript which show the Court was required to take several unplanned recesses because jurors repeatedly fell asleep during the presentation of the evidence. Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25.

60. Sleeping jurors cannot independently evaluate the evidence and function as the constitution requires.

61. This issue could not have been raised on appeal under *State v. Perry*, *supra*, because defense counsel did not object to the sleeping jurors or make a motion for mistrial.

62. This error was not harmless.

B. Why Relief Should be Granted.

A juror's inattentiveness, by sleeping during witness testimony, may constitute misconduct. *State v. Strange*, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2009). *See e.g., State v. Majid*, 914 N.E.2d 1113, 1115 (Ohio Ct. App. 2009) (Numerous instances of jurors' sleeping during murder trial, including during eyewitness testimony, violated defendant's right to due process and constituted plain error). "[A] juror who sleeps through much of the trial testimony cannot be expected to perform his duties." *Id*, *citing United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841 (1977); *United States v. Cameron*, 464 F.2d 333, 335 (3rd Cir. 1972).

"Due process mandates that the defendant is entitled to have a jury hear and evaluate the

evidence," *id.*, and the jurors in this case were instructed by the Court "to decide the facts from *all the evidence* in the case." Exhibit B, pg. 1399, ln. 24-25 (emphasis added). The repeated instances of sleeping by one or more jurors, especially given they were sleeping during the critical medical testimony of Drs. Ross and Arden, denied Mr. Grove his state and federal constitutional rights to a jury trial and due process.

FOURTH CAUSE OF ACTION: ***Petitioner was Denied the Effective Assistance of Counsel on Appeal in Violation of Idaho Constitution Art. I, § 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

63. Petitioner re-alleges paragraphs 1- 62 above.

64. Alternative argument: If the Court determines that the prosecutorial misconduct issue raised in the Second Cause of Action could have been raised on direct appeal, Petitioner alleges that it was therefore deficient performance for appellate counsel to fail to raise that issue.

64.1. Had appellate counsel raised the issue on appeal, the conviction would have been reversed by the appellate court.

65. Alternative argument: If the Court determines that the juror misconduct issue raised in the Third Cause of Action could have been raised on direct appeal, Petitioner alleges that it was therefore deficient performance for appellate counsel to fail to raise that issue.

65.1. Had appellate counsel raised the issue on appeal, the conviction would have been reversed by the appellate court.

B. Why Relief Should be Granted.

A defendant in a criminal case is guaranteed the effective assistance of counsel under the

Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.*

An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho 656, 658, 168 P.3d 40, 42 (Ct. App. 2007).

Petitioner draws the Court's attention to the fact that *Mintun* holds that it cannot be ineffective assistance for appellate counsel to fail to raise claims of fundamental error for the first time on appeal. *Id.* (Petitioner disagrees and believes the *Mintun* bright-line rule is contrary to *Strickland* and should be overruled by the Idaho Supreme Court.) Right or wrong, the rule is based in part upon a concern that the record on appeal might not be "complete enough to allow appellate examination of all the factors that must be considered on such a claim." *Id.* Thus, the

Court of Appeals decided to leave such issues "for presentation in a post-conviction proceeding, where an adequate record could be developed." *Id.* Moreover, "the allowance of this type of claim for ineffective assistance of appellate counsel is ordinarily not necessary to protect a defendant's rights because the defendant can bring the same claim of impropriety in the trial proceedings as a claim of ineffective assistance of his trial counsel for failing to object to the alleged error in the trial court." *Mintun*, 144 Idaho at 662, 168 P.3d at 46.

In this case, Mr. Grove has raised claims of prosecutorial misconduct and the deprivation of the right to jury trial, which were not objected to below. Mr. Grove does not believe appellate counsel could have raised those issues on direct appeal under *State v. Perry*, *supra*, as was the case with his confrontation clause claim. Thus, he can raise all those issues in this Petition, both as direct claims and as aspects of the ineffective assistance of trial counsel claim alleged below. *See e.g., DeRushé v. State*, 146 Idaho 599, 603-604, 200 P.3d 1148, 1152-53 (2009) (deprivation of the right to testify raised as direct constitutional violation) *with Barcella v. State*, 148 Idaho 469, 476, 224 P.3d 536, 543 (Ct. App. 2009) (deprivation of the right to testify raised as an aspect of an ineffective assistance of trial counsel claim). If the Court disagrees and holds that Claims Two or Three could have been raised on appeal and thus cannot be raised now, it should then grant relief due to the ineffective assistance of appellate counsel as the rationale behind the *Mintun* rule would no longer be applicable. In either case, trial counsel's failure to make proper objections at trial to the errors above are all incorporated into the ineffective assistance of trial counsel claim alleged below.

FIFTH CAUSE OF ACTION: ***Petitioner was Denied the Effective Assistance of Counsel at Trial in Violation of Idaho Constitution Art. I, § 13 and the Sixth and Fourteenth Amendments of the United States Constitution (I.C. § 19-4901(a)(1)).***

A. Facts Pertaining to Cause of Action.

66. Petitioner re-alleges paragraphs 1-65 above.

67. Defense counsel rendered deficient performance in failing to present an adequate analysis to support his pretrial motion to allow the admission of alternate perpetrator evidence.

67.1. The failure to present an adequate analysis resulted in the District Court denying admission of that evidence - evidence which was crucial to the defense and the lack of which was prejudicial.

68. Defense counsel rendered deficient performance in failing to move for a mistrial or for the summoning of a new jury pool after a potential juror made statements in voir dire that polluted the entire jury pool.

68.1. The potential juror stated in front of all the potential jurors that he worked in the funeral business and he knew the police officer witnesses Greene and Petrie well, both from their work investigating cases that came through the funeral home, and through their work for his wife who was the city manager, and that they are very credible. Exhibit B, pg. 155, ln. 13-14.

68.2. He also stated he had worked in the funeral business for a long time and seen "these situations" before and did not have a lot of empathy except for the victims. *Id.*, pg. 155, ln. 21 - pg. 156, ln. 2.

68.3. The failure to object and move for a cautionary instruction or for the

summoning of a new jury pool prejudiced Petitioner.

69. Counsel rendered deficient performance in failing to challenge for cause or peremptorily challenge Juror #5 (Loetscher) after voir dire revealed that he worked at St. Joseph's Hospital and knew of "just about everyone on the [state's witness list] . . . . particularly the ER doctors that was listed there." Exhibit B, pg. 144, ln. 14-19.

69.1. Juror #5 became the presiding juror. Exhibit B, pg. 1471, ln. 19-22.

70. Counsel rendered deficient performance in failing to assert Petitioner's state and federal constitutional rights to confrontation (Idaho Const. Art. I, § 13, United States Const. Amendments 6 and 14) and by failing to make proper evidentiary objections.

70.1. During trial, state's witnesses, *i.e.,* Nash, Chin, Harper, Hunter and Ross, repeatedly testified to the contents of the autopsy report which contained information from Dr. Reichard.

70.2. Dr. Reichard's information was the state's only basis of proof for the nature of head and alleged brain injuries, the only basis for testimony as to the timing of the head and alleged brain injuries, and the only basis for the state's claim that [redacted] had suffered a tear to the corpus callosum and axonal shearing.

70.3. However, the state did not present the testimony of Dr. Reichard in violation of the state and federal constitutional rights of confrontation.

70.4. Petitioner was prejudiced because had counsel objected on confrontation grounds, the state would have had no testimony as to any head or alleged brain injuries and the timing of those injuries and thus, could not have obtained a conviction.

70.5. In response to the defense motion for acquittal or in the alternative a new trial, the state argued that Dr. Reichard was the one person who actually examined the brain and therefore was a more credible witness than Dr. Arden. Exhibit B, pg. 1486, ln. 6-15.

70.6. Prosecutor Spickler said in discounting Dr. Arden's testimony, " . . . [Dr. Arden] was trying to contradict the findings of an expert in New Mexico who actually had the brain and actually took a look at the brain in toto, as opposed to one or more slides." Exhibit B, pg. 1486, ln. 8-12.

70.7. Defense counsel failed to object to the testimony from Dr. Chin which referred to Dr. Reichard's report.

70.8. Defense counsel failed to object to the testimony from Dr. Hunter which referred to and relied upon Dr. Reichard's report.

70.9. Defense counsel failed to object to the testimony from Dr. Harper which referred to and relied upon Dr. Reichard's report.

70.10. The testimony of Drs. Chin, Hunter, Harper and Ross which related the findings of Dr. Reichard, were inadmissible under IRE 703 as well as the confrontation clause.

70.11. Had Dr. Reichard provided testimony at trial, several major issues could have been explored by the defense. These include the significance of the APP staining, in which he would likely have testified consistent with his report that the vascular axonal injury pattern precluded a diagnosis of traumatic axonal injury, and, consistent with his own publication, that the PAI pattern did not indicate the

presence of more diffuse axonal injury. Had his testimony been to the contrary, he could have been impeached with his own report and publication.

70.12. In addition, defense counsel could have exposed the inconsistencies between Dr. Reichard's opinions and those expressed by both Dr. Ross and Dr. Harper.

70.13. Dr. Reichard also could have been confronted with the photographic evidence that Dr. Arden produced regarding the brain laceration being an artifact, which would have countered the only positive evidence of a primary brain injury.

70.14. Dr Reichard could also have been confronted with the evidence Dr. Arden produced concerning the age of the subdural hemorrhage, which contradicted his report.

71. Counsel rendered deficient performance in failing to object to hearsay testimony from Lisa Nash regarding the autopsy report contents.

71.1. At trial, Lisa Nash testified that she was told that [redacted] had blood in his brain that could not be removed. She did not identify who told her this and the testimony was admitted without limitation including for the truth of the matter asserted. Exhibit B, p. 755, ln. 16-25.

71.2. Defense counsel did not object on hearsay grounds. Had counsel objected, the objection would have been granted.

71.3. The failure to object prejudiced Petitioner because, as noted above, had counsel asserted Petitioner's constitutional confrontation rights, the state would have had no proof of cause of death other than Ms. Nash's hearsay testimony.

Without that testimony, Petitioner would not have been convicted.

72. Counsel rendered deficient performance in failing to object to the testimony of Steve Stocking, a paramedic, that Petitioner was too calm in his opinion when the paramedics arrived in response to the 911 call. Exhibit B, pg. 838, ln. 22.

72.1. Mr. Stocking was not a psychologist or psychiatrist and had no qualifications as an expert on the appropriate reactions in a crisis.

72.2. His opinion regarding Petitioner was not relevant (IRE 401 and 402) and did not fall within the scope of admissible opinion testimony by a lay witness (IRE 701) because it involved specialized knowledge of the appropriate reaction of people in crisis.

73. Defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that there was "no way we would have missed any of the[] injuries" described in the autopsy report. Exhibit B, pg. 851, ln. 5-6.

73.1. Defense counsel failed to cross-examine Dr. Chin on this claim even though, according to Dr. Ross, some of the injuries in autopsy were old enough that they did exist when he saw [redacted] specifically, Dr. Ross testified that the injury to the left thigh and the injuries on the back were older. Exhibit B, pg. 978, ln. 23 - pg. 979, ln.17; pg. 987, ln. 9-20.

74. Defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that what he "read in this autopsy report is the most brutal case" he had ever seen. Exhibit B, pg. 851, ln. 6-7.

74.1. This testimony was not relevant under IRE 401 and 402.

74.2. This evidence was unfairly prejudicial under IRE 403.

75. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that subarachonoid hemorrhage has to have immediate symptoms. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22.

75.1. There was insufficient foundation for that testimony as Dr. Hunter admitted that he is not a pathologist. Exhibit B, pg. 874, ln. 24-25.

76. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that [redacted] was either "ejected from an automobile" or "was beaten very severely." Exhibit B, pg. 871, ln. 12-14.

76.1. There was insufficient foundation for Dr. Hunter to give this opinion.

77. Defense counsel's performance was deficient because he failed to object 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 failed to impeach that testimony. Exhibit B, pg. 888, ln. 16-20.

77.1. This evidence was inadmissible because there was no foundation for his opinion.

77.2. Dr. Hunter's opinion could have been impeached with medical research published in peer-reviewed medical journals.

77.3. That an affidavit with medical journal articles documenting the possibility of serious head injury from short falls will be filed in support of this Petition.

78. Defense counsel's performance was deficient because he failed to object to Dr. Hunter's opinion, stated without any qualification as an expert, that [redacted] had sure signs of shaken baby syndrome. Exhibit B, pg. 869, ln. 4-16.

79. Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that, although he did not see certain hemorrhages in the psoas and retroperitoneal areas, he was told about them by the transplant surgeon. Exhibit B, pg. 938, ln. 20-23.

79.1. That testimony is inadmissible hearsay and violates the confrontation clause.

80. Defense counsel's performance was deficient because he failed to object to the foundation for Dr. Ross's testimony regarding the head and alleged brain injuries because Dr. Ross also testified that he had never viewed any of the slides or recuts himself. Exhibit B, pg. 959, ln. 10-15.

81. Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that Dr. Reichard's observation of a tear in the corpus callosum shows there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12.

81.1. That testimony violates the confrontation clause.

81.2. That testimony is not admissible under IRE 703.

81.3. There was no foundation for Dr. Ross's opinion about the amount of force.

82. Counsel rendered deficient performance in regard to the testimony of Dr. Deborah Harper.

82.1. Counsel failed to object or move to strike when Dr. Harper vouched for the abilities of state's witness Dr. Ross. Exhibit B, pg. 1031, ln. 12-14. ("Dr. Ross,

I'm sorry to say, is no longer our – in our Medical Examiner's Office, because he is a super clinician.")

82.2. Counsel failed to object to irrelevant and unfairly prejudicial testimony regarding the estimated force needed to inflict the injuries, comparing it to the force of being hit by a car, or being dragged behind a horse, or having a horse step on Kyler's abdomen, or being hit by a baseball bat, even though there was no foundation showing she could accurately make such estimates of force. Exhibit B, pg. 1034, ln. 7-21.

83. Counsel rendered deficient performance in failing to object to the admission of photographs taken a month after Kyler's death, which included many sympathy cards sent to the family.

83.1. During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after Kyler's death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997, ln. 23; Exhibit C (State's Exhibits 4, 5 and 6).

83.2. The photos were inflammatory because they included a large display of sympathy cards sent to Lisa Nash.

84.3. If counsel had objected, the photographs would have been excluded under IRE 403 as the danger of unfair prejudice outweighed any probative value.

84. Counsel rendered deficient performance in not moving to exclude any reference by any witness to the brain autopsy because no valid chain of custody for the brain was presented.

84.1. The state failed to present any evidence that the brain examined at the pathology laboratory in New Mexico was Kyler's brain.

85. Defense counsel's performance was deficient because he failed to move to strike the prosecutor's comments after his objection to prosecutorial misconduct during cross-examination was sustained. Exhibit B, pg. 1113, ln. 12-13.

85.1. In his cross-examination of Mr. Grove, the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11.

85.2. Defense counsel's objection was sustained, but counsel did not ask that the comments be stricken or that the jury be instructed to disregard the comments. *Id.*

86. Defense counsel's performance was deficient when he failed to object to the prosecutor asking Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12.

86.1. This questioning went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg. 1067, ln. 3-5.

87. Defense counsel's performance was deficient for failing to object to the prosecutor attempting to impeach Dr. Arden with alleged "gross mismanagement" when he was the Medical Examiner in the District of Columbia. Exhibit B, pg. 1382, ln. 6 - pg. 1388, ln. 12.

87.1. These allegations of administrative errors and allegations of sexual harassment were irrelevant under IRE 401 and 402 because they did not

impeach Dr. Arden's medical testimony.

87.2. The allegations' unfair prejudice outweighed any probative value and were inadmissible under IRE 403.

87.3. The allegations were not admissible under IRE 404, nor did the state give any notice of its intent to use the evidence to the extent it claims the evidence was admissible under IRE 404(b).

88. Defense counsel's performance was deficient for failing to attempt to rehabilitate Dr. Arden on re-direct examination.

89. It was deficient performance for defense counsel to fail to introduce photographs of [redacted] taken at St. Joseph's Hospital soon after he arrived in an ambulance.

89.1. The photographs show no redness or bruising and therefore are inconsistent with the state's theory that Mr. Grove had just brutally beaten [redacted]

89.2. The photographs will be filed with the Court under separate cover.

90. Defense counsel's performance was deficient because he failed to move for a mistrial after many jurors fell asleep during the testimony. See e.g., Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25.

91. Defense counsel's performance was deficient because he introduced evidence in the direct examination of Mr. Grove regarding the bad relationship between Mr. Grove and his son Alex. Exhibit B, pg. 1074, ln. 1-24.

91.1. This evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence.

92. Defense counsel's performance was deficient because he failed to object to the

prosecutor questioning Mr. Grove about the fact he was behind on child support. Exhibit B, pg. 1115, ln. 21-24

92.1. This evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence.

93. Defense counsel's performance was deficient because he failed to question paramedic David Chenalt about Lisa Nash's reaction to Kyler's injury.

93.1. Mr. Chenalt could have testified that Ms. Nash's behavior was "the most bizarre reaction we've ever seen for especially a kid call." See Grand Jury Tr. p. 214, ln. 5 - pg. 217, ln. 15.

93.2. The fact that defense counsel allowed the prosecutor to elicit evidence from a paramedic that Mr. Grove's affect was "too calm," while failing to bring out evidence from a paramedic that Lisa Nash's affect was "the most bizarre reaction we've ever seen" demonstrates the absence of a strategy regarding this type of evidence.

93.3. The Grand Jury Transcript is not attached hereto as it is a confidential document.

93.4. Mr. Grove asks the Court to take judicial notice of the Grand Jury Transcript pursuant to IRE 201(d).

94. Defense counsel's performance during closing argument was deficient because he failed to argue that the state had failed to carry its burden of proof because Dr. Reichard did not testify and the other doctors had no foundation for their opinions of when the injury happened.

95. Defense counsel's performance during the state's closing and rebuttal arguments was

deficient because he failed to object to multiple instances of misconduct by the prosecutor.

96. Defense counsel's performance was deficient because he failed to move for a mistrial after the prosecutor's closing and rebuttal arguments.

97. Defense counsel rendered deficient performance in the presentation of the expert testimony of Dr. Jonathan Arden.

97.1 Dr. Arden requested that defense counsel provide him with all existing microscopic slides for examination prior to trial.

97.1(a) Defense counsel did not comply with that request and did not provide any special stain slides, including iron stains, to Dr. Arden for review.

97.1(b) Those slides existed and have been provided to Dr. Arden for review in connection with this post-conviction petition.

97.1(c) Had defense counsel provided the iron stain slides to Dr. Arden prior to trial, Dr. Arden could have testified to his observations of the slides which would have both confirmed and extended his testimony on the ages of the injuries sustained by Kyler.

97.1(d) Upon his review of the iron stains slides, in preparation for this post-conviction action, Dr. Arden was able to confirm some of the findings

recorded by Dr. Ross.

97.1(e) Dr. Arden was also able to make some additional observations that support and extend his (Dr.Arden's) opinion on the ages of the injuries.

97.1(f) Some of the iron-staining is co-existent with the fresher-appearing hemorrhage; this in conjunction with the inflammatory response, indicates that the hemorrhage is in the early stages of response.

97.1(g) This observation is consistent with and strengthens the opinion offered by Dr. Arden that the injuries sustained by [redacted] had occurred several days to five days prior to death.

97.1(h) Dr. Ross testified that the fresher hemorrhage was coincidentally located with the positive iron staining, thus representing older and newer injuries in the same locations.

97.1(i) Dr. Arden disagrees with this interpretation, which relies on coincidence and fails to synthesize the totality of the findings into a unified diagnosis.

97.1(j) Based upon Dr. Arden's post-trial examination of the iron stains, he has found positive

iron staining trapped within connective tissue (i.e., separate from the visible hemorrhage), which represents the remnants of much older healed bleeding.

97.1(k) Had Dr. Arden been allowed to review the iron stains prior to trial, he could have testified that the iron stain autopsy slides contain evidence not only of significant aging of the more recent injuries such that they were not particularly consistent with having been incurred just prior to clinical presentation, (i.e., when Stacey Grove was with [redacted] but also of much older bleeding, reflective of older injuries.

97.1(l) Had Dr. Arden been allowed to review the iron stains prior to trial, he could have testified that [redacted] had been injured at some much earlier time or times, unrelated to when he was with Stacey Grove.

98. Defense counsel's performance was deficient because he failed to provide slides from the brain examination to Dr. Arden for the doctor's examination prior to trial.

98.1. Dr. Arden did not have the opportunity to examine APP stained slides from the neuropathology examination prior to trial.

98.2. He has not been able to review the slides since the trial.

98.3. Performing his own independent examination of the APP stained slides prior to trial would have afforded him the opportunity to assess all of the evidence related to penumbral axonal injury and potentially would have allowed him to have rebutted Dr. Ross's opinion that there was a laceration of the brain structure, but absent being provided those slides he could not do so.

98.4. Petitioner will seek discovery of these slides.

99. Defense counsel's performance was deficient because he failed to point out the differences between Dr. Reichert's report and the state witnesses' conclusions drawn from that report.

99.1. The PAI identified by Dr. Reichard (assuming for discussion that it was present) is a localized phenomenon and, by his own publication, does not imply that more diffuse or widespread axonal injury is present.

99.2. Dr. Reichard did not diagnose diffuse traumatic axonal injury in the brain of [redacted] Martin while Dr. Ross opined at trial that the child did have traumatic axonal injury.

99.3. Counsel failed to cross-examine Dr. Ross on this disagreement with Dr. Reichard, the neuropathologist who examined the brain, or get Dr. Ross to admit that he had not personally examined the slides from the brain, either the routine or APP stains.

99.4. Counsel failed to cross-examine Dr. Harper, the pediatrician, when she testified that the child had an intrinsic brain injury (suggestive of axonal injury),

an opinion contrary to the clinical CT scan and to the neuropathology examination.

100. The cumulative effect of defense counsel's deficient performance prejudiced Mr. Grove.

B. Why Relief Should be Granted.

In analyzing a claim of ineffective assistance of counsel, the Court should not look to each example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *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). As the Ninth Circuit has explained, "Separate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003).

As set forth above, there is a reasonable probability of a different result had defense counsel's performance not been deficient. Crucial state's evidence would have been excluded, exculpatory defense evidence would have been presented, and egregious prosecutorial misconduct would have been prevented or resulted in a mistrial, or a mistrial would have been granted due to juror misconduct. Accordingly, this Court should grant the Petition.

PRAYER FOR RELIEF: ***Petitioner Requests the Following Relief:***

A. That the judgment be vacated and a new trial be granted; and/or

B. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 31 day of December, 2012.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin

Deborah Whipple

Attorneys for Stacey Grove

VERIFICATION OF PETITION

I, Stacey Grove, being duly sworn under oath, state:

I know of the contents of the foregoing Petition for Post-Conviction Relief and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

Stacey Grove

SUBSCRIBED AND SWORN TO BEFORE ME
this 28 day of Dec, 20 12

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: July 26 2017

LAURA ASHFORD NOTARY PUBLIC STATE OF IDAHO

Respectfully submitted this ____ day of December, 2012.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin

Deborah Whipple

Attorneys for Stacey Grove

VERIFICATION OF PETITION

I, Stacey Grove, being duly sworn under oath, state:

I know of the contents of the foregoing Petition for Post-Conviction Relief and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

Stacey Grove

SUBSCRIBED AND SWORN TO BEFORE ME
this 29th day of Dec, 2012

Notary Public for the State of Idaho
Residing at: Lewiston
My commission expires: July 24 2017

LAURA ASHFORD NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

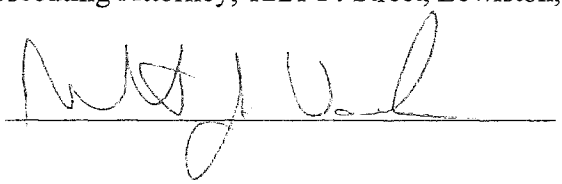
I CERTIFY that on 1-2-2013 2013, I caused a true and correct copy of the foregoing document to be:

✓ mailed

___ faxed

___ hand delivered

to: Daniel L. Spickler, Nez Perce County Prosecuting Attorney, 1221 F. Street, Lewiston, ID 83501



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

STACEY L. GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV2012-0001798 ANSWER and AMENDED MOTION FOR SUMMARY DISPOSITION AND DISMISSAL and TO SET FOR HEARING

COMES NOW, Respondent, State of Idaho, by and through its attorney of record, NANCE CECCARELLI, Deputy Prosecuting Attorney, Nez Perce County, Idaho, and reiterates its motion to this Court for Summary Disposition and Dismissal of Petitioner's Application for Post-Conviction Relief and Petitioner's AMENDED Petition for Post-Conviction Relief as it presents no genuine issues of material fact, raises issues decided in other appeals or more properly should have been raised elsewhere, fails to state a claim upon which relief may be granted, and, the Respondent is entitled to judgment as a matter of law pursuant to Idaho Code § 19-4906(c).

The Respondent, State of Idaho, further answers the Petition for Post-Conviction Relief and the Amended Petition for Post-Conviction Relief as follows:

1. Respondent denies all allegations not specifically admitted or otherwise answered.

2. Respondent admits allegations contained in paragraphs 1-15.

A. Petitioner's First Cause of Action:

3. Respondent denies the allegations in paragraphs 16 and 16.1.

4. Respondent admits the allegations in paragraphs 17 through 23.

5. Respondent denies allegations paragraph 24 (and sub-paragraphs 24.1-24.24) except Respondent admits that Dr. Ross testified as an expert witness, pursuant to IRE 702 & 703.

6. Respondent admits the allegations in paragraphs 25-31.

7. Respondent denies the conclusory allegation in paragraph 32.

8. Respondent denies the allegation made in paragraph 33 except Respondent admits that Dr. Ross testified as an expert witness, pursuant to IRE 702 & 703.

9. Respondent admits the allegation in paragraph 34.

10. Respondent denies the conclusory allegation in paragraph 35.

11. Respondent denies the conclusory allegation made in paragraph 36 (and sub paragraph 36.1) except Respondent admits that Dr. Chinn testified as an expert witness, pursuant to IRE 702 & 703.

12. Respondent denies the conclusory allegation made in paragraph 37 (and sub paragraphs 37.1 through 37.3) except Respondent admits that Dr. Hunter testified as an expert witness, pursuant to IRE 702 & 703.

13. Respondent denies the conclusory allegation made in paragraph 38 (and sub paragraphs 38.1 through 38.5) except Respondent admits that Dr. Harper testified as an expert witness, pursuant to IRE 703.

14. Respondent admits the allegation in paragraph 39.

15. Respondent denies the allegation in paragraph 40.

16. Respondent denies the allegation in paragraph 41.

17. Respondent denies the allegation in paragraph 42, except the Respondent admits that the Court of Appeals denied appellate review of Mr. Grove's case as a whole.

A. Why the State's Motion for Summary Dismissal should be granted with respect to Petitioner's First Cause of Action.

While there is no doubt that the Sixth Amendment's Confrontation Clause is the "bedrock procedural guarantee" (*Pointer v. Texas,* 380 U.S. 400, 406 (1965)) applicable in all criminal prosecution and the Idaho Constitution provides a similar guarantee, as Petitioner points out; in the case at hand, the testimony of expert witnesses for the State (pursuant to IRE 702 & 703) was in-person and available at trial for defense counsel to object to the opinions or the basis of the expert's opinions and inferences. The Idaho Rules of Evidence (I.R.E) provide that an expert witness is one "who is qualified as an expert by knowledge, skill, experience training, or education" and "may testify in the form of an opinion, or otherwise, if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." I.R.E. 702. Furthermore, an expert

may base his or her opinion testimony on "facts or data in the particular case" that "*may be perceived by or made known to*" the expert. I.R.E 703 (*emphasis added*)

Unlike the *Crawford* analysis of three formulations of "core" testimonial statements, the State's medical witnesses offered expert opinions based on an analytical report of examination. Petitioner's witness at trial, Dr. Arden, provided an opposing opinion presumably based on similar reports, analyses, or perhaps his own examinations.

Petitioner asserts that his right to confront witnesses against him was violated when State's medical witnesses testified at trial about neuropathology analyses and examination results they did not personally perform; and, the neuropathologist, Dr. Reichard, who performed analyses and examination, was not a witness at trial. However, the State's witnesses opined based on facts and data of which they were made aware through Dr. Reichard's report, as allowable under I.R.E. 702 and 703.

Petitioner's claim that his Sixth Amendment rights were violated because he did not have an opportunity to confront Dr. Reichard is irrelevant and improper in that Dr. Reichard, through written analysis in the form of a report of examination, merely provided facts and data that formed the basis of expert opinions. Petitioner had sufficient opportunity to object to any improper testimony, had ample opportunity to cross-examine all witness offered by the State, and presented similar medical expert testimony that served to support Petitioner's defense theory of the case.

Petitioner's First Cause of Action should be summarily dismissed.

B. Petitioner's Second Cause of Action.

18. Respondent re-states all responses to allegations in paragraphs 1-42 in the Petition for Post-Conviction Relief and the Amended Petition for Post-Conviction Relief.

19. Respondent denies the conclusory allegations in paragraphs 44 through 49.

20. Respondent neither admits nor denies the allegation in paragraph 50.

21. Respondent denies the conclusory allegation in paragraph 51.

22. Respondent denies the conclusory allegations in paragraphs 52 through 57.

B. Why the State's Motion for Summary Dismissal should be granted with respect to Petitioner's Second Cause of Action.

Petitioner asserts that the prosecutor committed misconduct in multiple ways:

- first, he projected family photos of the victim prior to the Court going on record, thus exposing the jury to extra-judicial evidence;
- second, he appealed to the emotions, passions, and prejudices of the jury through the use of inflammatory tactics by eliciting testimony of the victim's sister;
- third, he elicited inadmissible evidence during cross-examination of Petitioner and Dr. Arden; and,
- finally, comments during his closing and rebuttal arguments constitute conduct sufficiently egregious as to result in fundamental error.

It is generally held that "a conviction will be set aside for prosecutorial misconduct only when conduct is sufficiently egregious to result in fundamental error." *State v. Porter*, 130 Idaho 772, 785 (1997). "Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of the jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *Id.* (citing, *State v. Babb*, 125 Idaho 934, 942 (1994)).

The allegations presented by the Petitioner attempt to create a cumulative effect of

misconduct from voir dire through verdict by the prosecutor without providing any evidence of fundamental unfairness. In addition, nothing articulated was so egregious or inflammatory that any consequential prejudice could not have been remedied during the trial or through curative instructions to the jury if Petitioner and his defense counsel deemed those incidents (as cited above) material at the time. *State v. Priest*, 128 Idaho 6, 9 (Ct.App.1995).

Petitioner's trial counsel had sufficient opportunity to bring to the Court's attention any bad acts or misconduct by the prosecutor. Petitioner's trial counsel had sufficient opportunity to object to any improper testimony. Petitioner's trial counsel had sufficient opportunity to move for a mistrial. Petitioner's trial counsel had sufficient opportunity to request curative instructions.

The petition does not provide a preponderance of evidence of prosecutorial misconduct, but rather an opinion and series of suppositions made *as if* prosecutorial misconduct were already determined to have occurred. A petition for post conviction relief must be supported by affidavits, records, or other evidence supporting its allegations. I.C. § 19-4903. Petitions that are conclusory or unverified may be summarily dismissed. In this instance, Petitioner makes conclusory allegations as to the prosecutor's conduct and fails to include any supporting evidence that the prosecutor's conduct was sufficiently egregious as to result in fundamental error. In addition, the Petition further makes allegations of expected results *if* the trial court had heard objections from defense counsel or *if* the appellate court(s) reviewed.

Petitioner's claims of prosecutorial misconduct should be summarily dismissed.

C. Petitioner's Third Cause of Action.

23. Respondent re-states all responses to allegations in paragraphs 1-57 in the Petition for Post-Conviction Relief and the Amended Petition for Post-Conviction Relief.

24. Respondent denies the allegations and conclusions made in paragraph 59 and sub-paragraph 59.2, except Respondent admits the allegation in sub-paragraph 59.1.

25. Respondent has insufficient information with which to admit or deny the allegations of paragraph 60.

26. Respondent admits the allegation in paragraph 61.

27. Respondent denies the allegation in paragraph 62.

C. Why the State's Motion for Summary Dismissal should be granted with respect to Petitioner's Third Cause of Action.

Petitioner asserts that jurors engaged in misconduct when they allegedly slept during the presentation of evidence at various points throughout the trial. A similar issue was presented in *Murphy v. State*, 143 Idaho 139 (Ct.App.2006).

> Murphy did not identify which day of the five-day jury trial the juror allegedly slept, describe the length of time the juror allegedly slept, or explain what testimony or evidence the juror allegedly slept through. In the absence of such evidence, there was no showing of deficient performance or prejudice. Therefore, it was proper for the court to dismiss this claim.

Id. at 150.

Petitioner faces similar circumstances in this case. Although Petitioner presents affidavits that identify *days* in which jurors allegedly slept, Petitioner has not presented affidavits, records, or evidence indicating *the length of time* the jurors allegedly slept nor has Petitioner explained *what testimony or evidence* the jurors allegedly slept through.

Additionally, one of Petitioner's affidavits cannot clearly name the juror that was allegedly sleeping. Lastly, five of the six affidavits in support of Petitioner's petition generally allege that jurors were sleeping during "various times during the proceedings" and do not indicate specifically which day these jurors allegedly slept or what testimony was allegedly slept through. While there is *some* indication in *some* of the affidavits that reference which testimony jurors allegedly slept through, the allegation does not indicate which jurors were allegedly sleeping through the referenced testimony. Further, all of these individuals now moved to provide affidavits in support of the Petitioner had sufficient opportunity to bring this to the attention of Petitioner and trial counsel at a time wherein the issue could have been raised to the attention of the Court. Alternatively, this is an issue more properly brought to the attention of the appellate courts.

The affidavits are simply non-specific conclusions by audience members watching the trial now offered in support of Petitioner's allegations of juror misconduct without any verification. Thus, there is not a preponderance of evidence showing of juror misconduct.

Petitioner's allegations of juror misconduct should be summarily dismissed.

D. Petitioner's Fourth Cause of Action.

28. Respondent re-states all responses to allegations in paragraphs 1-63 in the Petition for Post-Conviction Relief and the Amended Petition for Post-Conviction Relief.

29. Respondent has insufficient information upon which to admit or deny the allegation in paragraph 64, except Respondent denies the allegation of deficient performance of appellate counsel and the conclusory allegation in sub-paragraph 64.1.

30. Respondent has insufficient information upon which to admit or deny the allegation in paragraph 65, except Respondent denies the allegation of deficient performance of appellate counsel and the conclusory allegation in sub-paragraph 65.1.

D. Why the State's Motion for Summary Dismissal should be granted with respect to Petitioner's Fourth Cause of Action.

Petitioner asserts in the alternative that appellate counsel was ineffective for failing to raise on appeal either the alleged issue of prosecutorial misconduct or the alleged issue of juror misconduct. In addition, Petitioner asserts a conclusory result based solely on appellate counsel raising either issue on appeal.

"To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate both that his attorney's performance was deficient, and that he was thereby prejudiced in the defense of the criminal charge." *Murphy v. State*, 143 Idaho 139, 145 (Ct.App.2006); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In addition, to show the attorney's performance was deficient, "a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman v. State*, 125 Idaho 644, 648 (Ct.App.1994). Furthermore, if counsel's performance is proven to be deficient, 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." *Strickland*, 446 U.S. at 694.

Nothing in Petitioner's petition supports an argument that the appellate counsel representation fell below an objective standard of reasonableness. The particular attorneys who represented Petitioner are respected members in good standing of the Idaho State Bar and experienced in appellate work.

Petitioner's argument that *Mintun* (*holding that it cannot be ineffective assistance for appellate counsel to fail to raise claims of fundamental error for the first time on appeal*) is contrary to *Strickland* and should be overruled by the Idaho Supreme Court is dispositive. Petitioner is arguing for a rule that does not exist. Simply believing that the *Mintun* decision should be overruled because it is contrary to *Strickland* is not sufficient to establish a claim for relief.

Petitioner's claim of ineffective appellate counsel should be summarily dismissed.

E. Petitioner's Fifth Cause of Action.

31. Respondent re-states all responses to allegations in paragraphs 1-66 in the Petition for Post-Conviction Relief and the Amended Petition for Post-Conviction Relief.

32. Respondent denies the allegations in paragraphs 67 through 69, except Respondent admits the allegation in sub-paragraph 69.1

33. Respondent denies the allegations in paragraphs 70 through 100, excepting certain portions of sub-paragraphs in which Respondent has insufficient information upon which to admit or deny allegations or conclusions contained therein.

E. Why the State's Motion for Summary Dismissal should be granted with respect to Petitioner's Fifth Cause of Action.

Petitioner offers a laundry list of claims that trial counsel was ineffective. However, Petitioner fails to support this laundry list of claims with affidavits, records, or other evidence. Conclusory allegations unsubstantiated by fact, are insufficient to entitle the Petitioner to an evidentiary hearing. I.C. § 19-4903. In this instance, Petitioner offers no facts to support his bare and conclusory allegations. Rather, Petitioner offers suppositions of inaction as opposed to documented ineptness by trial counsel. Petitioner asserts errors that may just as easily be defined as trial tactics. Petitioner further indicates that the Court should string together this list of errors and determine a prejudicial effect.

That trial counsel is an experienced criminal defense attorney and litigator in good standing seems to bear no weight in Petitioner's 20-20 hindsight review. Also, not mentioned is the fact the Petitioner was competent to stand trial, fully able and capable to assist trial counsel in his own defense, and presumably participated fully in the strategies and decision-making throughout the course of the trial. As is customary in criminal cases in general and in this case specifically, trial counsel and defendant prepared and presented to the jury a theory of their defense, offered evidence and witnesses to support that theory. Together, the trial counsel and client made decisions, strategic and tactical, throughout the conduct of the case. There is nothing offered in the Petition or Amended Petition that demonstrate by a preponderance of evidence, that Petitioner, by and through his trial counsel, was unable to present his entire case and defense to the jury; or, that Petitioner, by and through his trial counsel, was prejudiced by performance that was deficient.

Furthermore, Petitioner fails to meet the standards set forth in *Strickland v. Washington*

for purposes of determining whether counsel was ineffective. A court will "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..." *State v. Payne*, 146 Idaho 548, 561 (2008); *Pratt v. State*, 134 Idaho 581, 584 (2000). In addition, "[t]here is a strong presumption that counsel's performance fell within the wide range of professional assistance." *Aragon v. State*, 114 Idaho 758, 760 (1988).

Petitioner has not shown that any of trial counsel's strategic decisions resulted from inadequate preparation or ignorance of the relevant law. Therefore, Petitioner's claims of ineffective trial counsel cannot be the basis for his relief and should be summarily dismissed.

F. Conclusion.

The Petitioner bears the burden of proving, by a preponderance of the evidence, the allegations upon which his request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869 (1990); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002). Petitioner

Idaho Code § 19-4906 permits summary dismissal of a petition for post-conviction relief upon motion of a party or upon the court's own initiative. "Summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted." *State v. Payne*, 146 Idaho 548, 561 (2008); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002). Petitions that are unverified and conclusory may be dismissed by motion for summary disposition. I.C. § 29-4906. Conclusory or unverified allegations are "insufficient to entitle petitioner to an

evidentiary hearing." *King v. State*, 114 Idaho 442, 446 (Ct.App.1988).

The State respectfully requests that this Court grant the State's Motion for Summary Dismissal because the Petition and the Amended Petition fail to:

- meet the statutory requirements to properly support claims with evidence; and,
- assert claims not valid under The Uniform Post-Conviction Procedure Act; and,
- raise issues that could and more properly should have been decided on direct appeal but were not raised; and,
- demonstrate any genuine issue of material fact; and. therefore, no relief may be granted under The Uniform Post-Conviction Procedure Act.

Alternatively, Respondent requests that this matter be set for hearing at a time convenient for the Court.

DATED this **4th** day of February 2013.

NANCE CECCARELLI
Deputy Prosecuting Attorney

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a full, true, complete and correct copy of the foregoing MOTION FOR SUMMARY DISPOSITION AND DISMISSAL AND TO SET FOR HEARING was

(1) ✓ hand delivered, or emailed

(2) _____ hand delivered via court basket, or

(3) _____ sent via facsimile, or

(4) _____ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Deborah Whipple
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

DATED this 6th day of February, 2013.

Joan C. Way

JOAN C. WAY
Civil Legal Assistant

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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **PETITIONER'S RENEWED MOTION FOR SUMMARY DISPOSITION**

Petitioner, Stacey Grove, asks the Court to grant summary disposition in his favor and grant the relief requested in his Petition. There is good cause to grant the motion because even considering the Respondent's Answer and Amended Motion for Summary Disposition and Dismissal filed February 6, 2013, and construing the Amended Petition and Answer most favorably to the Respondent, Petitioner has established that he is entitled to relief as a matter of law.

This Motion is made pursuant to I.C. § 19-4906(c). It is supported by the affidavits already filed herein as well as the allegations and arguments made in the Amended Petition. See

Amended Verified Petition, p. 10-12 (argument regarding confrontation clause claim); p. 18-19 (argument regarding prosecutorial misconduct claim); p. 20-21 (argument regarding juror misconduct claim); p. 21-23 (argument regarding ineffective assistance of appellate counsel claim); and p. 39 (argument regarding the ineffective assistance of trial counsel claim).

Petitioner will further support this Renewed Motion with a Memorandum of Law to be filed pursuant to the schedule to be established by this Court at the status conference set for February 12, 2013.

Respectfully submitted this 7th day of February, 2013.

Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on February 7, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

X emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV12-01798 ORDER SCHEDULING BRIEFS AND ARGUMENT

THEREFORE, IT IS HEREBY ORDERED:

1) Petitioner's Response to State's Motion for Summary Disposition and Petitioner's Brief in Support of Petitioner's Renewed Motion for Summary Disposition due on or before March 15, 2013;

2) State's Reply Brief in Support of its Motion for Summary Disposition and State's Response to Petitioner's Motion for Summary Disposition due on or before March 29, 2013;

3) Petitioner's Reply Brief in Support of Petitioner's Renewed Motion for Summary Disposition due on or before April 12, 2013;

4) Oral argument shall take place before the above-entitled Court in the Courtroom of the Nez Perce County Courthouse on April 30, 2013, commencing at 1:30 p.m.

DATED this 12th day of February, 2013.

CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER SCHEDULING BRIEFS AND ARGUMENT was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 27th day of February, 2013, on:

Dennis Benjamin
Debra Whipple
P O Box 2772
Boise ID 83701

Nance Ceccarelli – valley messenger
P O Box 1267
Lewiston ID 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO • EX-OFFICIO AUDITOR AND RECORDER

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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **PETITIONER'S BRIEF IN RESPONSE TO STATE'S MOTION FOR SUMMARY DISPOSITION AND IN SUPPORT OF PETITIONER'S MOTION**

Petitioner, Stacey Grove, submits the following opposition to the state's motion to grant summary disposition and in support of his motion for summary disposition.

I. INTRODUCTION

In proceedings under the Uniform Post-Conviction Procedure Act, the applicant has the burden of eventually proving the allegations which entitle him to relief by a preponderance of the evidence. However, until the allegations contained in a verified application for post-conviction relief are controverted by the state, they must be deemed to be true for the purpose of determining if an evidentiary hearing is to be held. A motion to dismiss, unsupported by

affidavits, depositions or other materials does not controvert the allegations in the petition. *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Thus, at this point, the state's motion for summary disposition, which is unsupported by any evidentiary material, has not controverted any of the allegations in the Amended Petition. *Id.*

Allegations contained in the application are insufficient for the granting of relief when they are clearly disproved by the record of the original proceedings, or do not justify relief as a matter of law. This Court may summarily grant an application for post-conviction relief only when it appears from the pleadings and the record that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, but may not grant a motion to dismiss a petition when, reviewing the facts in a light most favorable to the petitioner, the allegations would entitle the petitioner to relief. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding. *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995), *citing Kraft v. State*, 100 Idaho 671, 674, 603 P.2d 1005, 1008 (1979).

In this case, the state has failed to meet its burden of showing that Mr. Grove would not be entitled to relief if his allegations are true. Thus, summary disposition in its favor should not be granted. At the same time, it has failed to establish a genuine issue of material fact as to the truth of Mr. Grove's allegations. Consequently, summary disposition in his favor should be granted.

II. ARGUMENT

A. *Mr. Grove's Right to Confront Witnesses Against Him was Violated*

1. Legal background

The Sixth Amendment's Confrontation Clause provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." The Supreme Court has held "that this bedrock procedural guarantee applies to both federal and state prosecutions." *Pointer v. Texas*, 380 U.S. 400, 406 (1965). Article 1, § 13 of the Idaho Constitution similarly guarantees a criminal defendant the right to "appear and defend in person."

The U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), significantly altered Sixth Amendment Confrontation Clause analysis prior to the trial in this case. The *Crawford* Court held that testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable and where defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 59. As to the definition of "testimonial," the Court first looked to an early dictionary definition of "testimony," *i.e.*, "A solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51, quoting 1 N. Webster, An American Dictionary of the English Language (1828). In addition, the Court listed three "core" testimonial statements: (1) "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;"

and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted). This, however, is not an exclusive list of "testimonial" evidence. *Id.*

Davis v. Washington, 547 U.S. 813 (2006), followed *Crawford*. There, the United States Supreme Court stated that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Therefore, the threshold question in Confrontation Clause analysis is whether the statement is testimonial. If it is, the evidence may be admitted only if the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Davis*, 547 U.S. at 821.

The Idaho Supreme Court first applied the new confrontation clause analysis in *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007), the year prior to the trial in Mr. Grove's case. It synthesized *Crawford* and *Davis* and stated 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, unless made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 145 Idaho at 144, 176 P.3d at 916. The *Hooper* Court found that a forensic interview of a child witness was testimonial. "[S]ince the purpose of a forensic interview is to collect information to be used in a criminal prosecution, and there is a clear connection between the police and the STAR Center,

the interview was the functional equivalent of a police interrogation. Thus, it is testimonial under *Crawford* and *Davis*, and inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." 145 Idaho at 142-143, 176 P.3d at 914-15.

The confrontation clause error is subjected to a heightened harmless error test. As the *Hooper* Court wrote, "Whether a conviction for a criminal offense should stand when a state has failed to accord a constitutionally guaranteed right is a federal question. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. The test for harmless error is whether a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." 145 Idaho at 146, 176 P.3d at 918, *citing Chapman v. State of California*, 386 U.S. 18, 24 (1967).

2. Why relief should be granted to Mr. Grove

Mr. Grove's right to confront Dr. Reichard was violated at trial. This Court should grant summary disposition in his favor and order a new trial because there is not a genuine issue of material fact and the facts established prove the cause of action.

a. The facts alleged by Mr. Grove have not been controverted by the state

As to the factual background, the state has admitted many of the factual allegations establishing the cause of action in the Amended Petition. *See* Answer (admitting ¶¶ 1-15, 17-23, 25-31, and 34). In addition, the state has admitted in relevant part ¶¶ 36-38. *Id.* The allegations contained in ¶¶ 24 (including subparts 1-24), 32-33, 36.1, 37.1, 37.2, and 38.1-38.5, while denied by the state, are all conclusively proven as true by the transcript of the criminal trial, of which the

Court has taken judicial notice. Each of the allegations denied by the state listed above, contain a citation to the portion of the trial transcript which establishes the claim. Thus, the mere fact that the state has denied a factual allegation which is conclusively proven by the trial transcript does not raise a genuine issue of material fact, especially as the state has not made a claim that the transcript does not accurately represent the trial proceedings. *See Hauschulz v. State*, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007) ("Allegations contained in the application are insufficient for the granting of relief when . . . they are clearly disproved by the record of the original proceedings[.]"), *quoting Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *see also McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010).[1]

b. The state's legal analysis of the claim is without merit

The facts alleged establish a confrontation clause violation. The state, however, argues that the disputed evidence was admissible under I.R.E. 702 and 703 and thus, there was no confrontation clause violation. See Answer and Amended Motion for Summary Disposition and Dismissal (hereinafter "State's Motion"), pg. 3-4. As set forth below, there are at least two problems with the state's analysis.

First, the fact that evidence may be admissible under the rules of evidence does not necessarily make it admissible under the confrontation clause. As stated by the Idaho Supreme Court, "The hearsay rules and the Confrontation Clause have similar policy objectives.

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[1] Although the question was not directly presented in any of the cases cited, it logically follows that if facts alleged by the petitioner which are conclusively disproved by the record are insufficient for the granting of relief, then allegations denied by the state yet clearly proved by the record are insufficient for the granting of relief in the state's favor. *See also Cooper v. State*, *supra*. (A motion to dismiss, unsupported by affidavits, depositions or other materials, does not controvert the allegations in the petition.)

However, they are not coextensive. Some out-of-court declarations which are admissible under hearsay exceptions may violate confrontation rights." *State v. Wright*, 116 Idaho 382, 384-85, 775 P.2d 1224, 1226-27 (1989) *judgment aff'd while overruled on different grounds*, 497 U.S. 805 (1990). An example of this is *Bruton v. United States*, 391 U.S. 123 (1968), (where the prior admissions of a co-defendant were held to be not admissible against defendant under the confrontation clause when the co-defendant was not available to be cross-examined). In this regard, the United States Supreme Court noted that "we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *California v. Green*, 399 U.S. 149, 155-56 (1970), *citing Barber v. Page*, 390 U.S. 719 (1968) and *Pointer v. Texas*, 380 U.S. 400 (1965). Consequently, this aspect of the state's argument in support of its Motion is squarely foreclosed by controlling Idaho and United States Supreme Court precedent.

Second, the evidence was not fully admissible under the rules of evidence. Idaho Rule of Evidence 703 states that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. *Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

(Emphasis added). The purpose of the italicized portion of the rule was to ensure that I.R.E. 703 not be used as a means to avoid the prohibition on hearsay. *State v. Watkins*, 148 Idaho 418,

426-27, 224 P.3d 485, 493-94 (2009). "Some Idaho courts have allowed inadmissible evidence to come in through an expert who testifies on direct about what he or she relied on in forming the opinion and this has been a back door for getting this evidence in the record." Idaho Rule of Evidence 703 "serves to prevent an expert witness from serving as a conduit for the introduction of otherwise inadmissible evidence." *Id.* Professor D. Craig Lewis states that, "Properly applied, this rule allows the expert to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they are otherwise admissible, or the court makes the required balancing determination." D. Craig Lewis, Idaho Trial Handbook § 16:9 (2d ed.).

In the present case, the Court did not make a finding that Dr. Reichard's report was admissible because its probative value in assisting the jury to evaluate the other experts' opinions substantially outweighed its prejudicial effect, nor was it admitted for the limited purpose of evaluating the other doctors' opinion, and it is plain that the testimony was not offered for this limited purpose. Rather, the state clearly relied upon the hearsay evidence contained in Dr. Reichard's report for the purpose of demonstrating the truth of the matter asserted therein. Accordingly, the various doctors' testimony as to hearsay received from Dr. Reichard was not admissible pursuant to I.R.E. 703. *State v. Watkins*, *supra*.

c. The evidence was "testimonial"

Dr. Reichard's report and the hearsay testimony about its specific contents by other doctors clearly fits within the definition of "core" testimonial statements under *Crawford*, *supra*,

and its prodigy. The United States Supreme Court applied *Crawford* in *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 309-310 (2009), and held that the state's use of a forensic laboratory report to prove that seized cocaine was of a certain quality and quantity violated the Confrontation Clause because no live witness competent to testify to the truth of the statements made in the report was available for cross-examination. In *Bullcoming v. New Mexico*, —— U.S. ——, 131 S.Ct. 2705 (2011), the defendant was arrested after failing field sobriety tests and refusing a breath test. Bullcoming was arrested and required to give a blood sample to determine his blood-alcohol concentration ("BAC"). The blood sample was sent to the New Mexico Department of Health, Scientific Laboratory Division, where a forensic analyst signed a "certificate of analyst," part of a standard form titled "Report of Blood Alcohol Analysis," recording Bullcoming's BAC as 0.21 grams per hundred milliliters of blood. Bullcoming was then charged with aggravated driving under the influence. At trial, the prosecutor introduced the report and certificate of analyst into evidence as a business record. However, the forensic analyst who authored the report did not testify at trial and was not otherwise subject to cross-examination. Instead, the prosecutor called as a witness a scientist from the same laboratory who had not signed the Report of Blood Alcohol Analysis, and neither participated in nor observed the test on Bullcoming's blood sample. The testifying scientist was, however, familiar with blood-alcohol analysis and the laboratory's testing protocols. *Bullcoming*, 131 S.Ct. at 2706–12.

The United States Supreme Court held that the Report of Blood Alcohol Analysis was "testimonial" and therefore within the ambit of the Confrontation Clause under *Melendez–Diaz*.

Id. at 2716–17. It said that "[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial." *Bullcoming*, 131 S.Ct. at 2717, *quoting Melendez–Diaz*, 129 S.Ct. at 2532.). *Bullcoming* also clarified that the "surrogate testimony" of the substitute witness "does not meet the constitutional requirement [of cross-examination]. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular [analyst]." *Id.* at 2710.[2]

Pursuant to the authority above, Dr. Reichard's report was testimonial evidence and the report and the hearsay testimony about it was not admissible absent a showing of both Dr. Reichard's unavailability and a prior opportunity for cross-examination, neither of which was present here. In fact, the admission of autopsy reports have been held to violate the confrontation clause by the federal courts and several state courts. The United States Court of Appeals for the District of Columbia Circuit applied *Melendez-Diaz* and *Bullcoming* in *United States v. Moore*, 651 F.3d 30, 72-73 (D.C. Cir. 2011) *cert. granted in part*, 132 S. Ct. 2772 (U.S. 2012) *and cert. denied*, 132 S. Ct. 2772 (U.S. 2012) *and aff'd in part sub nom. Smith v. United States*, 133 S. Ct. 714 (2013), and found the admission of an autopsy report was error. In *Smith,* the government

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[2] At the time of Mr. Grove's 2008 trial, the United States Supreme Court had decided both *Crawford* (2004) and *Davis* (2006). Moreover, both *Melendez-Diaz* and *Bullcoming* apply here because both are simply applications of the rule first announced in *Crawford.* But, even if *Melendez-Diaz* and *Bullcoming* could be read as announcing a new rule of criminal procedure, they would still apply here because they were both decided prior to the conclusion of Mr. Grove's direct appeal and "decisions by the U.S. Supreme Court announcing a new rule apply to all criminal cases still pending on direct review." *Rhoades v. State*, 149 Idaho 130, 139, 233 P.3d 61, 70 (2010). *Melendez-Diaz* was decided in 2009 and *Bullcoming* was decided on June 23, 2011. The remittitur in Mr. Grove's direct appeal was not issued until September 12, 2011.

called Dr. Jonathan Arden as a witness. At that time, Dr. Arden was the Chief D.C. Medical Examiner. He was later a defense witness in the criminal trial here. Dr. Arden testified to the contents of approximately 30 autopsy reports authored by other medical examiners in his office, but he neither performed nor observed the autopsies and his signature did not appear on any of the reports. The autopsy reports were admitted into evidence over a defense confrontation clause objection. The Circuit Court found that the autopsy reports were testimonial for purposes of the Confrontation Clause. *Moore*, 651 F.3d at 72 ("The government's attempts to avoid the Confrontation Clause, on the grounds that the autopsy reports rank as non-testimonial . . . are foreclosed by *Bullcoming*.") *Accord, State v. Davidson*, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007); *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. Ct. App. 2010); *see also, State v. Freeman*, 2012 WL 1656975 (Tenn. Court of Criminal Appeals May 9, 2012) *review denied* (October 17, 2012).

Dr. Reichard's brain pathology report admitted in this case was testimonial because it fit into the first and third of the three types of "core" testimonial statements: it was the type of pretrial statement "that declarants would reasonably expect to be used prosecutorially"; and it was a statement that was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52 (internal citations omitted). If anything, Dr. Reichard's report is a clearer example of testimonial evidence than the autopsy reports found to be testimonial in *Moore v. United States, State v. Davidson, Martinez v. State*, and *State v. Freeman*. First, Dr. Reichard is a forensic neuropathologist, Exhibit B, pg. 910, ln. 5-7, and as Medical Examiner for the State of

New Mexico, his findings were no doubt regularly used in criminal prosecutions. Dr. Ross explained that the medical examiner's office in New Mexico had a "forensic function." Exhibit B, pg. 953, ln. 1-7. Dr. Ross also testified that he decided to send the brain to Dr. Reichard because the case involved an infant with a blunt force injury, Exhibit B, pg. 927, ln. 25 - pg. 928, ln. 20, again a clear indication that suspected criminal activity was being investigated and that Dr. Reichard's report was part of that investigation. Consequently, Dr. Reichard's report contained testimonial evidence which was not admissible under the confrontation clause because the state never called Dr. Reichard to testify.

The unconstitutional admission of the evidence cannot be found to be harmless. Indeed, the state does not raise a harmless error argument in its motion for summary disposition. The state's failure to raise a harmless error argument is sensible because any such argument would be disingenuous in light of the heavy emphasis the state put on Dr. Reichard's testimony at trial. (Dr. Ross's testimony regarding the testimonial statements of Dr. Reichard are set forth in ¶ 24.1 -24.24 in the Amended Petition. Dr. Hunter's testimony regarding the testimonial statements of Dr. Reichard are set forth in ¶ 37.1-37.3. Dr. Harper's testimony regarding the testimonial statements of Dr. Reichard are set forth in ¶ 38.3-38.5.) During closing arguments, the state argued, "if you believe the opinions of the State's witnesses, then the only person who had the opportunity to inflict these injuries was the defendant sitting before you." Exhibit B, pg. 1415, ln. 17-20. What the prosecution was referring to was the finding in Dr. Reichard's report that there was a tear in the corpus callosum, which was indicative of a high degree of force which would have rendered [redacted] unconscious or nearly unconscious at the time of impact. Exhibit B,

pg. 930, ln. 21-23. Since, [redacted] was not unconscious at the time Lisa Nash left the house to go to work, Dr. Reichard's testimonial statements were the key in establishing the state's time line which pointed to Mr. Grove as the only person who could have inflicted the fatal injury.

The Court of Appeals in the direct appeal noted the importance of Dr. Reichard's evidence to the state's case:

> Initially, we clarify that the crux of this issue affects the central disputed question in this case—when the injuries which ultimately caused K.M.'s death occurred and whether it was likely that K.M. would have lost consciousness and/or shown severe symptoms immediately after the injuries were inflicted. In other words, did the injuries occur on the morning that K.M. lost consciousness—and was alone with Grove—or several days prior, when it was undisputed that the injuries could not have been inflicted by Grove because he was not alone with K.M. In this regard, important to the state's theory of the case that Grove caused the fatal injuries on the morning of July 10 was the conclusion of Dr. Reichard, based on his microscopic examination of K.M.'s brain, that K.M. had suffered a laceration of the corpus callosum, which would have likely caused immediate loss of consciousness, thereby implicating Grove as the cause of K.M.'s injuries during the 36–45 minute period of time during which he was alone with K.M. Grove points out that both Dr. Ross and Dr. Harper recited Dr. Reichard's observations in this regard, as gleaned from the autopsy report, as neither was present during the autopsy nor conducted their own microscopic analysis, and relied on these observations in forming their respective opinions that K.M.'s injuries had been inflicted on July 10.
>
> By contrast, Grove's expert, Dr. Arden, testified that he did not agree with Dr. Reichard that a laceration was present and that the anomaly was the result of handling of the brain after death. He also offered his opinion, after examination of the microscopic slides, that K.M.'s injuries had been inflicted at least three days prior to death (thus absolving Grove of having caused them) and that they would not have necessarily resulted in immediate loss of consciousness.

State v. Grove, 151 Idaho 483, 490, 259 P.3d 629, 636 (Ct. App. 2011), *review denied* (Sept. 12, 2011). In light of the central importance of the evidence from Dr. Reichard, the state does not argue harmless error and cannot meet the burden of proving the unconstitutional admission of

testimonial evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[W]e hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt).

Finally, the state's argument that Mr. Grove "had sufficient opportunity to object to any improper testimony," State's Motion, pg. 4, is not persuasive because the fact that defense counsel failed to make proper evidentiary and confrontation clause objections does not nullify or excuse the constitutional error. In fact, the state's argument simply goes to prove that defense counsel's performance was deficient under *Strickland v. Washington*, 446 U.S. 668 (1984), but that is a different and separate cause of action which is addressed in Section E below.

d. Conclusion

As Mr. Grove has presented uncontroverted evidence of a confrontation clause violation and the state cannot show the error was harmless beyond a reasonable doubt, this Court should deny the state's motion, grant Mr. Grove's motion for summary disposition, and order a new trial

B. *The Misconduct by the Prosecutor Deprived Mr. Grove of a Fair Trial*

1. Legal background

The due process clauses of Art. 1, § 13, of the Idaho Constitution, and the Fourteenth Amendment ensure, at a minimum, "that criminal trials shall be fundamentally fair." *Schwartzmiller v. Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978). Further, "[i]t is the *duty of a prosecuting attorney* to see that the accused has a fair and impartial trial." *State v. Spencer*, 74 Idaho 173, 183, 258 P.2d 1147, 1153 (1953) (emphasis added) (finding that the prosecutor's misconduct warranted a new trial). The prosecutor is charged with the dual task of

ensuring that the government's case is presented "earnestly and vigorously, using every legitimate means to bring about a conviction, but also to see that justice is done and that every criminal defendant is accorded a fair trial." *State v. Reynolds*, 120 Idaho 445, 449, 816 P.2d 1002, 1006 (Ct. App. 1991). Therefore, it is improper for a prosecutor to appeal to the emotions, passion or prejudice of the jury through the use of inflammatory tactics. *State v. Phillips*, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007).

2. Why relief should be granted to Mr. Grove

While the state has denied the allegations in its Answer, it has not offered any proof that the prosecuting attorney did not engage in the acts alleged in ¶ 41-49 and the subparts thereof. Nor could it in large part, as most of the allegations are conclusively proved by the record in the criminal case pursuant to *Hauschulz v. State*, *supra* and *Workman v. State*, *supra*. The only exceptions are the allegations that Mr. Spickler exposed the jury to prejudicial extra-judicial evidence found in ¶ 44.1-44.2. These allegations, however, are supported by the affidavits of Craig Stamper, Karen Stamper, Stacey Grove, Deborah Grove and Stevie Grove previously filed. As there is no affidavit from Mr. Spickler denying the allegations, there is no genuine question of whether this instance of misconduct occurred either.

a. The prosecutor exposed the jury to extra-judicial evidence

During the trial, but prior to the Court going on the record, the prosecutor projected family photos of [redacted] onto the court room screen while the jury entered the courtroom. He then interchanged the family photos with the autopsy photographs. Thus, the prosecutor exposed the jury to evidence outside the presence of the Court, invoking sympathy for [redacted] and his

biological family and arousing passion and prejudice against Mr. Grove. This was prosecutorial misconduct which amounted to fundamental error. "Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *State v. Gross*, 146 Idaho 15, 18, 189 P.3d 477, 480 (Ct. App. 2008), *citing State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App.2003).

b. The prosecutor violated this Court's order in limine

At trial, the prosecutor called [redacted] Bandel, the sister of [redacted] as a witness. Defense counsel objected noting that [redacted] was a child and arguing that the prosecutor's purpose in calling her was "obviously . . . just to impassion or inflame the jury" and he expected [redacted] to testify that when she last saw her brother "he was lying on his mother's bed, and she gave him a hug and kiss and he said good bye." Exhibit B, pg. 821, ln. 24 - pg. 822, ln. 8. In response, the prosecutor told the Court that his purpose in calling [redacted] was to elicit evidence regarding the "condition of [redacted] Martin on the morning of July 10th," and argued that he only had Lisa Nash and [redacted] to provide evidence on that topic. Exhibit B, pg. 822, ln. 17-23. He stated, "I'm entitled to ask her what she recalls that morning, what she recalls of the physical condition of her brother the last time she saw him." Exhibit B, pg. 823, ln. 1-3. The Court overruled defense counsel's objection "based on the argument made by Mr. Spickler on behalf of the State." Exhibit B, pg. 823, ln. 8-9. Mr. Spickler then elicited testimony from [redacted] that she was a "[p]retty strong little girl," that she said "bye" to [redacted] before she left that morning, gave him a

kiss and a hug and that she never saw her "brother again after that." Exhibit B, pg. 825, ln. 22; pg. 826, ln. 15-18; pg. 827, ln. 16-17. Thus, the prosecutor elicited highly prejudicial testimony in violation of this Court's order *in limine*. (Set forth at Amended Petition ¶ 45.1-45.7.)

That testimony went beyond what the prosecutor told the Court he would elicit and it had the effect of inflaming the passions and prejudices of the jury and encouraging the jury to convict Mr. Grove for reasons other than the relevant evidence. Accordingly, it was misconduct as a prosecutor may not intentionally seek to admit evidence the court has previously ruled excluded. "Violation of a district court order governing the presentation of evidence may constitute misconduct." *State v. Erickson*, 148 Idaho 679, 684, 227 P.3d 933, 938 (Ct. App. 2010) (misconduct to ask about defendant's alleged possession of drugs which had been excluded pre-trial); *State v. Martinez*, 136 Idaho 521, 37 P.3d 18 (Ct. App. 2001) (prosecutorial misconduct in eliciting a statement from the victim that had been excluded from the preliminary hearing and attempting to elicit the contents of a doctor's report which had previously been ruled inadmissible); *State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995) (prosecutorial misconduct in eliciting hearsay evidence after the district court had sustained the defendant's objection to this questioning); *State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007) (prosecutorial misconduct to raise issue on examination after court had instructed prosecutor to alert the court beforehand so it could make a ruling on admissibility).

c. The prosecutor admitted highly prejudicial and improper photographs of the many sympathy cards sent to [redacted]'s mother

During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after Kyler's death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997,

ln. 23; Exhibit C (State's Exhibits 4, 5 and 6). These photos were unfairly prejudicial and highly inflammatory because they included a large display of sympathy cards sent to Lisa Nash. It was prosecutorial misconduct to introduce these photographs because they had the effect and were intended to arose sympathy toward Kyler's biological parents and inflame the passion of the jurors against Mr. Grove.

The above was prosecutorial misconduct because "[a]ppeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *State v. Eldred*, 148 Idaho 317, 320, 222 P.3d 1011, 1014 (Ct. App. 2009). *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993).

d. The prosecutor's cross-examination of Mr. Grove was improper

The prosecutor committed misconduct during the cross-examination of Mr. Grove. First, he cross-examined Mr. Grove about the fact that Mr. Grove was behind on child support to his biological son, a fact both irrelevant and unfairly prejudicial. Exhibit B, pg. 1115, ln. 21-24.

The Idaho Supreme Court has written, "An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury should not be admitted." *State v. Wilson*, 93 Idaho 194, 196-98, 457 P.2d 433, 435-37 (1969), *quoting State v. Fleming,* 154 N.W.2d 65, 66 (Neb. 1967). This is so because "[a] fundamental principle of criminal law is that where the offense charged 'is of itself sufficient to inflame the minds of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of

evidence'." *Id.*, *quoting People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954). "However, reception at trial of irrelevant and immaterial evidence, which serves no probative function, but serves only to inflame the minds and passions of the jury to the prejudice of the defendant is reversible error." *Id.* The Idaho Supreme Court in *Wilson* held that evidence of "[t]he degree on pain suffered by a young virgin upon being raped, as opposed to the feelings of a bride when first experiencing intercourse with her husband," was patently inadmissible and reminded the prosecutor that he was only "entitled to hit as hard as he can above, but not below, the belt." *Id.*, *quoting State v. Rollo*, 351 P.2d 422, 426-427 (Or. 1960). It went on to list several other "examples of irrelevant, immaterial and inflammatory material, the admission of which into evidence was held to be reversible error," including:

> Evidence that defendant, accused of Mann Act Violation, failed to file income tax returns; evidence that defendant, accused of murder, was a deserter from the army; evidence that defendant, accused of arson, had been treated for venereal disease; evidence that defendant, accused of murder, while in the army offered a friend $500.00 to shoot him in the foot in order to avoid frontline duty; evidence, in prosecution for 'Malicious shooting at and wounding another with intent to kill,' of victim's prognosis for recovery and future ability to perform manual labor; evidence, in rape prosecution, that victim was pregnant as a result of the rape; evidence, in murder prosecution, that victim was married and a parent; evidence that married defendant, accused of murdering wife's friend, had been seen with other women[.]

93 Idaho at 198, 457 P.2d at 437.

The evidence about Mr. Grove's child support arrears fits squarely into the Idaho Supreme Court's list of examples of "irrelevant, immaterial and inflammatory material" and it was misconduct for the prosecutor to elicit such testimony because it had no such tendency to

prove the charge and "could only serve to excite the minds and inflame the passions of the jury[.]" *Id.*

The prosecutor also committed misconduct when he asked Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12. This questioning went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg. 1067, ln. 3-5. Further, the answer to the question was totally irrelevant, yet highly prejudicial to Mr. Grove.

The prosecutor also committed misconduct in his cross-examination of Mr. Grove when he characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11. Counsel should not interject his personal opinion and beliefs about the credibility of a witness or the guilt or innocence of the accused. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007); *citing State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *State v. Garcia*, 100 Idaho 108, 110–11, 594 P.2d 146, 148–49 (1979); *State v. Lovelass*, 133 Idaho 160, 169, 983 P.2d 233, 242 (Ct. App. 1999); *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). The prosecutor's characterization of Mr. Grove's testimony as a "story you need the jury to believe" and that "some things . . . just don't really make sense" are mere assertions of his personal

opinions and belief in Mr. Grove's guilt and to the lack of credibility of Mr. Grove's testimony, and thus was misconduct.

e. The prosecutor's cross-examination of Dr. Arden was improper

The same type of misconduct was committed when the prosecutor stated in his cross-examination of Dr. Jonathan Arden, that the doctor was "on a special mission here, which is to provide such evidence as you might that would support the defense's case[.]" Exhibit B, pg. 1321, ln. 18-20. The prosecutor's personal evaluation of motives (unsupported by any admissible evidence) and disparagement of Dr. Arden's credibility was misconduct. *State v. Phillips, supra and cases cited therein.*

f. The prosecutor's closing and rebuttal arguments were replete with improprieties

"Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case .... [t]o enlighten the jury and to help the jurors remember and interpret the evidence." *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (internal quotations omitted). Therefore, "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice: Prosecution and Defense Functions § 3-5.8 (3d. ed.1993). While both sides in a trial have traditionally been afforded considerable latitude in closing argument to the jury, "[t]his latitude is not boundless, however, and it is impermissible to appeal to the emotion, passion, or prejudice of the jury through the use of inflammatory tactics." *State v. Johnson*, 149 Idaho 259, 266-67, 233 P.3d 190, 197-98 (Ct. App. 2010), *citing State v. Gross*, 146 Idaho 15, 20–21, 189 P.3d 477, 482–83 (Ct. App. 2008); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007)

("Considerable latitude, however, has its limits, both in matters expressly stated and those implied."). A prosecutor exceeds the scope of this considerable latitude if he or she "attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence." *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Idaho Supreme Court has long held that the limits on permissible closing argument apply most stringently to a prosecuting attorney:

> A prosecuting attorney is a public officer, "acting in a quasi judicial capacity." It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same....
>
> It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.

State v. Irwin, 9 Idaho 35, 43-44, 71 P. 608, 609-11 (1903). *See also, State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994); *State v. Givens*, 28 Idaho 253, 268, 152 P. 1054, 1058 (1915).

Here, the prosecutor committed multiple instances of misconduct during closing and rebuttal argument. He misstated the defense position regarding pre-existing head injury, saying that the defense was that there was "some long-term brain injury." Exhibit B, pg. 1419, ln. 6-10. The prosecutor misstated for a second time Dr. Arden's testimony about head injuries. *Id.*, pg. 1462, ln. 18-19. And, the prosecutor suggested without supporting evidence that Dr. Arden's "financial position" leads him to decide what cases he can take. *Id,* pg. 1429, ln. 8-9. 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. Griffiths*, 101 Idaho 163, 166, 610 P.2d 522, 525 (1980); *State v. Tupis*, 112 Idaho 767, 771-72, 735 P.2d 1078, 1082-83 (Ct. App. 1987); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007).

The prosecutor stated in argument that a "colleague" said that Dr. Arden's answers during cross-examination were slippery as an ice cube and the prosecutor opined that the doctor "was stretching things." *Id*, pg. 1430, ln. 4-8; pg. 1461, ln. 11. This violated the prohibition against using inflammatory words employed in describing a witness or defendant as well as the prohibition against arguing facts not presented in trial. *State v. Hairston*, 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999); *State v. Kuhn*, 139 Idaho 710, 715-16, 85 P.3d 1109, 1114-15 (Ct. App. 2003).

The prosecutor implied that he had evidence not presented at trial that Mr. Grove had previously been "violent with [redacted]" Exhibit B, pg. 1430, ln. 15-21. The prosecutor told the jury that he did not call Kyler's biological father as a witness "because my medical experts unanimously, to no exception, said he could not have done it." *Id*, pg. 1477, ln. 18-20. The prosecutor told the jury without supporting evidence that "[c]are takers kill little babies all the time." *Id*, pg. 1460, ln. 5-6. The prosecutor argued without supporting evidence that the emotional breakdown of Mr. Grove at trial showed that Mr. Grove had a different kind of "emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries[.]" *Id*, pg. 1458, ln. 16-18. And the prosecutor told the jury without supporting evidence that "[p]arents kill babies all the time," that "there are literally thousands of [similar] incidents in any given span of time" and that "our local paper has probably shown . . . probably six more of these cases since – since this one started." *Id*, ln. 5-14. The authority is clear that it is misconduct for the prosecutor to refer to facts not in evidence. "It is plainly improper for a party to present closing argument that misrepresents or mischaracterizes the evidence." *State v. Troutman*, 148 Idaho 904, 911, 231 P.3d 549, 556 (Ct. App. 2010); *see also Griffiths*, 101 Idaho at 166, 610 P.2d at 525; *State v. Martinez*, 136 Idaho 521, 525, 37 P.3d 18, 22 (Ct. App. 2001); *State v. Phillips,* 144 Idaho at 86, 156 P.3d at 587.

Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Raudebaugh*, 124 Idaho at 769, 864 P.2d at 607; *State v. Smith*, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982); *Griffiths*, 101 Idaho at 168, 610 P.2d at 527. Yet, the prosecutor attempted to invoke

sympathy for his expert witness and [redacted] by arguing that "Dr. Ross had the unenviable task of taking Kyler's body apart piece by piece[.]" *Id*, pg. 1464, ln. 24-25. And he argued that "we don't want to let a murderer go free." *Id*, pg. 1466, ln. 9. However, "[u]rging the jury to render a verdict based on factors other than the evidence and jury instructions, such as sympathy for the victim, has no place in closing arguments." *State v. Felder*, 150 Idaho 269, 275, 245 P.3d 1021, 1027 (Ct. App. 2010); *State v. Beebe*, 145 Idaho 570, 576, 181 P.3d 496, 502 (Ct. App. 2007)

Here the prosecutor appealed to the passions and prejudices of the jury, misstated the evidence, used inflammatory language in reference to defense witnesses, argued evidence not presented at trial, and misrepresented the state's burden of proof by denigrating the presumption of innocence with his argument that it was as bad to let a "murderer go free" as "convicting an innocent man." *Id.*, pg. 1466, ln. 6-9. To the contrary, the burden of proof requirement is the contitutionally required "fundamental value determination of our society that *it is far worse* to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (emphasis added).

Although it is manifest from the many instances of misconduct and the egregiousness of the individual instances that the prosecutor was intentionally engaging in what he knew to be improper behavior, it is not necessary for this Court to find intentional misconduct in order to find prosecutorial misconduct. The "decisions of th[e United States Supreme] Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982). Whether or not the prosecutor knew his actions were misconduct is

not relevant to this analysis. Mr. Grove's right to a fair trial was violated irrespective of the intent of the prosecutor.

g. The error is not harmless

The effect of the prosecutor's misconduct requires the granting of the petition. "The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated show the absence of a fair trial in contravention of the defendant's right to due process." *State v. Gross*, 146 Idaho 15, 21, 189 P.3d 477, 483 (Ct. App. 2008). Thus, it is the cumulative effect of the misconduct engaged in here that should be considered. *Id.*

The evaluation of the cumulative effect of the misconduct is a legal determination. Thus, Mr. Grove is not required to present "supporting evidence that the prosecutor's conduct was sufficiently egregious as to result in fundamental error," as argued by the state. State's Motion, pg. 6. Instead, the Court must consider all the misconduct, established by the trial record and affidavits, and then make a legal determination as to whether Mr. Grove is entitled to relief. Considering all the misconduct, it is clear that the state cannot meet its burden of proving its misconduct was harmless beyond a reasonable doubt as required by *Chapman v. California*, *supra*.

Finally, the state makes a variation on an argument made in its confrontation clause argument: That "trial counsel had sufficient opportunity to bring to the Court's attention any bad acts or misconduct by the prosecutor." State's Motion, pg. 6. But again, that argument proves too much, at least from the state's point of view. Mr. Grove agrees that defense counsel's

performance was deficient because he failed to object to any of the many instances of prosecutorial misconduct. Defense counsel should have objected to the prosecutor eliciting highly prejudicial testimony in violation of this Court's order *in limine*. (Set forth at Amended Petition ¶ 45.1-45.7.) He should have objected to the highly prejudicial and improper photographs of the many sympathy cards sent to Kyler's mother. (Set forth at Amended Petition ¶ 45.8-45.10.) He should have objected to the improper cross-examination of his client. (Set forth at Amended Petition ¶ 46 and 48.1-48.3.) He should have objected to the improper cross-examination of his sole defense expert witness. (Set forth at Amended Petition ¶ 47.) And he should have objected to the multiple instances of prosecutorial misconduct set forth in the Amended Petition at ¶ 49.1-49.14. But all the state's argument in this regard proves is that, in addition to a due process violation based upon prosecutorial misconduct, Mr. Grove was also deprived of his right to effective assistance of counsel under *Strickland v. Washington, supra.* That cause of action is addressed in Section E below.

h. Conclusion

As Mr. Grove has presented uncontroverted evidence of prosecutorial misconduct and the state cannot show the error was harmless beyond a reasonable doubt, this Court should deny the state's motion, grant Mr. Grove's motion for summary disposition, and order a new trial.

C. *Juror Misconduct Deprived Mr. Grove of a Fair Trial*

1. Legal background

A juror's inattentiveness, by sleeping during witness testimony, may constitute misconduct. *State v. Strange*, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2009). *See e.g.,*

State v. Majid, 914 N.E.2d 1113, 1115 (Ohio Ct. App. 2009) (Numerous instances of jurors' sleeping during murder trial, including during eyewitness testimony, violated defendant's right to due process and constituted plain error). "[A] juror who sleeps through much of the trial testimony cannot be expected to perform his duties." *Id, citing United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841 (1977); *United States v. Cameron*, 464 F.2d 333, 335 (3rd Cir. 1972). "Due process mandates that the defendant is entitled to have a jury hear and evaluate the evidence," *State v. Majid, supra*, that is why the jurors in this case were instructed by the Court "to decide the facts from *all the evidence* in the case." Exhibit B, pg. 1399, ln. 24-25 (emphasis added). The repeated instances of sleeping by several of the jurors, especially given they were sleeping during the critical medical testimony of Drs. Ross and Arden, denied Mr. Grove his state and federal constitutional rights to a jury trial and due process.

2. Why relief should be granted to Mr. Grove

a. The uncontroverted evidence shows juror misconduct

Several affidavits of individuals who witnessed jurors sleeping during trial testimony have been filed in support of this Petition. Stevie Grove, Deborah Grove, Lynette Walton, Jack Grove and Carol Grove were all present in the courtroom during the criminal trial proceedings and they observed the following five jurors sleeping during court at various times during the proceedings: Casey Neuman, Mike Keller, Cynthia Barrett, Greg Lind and James Yates. They observed jurors sleeping during the testimony of Dr. Marco Ross on July 22, 2008, during the testimony of Dr. Deborah Harper on July 24, 2008, and during the testimony of Dr. Jonathan

Arden on July 29, 2008. Further, all saw that "[o]ne juror, Mike Keller, was so soundly asleep that his head was resting against the back wall during Dr. Ross's testimony." Affidavit of Carol Grove, pg. 2; Affidavit of Lynette Walton, pg. 2; Affidavit of Jack Grove, pg. 2; Affidavit of Deborah Grove, pg. 2; Affidavit of Stevie Grove, pg. 2.

Their observation of Juror Keller sleeping with his head resting against the back wall is corroborated by Craig Stamper who stated that "during the testimony, I twice observed a juror in the back row sleeping [and] [t]hat this sleeping juror leaned back to rest his head on the wall as he slept." Affidavit of Craig Stamper, pg. 1. Lori Stamper observed a juror, either Michael Keller or Kendall Loetscher (the presiding juror) in the back row sleeping. Affidavit of Lori Stamper, pg. 1. Karen Stamper stated in her affidavit that she saw jurors sleeping. Further, the witness's affidavits are confirmed by the trial transcripts which show the Court was required to take several unplanned recesses because jurors repeatedly fell asleep during the presentation of the evidence. Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25.

While the state has denied the allegations, it has not offered any proof that the jurors were not asleep as alleged in the Amended Petition and the supporting affidavits. As there is no affidavit from Mr. Spickler or other witness denying the allegations, there is no genuine question of whether this instance of juror misconduct occurred. *Cooper v. State*, 96 Idaho at 545, 531 P.2d at 1190.

b. The state's arguments are without merit

Confusingly, the state complains that the affidavits are from "audience members" "without any verification." State's Motion, pg. 8. However, the state offers no reason why "audience members" are not as competent to observe and testify as the participants in the courtroom proceedings. Further, all the affidavits are "verified" in the legal sense that they are sworn to under oath. *See*, www.merriam-webster.com/dictionary/verify. The affidavits also are verified in the conversational sense that they establish the truth, accuracy, or reality of the claim because there are six witnesses who all saw Casey Neuman, Mike Keller, Cynthia Barrett, Greg Lind, and James Yates asleep during the testimony of Drs. Ross and Arden. Further, those six affidavits are corroborated by two other witnesses and the trial transcript.

Next, the state cites to *Murphy v. State*, 143 Idaho 139, 150, 139 P.3d 741, 752 (Ct. App. 2006), to argue that there was no due process violation, State's Motion, pg. 7, but that case is easily distinguishable. In *Murphy*, the claim brought in post-conviction was that "trial counsel was ineffective for failing to move to strike a juror who allegedly had fallen asleep at trial." 143 Idaho at 150, 139 P.3d at 752. However, "Murphy did not identify which day of the five-day jury trial the juror allegedly slept, describe the length of time the juror allegedly slept, or explain what testimony or evidence the juror allegedly slept through. In the absence of such evidence, there was no showing of deficient performance or prejudice." *Id.*

By contrast, the claim in this cause of action is that Mr. Grove's due process rights were violated by the sleeping jurors, thus he does not need to show either deficient performance, nor prejudice to prevail here. (The effect of *Murphy* on the ineffective assistance of counsel claim is

set forth in Section E below.) To the contrary, since Mr. Grove has shown a due process violation, *i.e.*, the five jurors sleeping, the state has the burden of proving the constitutional error is harmless beyond a reasonable doubt. *Chapman v. California*; *supra.* Thus, the state's complaint that Mr. Grove "has not presented affidavits, records or evidence indicating *the length of time* the jurors allegedly slept nor has Petitioner explained *what testimony or evidence* the jurors allegedly slept through," State's Motion, pg. 7 (emphasis in original), is not germane here because those facts go to the harmless error question. It is the state's burden to prove that the jurors did not sleep through any important evidence. In any case, unlike *Murphy,* the affidavits do identify which day of the jury trial the jurors slept and further note that they slept during the testimony of the two most important medical witnesses in the case, Drs. Ross and Arden. Defense counsel testified that he was cross-examining Dr. Ross when he was told by his paralegal that a juror was asleep. Defense counsel said that he was "laying foundation for Dr. Arden's testimony" during his cross-examination of Dr. Ross and that doing so "was an important thing to do." Depo., pg. 68, ln. 12 - pg. 69, ln. 23.

The state also argues that there was "sufficient opportunity to bring this to the attention of the Petitioner and trial counsel at a time wherein the issue could have been raised to the attention of the Court." State's Motion, pg. 8. However, trial counsel admitted that he noticed jurors falling asleep and that, in one instance, his paralegal alerted him to that fact. Depo., pg. 66, ln. 22 - pg. 67, ln. 2. While it was ineffective assistance for defense counsel to fail to ask for a mistrial after he noticed the sleeping jurors, that ineffectiveness does not alter the fact that the

misconduct of the jurors also deprived Mr. Grove of his rights to a jury trial and due process of law.

Finally, the state argues that "this is an issue more properly brought to the attention of appellate court," State's Motion, pg. 8, but does not support that argument with any citation to authority. That is no surprise because, in fact, this issue could not have been raised upon appeal because there was no record made of the jurors sleeping at the time of trial, nor did defense counsel make a motion for mistrial based upon the juror misconduct. Under *State v. Perry,* 150 Idaho 209, 226, 245 P.3d 961, 978 (2010), "where an error has occurred at trial and was not followed by a contemporaneous objection, such error shall only be reviewed where the defendant demonstrates to an appellate court that one of his unwaived constitutional rights was plainly violated." Here, of course, it was not possible for Mr. Grove to raise this issue for the first time on appeal because the criminal court record does not demonstrate that any of the jurors were sleeping. As Mr. Grove's appellate counsel Diane Walker states in her affidavit, "[t]he juror misconduct issue raised in the Third Cause of Action could not have been raised on direct appeal because trial counsel did not draw the misconduct to the Court's attention or ask the Court to take any action about it, and there was no definitive evidence in the record that jurors had been sleeping during trial testimony." Affidavit of Diane Walker, pg. 2. See also Affidavit of Eric Frederickson, pg. 2. Thus, the state's argument that the issue should have been raised on appeal is plainly incorrect.

As Mr. Grove has presented uncontroverted evidence of juror misconduct and the state cannot show the error was harmless beyond a reasonable doubt, this Court should deny the state's motion, grant Mr. Grove's motion for summary disposition, and order a new trial.

D. The Ineffective Assistance of Appellate Counsel Claim

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The Idaho Constitution also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* Courts will not attempt to second-guess trial counsel's strategic decisions unless those decisions are made upon the basis of inadequate preparation, ignorance of the relevant law, or other

shortcomings capable of objective evaluation. *Murphy v. State*, 143 Idaho at 145, 139 P.3d at 747. An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho 656, 658, 168 P.3d 40, 42 (Ct. App. 2007).

The state argues in its motion that *Mintun* requires the court to summarily dismiss this claim because that case holds that it cannot be ineffective assistance for appellate counsel to fail to raise claims of fundamental error for the first time on appeal. State's Motion, pg. 10. Yet, at the same time it argues that the Juror Misconduct claim should have been raised on appeal and asks the Court dismiss on that basis. State's Motion, pg. 8, 13.[3] The state, however, cannot have it both ways. If appellate counsel should have raised the Juror Misconduct claim on appeal, then it was ineffective assistance of appellate counsel to fail to do so. The correct answer, however, is that the Juror Misconduct claim could not have been raised on appeal, even as fundamental error, under *State v. Perry, supra,* as explained in the affidavits of appellate counsel Eric Frederickson and Diane Walker.

As appellate counsel could not have raised the Juror Misconduct issues on direct appeal, Mr. Grove can raise it in this Petition, both as a direct claim and as a part of the Ineffective Assistance of Trial Counsel claim alleged below. *See e.g., DeRushé v. State*, 146 Idaho 599, 603-604, 200 P.3d 1148, 1152-53 (2009) (deprivation of the right to testify raised as direct constitutional violation) *with Barcella v. State*, 148 Idaho 469, 476, 224 P.3d 536, 543 (Ct. App. 2009) (deprivation of the right to testify raised as an aspect of an ineffective assistance of trial counsel claim). However, if the Court adopts the state's argument that the Juror Misconduct

[3] It does not raise that argument as to the Confrontation Clause, Prosecutorial Misconduct or Ineffective Assistance of Trial Counsel claims.

claim should have been raised on direct appeal, notwithstanding *Mintun* and *Perry*, Mr. Grove reserves the right to assert the Ineffective Assistance of Appellate Counsel claim in the alternative.

E. *Mr. Grove was Deprived of the Effective Assistance of Trial Counsel*

1. Legal background

The legal standard for evaluating an ineffective assistance of counsel claim was set forth in Section D above.

2. Why the state's motion should be denied

Idaho Rule of Civil Procedure Rule 7(b)(1) requires that "[a]n application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor[.]" *See Saykhamchone v. State*, 127 Idaho at 322, 900 P.2d at 798 (1995) (applying rule to post-conviction proceedings). The Court of Appeals wrote in *Martinez v. State*, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995):

> It is clear that in summary judgment proceedings the nonmovant is required to respond only to alleged grounds for summary judgment asserted by the moving party. The nonmovant need not address any aspect of the nonmovant's case that has not been challenged by the opposing party's motion. . . . In *Mason* [*v. Tucker and Associates*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994)], we emphasized the necessity of notice of the grounds for a motion in order to afford the nonmovant an opportunity to address the issues raised and present evidence and legal argument directed to those issues.

See also, DeRushé v. State, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) (Rule 7(b)(1) requires grounds be stated with "reasonable particularity"), *citing Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264-65 (1965). Here the state's motion asserts vague and general objections

and defenses to this cause of action without tying objections to a particular part of the claim, which has several sub-parts, and thus does not satisfy the reasonable particularity requirement.

With regard to the specific arguments made, the state first makes the remarkable claim that Mr. Grove has failed to support his "claims with affidavits, records or other evidence," State's Motion, pg. 11, apparently overlooking the record of the trial proceedings, which establish the factual basis for most of the claims, which largely consist of errors of omissions at trial, the deposition of Mr. Chapman (which the state attended and participated in, but which was not transcribed until after the state's motion was filed) and the ten affidavits containing facts in support of the claims already filed. Thus, Mr. Grove has done far more than make "bare and conclusory allegations." State's Motion, pg. 11. 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. Further, one aspect of the prosecutorial misconduct and the juror misconduct is shown by the many affidavits filed in support of Mr. Grove's petition.

Next, the state's observation that "trial counsel is an experienced criminal defense attorney and litigator in good standing" is irrelevant. The United States Supreme Court has said that the duty of the defense lawyer "is to make the adversarial testing process work *in the particular case*." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (emphasis added). Thus, it is defense counsel's specific performance in Mr. Grove's case which matters, not his body of work over a career or his reputation. The purpose of the effective assistance guarantee of the Sixth Amendment is not to castigate the lack of diligence or talent of the mediocre lawyers or to lionize

the career accomplishments of the best lawyers. "The purpose is simply to ensure that criminal defendants receive a fair trial." *Strickland*, 466 U.S. at 689.

The state's Motion also observes: "Petitioner further indicates that the Court should string together this list of errors and determine a prejudicial effect." *Id*, pg. 11. To the extent this observation is intended as an argument that the cumulative error doctrine should not apply, it is unsupported by citation to authority or analysis. Further it fails to acknowledge either *Boman v. State,* 129 Idaho 520, 527, 927 P.2d 910, 917 (Ct. App. 1996) or *Reynolds v. State*, 126 Idaho 24, 32, 878 P.2d 198, 206 (Ct. App. 1994), both of which have been previously cited and which recognize the cumulative error doctrine in cases involving ineffective assistance of counsel claims. Nor does the state address *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003), where the Circuit Court explained that "[s]eparate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." Thus, the state's assertion must fail.

The state also argues that "Petitioner was competent to stand trial, fully able and capable to assist trial counsel in his own defense," State's Motion, pg. 11, as if that makes a difference here. There is no rule that a competent defendant is not entitled to a competent defense attorney, nor is there a requirement that a criminal defendant provide "effective assistance of client" in order to receive the benefits of the Sixth Amendment. It is so well-established that it should go without saying that it was not up to Mr. Grove to understand the rules of evidence and how the Confrontation Clause affects the admission of evidence. It was not up to him to properly prepare

the defense expert witness for trial testimony, present evidence in his favor, or to properly cross-examine the state's witnesses. It was not up to him to object during trial to the prosecutorial misconduct. In fact, had Mr. Grove tried to insert objections into the trial, the court would have reminded him that he was represented by counsel. Had he persisted, he could have then been removed from the courtroom. *See, Illinois v. Allen,* 397 U.S. 337 (1970). And it was not up to him to make a motion for mistrial for juror misconduct after he alerted his attorney that several jurors had fallen asleep. There would be no need for the right to counsel at all, if being competent, fully able and capable to assist trial counsel were enough. But as the United States Supreme Court has written:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963), *quoting Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). The state's argument in this regard has been rejected for nearly 50 years,[4] and has no force in either logic or law.

The state's motion should be denied and Mr. Grove's motion should be granted as explained below.

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[4] The fiftieth anniversary of the *Gideon* decision is March 18, 2013.

3. Why relief should be granted to Mr. Grove

Mr. Grove has shown that defense counsel rendered deficient performance in several instances and the state has not controverted his evidence. The effect of these errors both individually and cumulatively merit the granting of relief.

a. Counsel's performance was deficient during voir dire

The American Bar Association's Standards Relating to the Defense Function are a starting point for determining whether counsel's actions were objectively reasonable. *State v. Larkin,* 102 Idaho, 231, 233, 628 P.2d 1065, 1067 (1981). ABA Defense Function Standard 4-7.2(a) states that defense counsel should prepare prior to trial to discharge effectively counsel's function in jury selection "including the raising of any appropriate issues concerning the method by which the jury panel was selected[.]"

In this case, defense counsel rendered deficient performance in failing to move for a mistrial or for the summoning of a new jury pool after a potential juror made statements in voir dire that polluted the entire jury pool. That potential juror stated in front of all the potential jurors that he worked in the funeral business and he knew the police officer witnesses Greene and Petrie well, both from their work investigating cases that came through the funeral home, and through their work for his wife who was the city manager, and that they are very credible. Exhibit B, pg. 155, ln. 13-14. He also stated he had worked in the funeral business for a long time and seen "these situations" before and did not have a lot of empathy except for the victims. *Id.*, pg. 155, ln. 21 - pg. 156, ln. 2. These comments were prejudicial because they had the effect

of unfairly bolstering the credibility of the state's witnesses and engendering sympathy for [redacted]s biological parents.

That counsel should have moved for a mistrial or the summoning of a new jury pool is illustrated by *United States v. Mach,* 137 F.3d 640 (9th Cir. 1997). *Mach* presented a situation quite similar to that in this case. Mach was on trial for sexual conduct with a minor. The first prospective juror to be questioned in voir dire stated that as a social worker with the state, she would have a difficult time being impartial given her line of work and that sexual assault had been confirmed in every case in which one of her clients reported an assault. The court engaged in further questioning of the potential juror warning her that she needed to decide the case on the evidence. Mach moved for a mistrial on the grounds that the entire panel had been tainted. The state court did not grant the motion, but did strike the potential juror for cause. Mach was convicted. The Ninth Circuit granted habeas relief. The Court held that given the nature of the potential juror's statements, the certainty with which they were delivered, the years of experience that led to them, the Court would presume that at least one juror was tainted and entered into deliberations with the conviction that children never lie about sexual abuse.

In Mr. Grove's case, the potential juror's statements, like those in *Mach,* vouched for the state's witnesses and were based upon professional experience and observations. As in *Mach,* a presumption that the potential juror's statements tainted the entire jury pool is warranted and the failure to move for a mistrial or the summoning of a new panel was objectively unreasonable representation by defense counsel.

Counsel also rendered deficient performance in failing to challenge for cause or peremptorily challenge Juror #5 (Loetscher) after voir dire revealed that he worked at St. Joseph's Hospital and knew of "just about everyone on the [state's witness list] . . . particularly the ER doctors that was listed there." Exhibit B, pg. 144, ln. 14-19. Mr. Grove was prejudiced because Juror #5 became the presiding juror. Exhibit B, pg. 1471, ln. 19-22.

b. Counsel's performance was deficient because he failed to make a confrontation clause objection

Counsel rendered deficient performance in failing to assert Petitioner's state and federal constitutional rights to confrontation (Idaho Const. Art. I, § 13, United States Const. Amendments 6 and 14) and by failing to make proper evidentiary objections. During trial, state's witnesses, *i.e.,* Nash, Chin, Harper, Hunter and Ross, repeatedly testified to the contents of the autopsy report which contained information from Dr. Reichard. See Amended Petition, pgs. 3-9. However, the state did not present the testimony of Dr. Reichard in violation of the state and federal constitutional rights of confrontation. Had defense counsel objected on confrontation grounds, that evidence would have been excluded by the Court as argued in Section A above.

There was no conceivable strategic purpose to fail to object to the inadmissible hearsay testimony which also related Dr. Reichard's testimony in violation of the confrontation clause. Defense counsel, Scott Chapman, was deposed as part of this case. Mr. Chapman testified that he was not the sort of lawyer who was shy about voicing an objection, if he thought it was appropriate and that, generally speaking, he is not hesitant to do so, especially if he believes the objection would make a difference. Deposition of Scott Chapman ("Depo"), pg. 10, ln. 4-17. At the same time, Mr. Chapman stated that since one can never be sure that an objection will be

sustained, there is an advantage in litigating important matters pre-trial. Depo., pg. 12, ln. 15 - pg. 13, ln. 6.

In the deposition, Mr. Chapman stated that he did not object to the introduction of Dr. Ross's autopsy report (which contained Dr. Reichard's report) because "[t]here wasn't anything in that autopsy report that didn't work with . . . what my . . . thrust of the case was going to be." Depo., pg. 18, ln. 10-23. He described the thrust of the defense as follows: "That the injuries that occurred to [redacted] were inflicted at a time when Stace was not around or with the child in any fashion that it could have happened." *Id.* However, he admitted that there was, in fact, evidence in Dr. Reichard's report which undermined the thrust of his case. Depo., pg. 19, ln. 10-13. He then explained,

> [E]ven though there was evidence that was contrary to our position, I had what I believed to be evidence that his findings weren't totally correct, if you will. And as such we had – a number of doctors were relying on that autopsy report, including Reichard's report, and I felt that Dr. Arden would, in large degree, poke enough holes in that to make reliance on that report misplaced.
>
> Also had to, I guess, take into consideration the possibility that Dr. Reichard could have been made a witness and come to testify and then have him and Arden sitting there at opposing positions.

Depo., pg. 19, ln. 17 - pg. 18, ln. 5.

This decision, however, was objectively unreasonable and was also based upon ignorance of the relevant law. First, it is objectively unreasonable to allow the avoidable admission of damaging evidence upon the belief that one possesses counter-evidence which is only capable of 'poking holes' in that evidence. That is tantamount to a strategy in a gun fight to allow

oneself to be shot on the belief that the medic has sufficient skill and supplies to keep you from dying of the wound. That plan does not further your goal of winning the gun fight and it is objectively better to not be shot, just as it is objectively better to avoid the admission of the evidence altogether rather than allow it in with the hope that the jury might find reliance on the evidence "misplaced." In fact, defense counsel conceded that Dr. Reichard's conclusions were harmful to the defense theory of the case and agreed that Dr. Reichard's conclusion about the tear in the corpus callosum, if believed, showed that his "theory of the case was impossible." Depo., pg. 28, ln. 22-25. He also admitted that Dr. Reichard's conclusion about the tear in the corpus callosum was "particularly damaging to the thrust of [his] defense" and agreed that [f]rom a strategic point of view, it would have been better for [his] theory of the case to keep this evidence out if [he] could." Depo. pg. 21, ln. 1-3 ("particularly damaging"); pg. 22, ln. 21-25 ("strategic point of view").

Further, the decision to not object was not consistent with the trial strategy and appears to have been caused by defense counsel's lack of understanding of the relevant law. Defense counsel could not say whether he was familiar with the *Crawford* confrontation clause case at the time of the trial. Depo., pg. 37, ln. 5 - pg. 38, ln. 9. Further, he described the holding in *Crawford* as, "[t]hat there was a confrontation right that trumps hearsay exceptions." Depo., pg. 37, ln. 9-12. Further, he admitted, that the testimony about the particulars of Dr. Reichard's report was inadmissible under I.R.E. 703. And counsel did not testify that he made a strategic decision to not make an I.R.E. 703 objection to testimony about the facts and data in Dr. Reichard's report. Depo., pg. 31, ln. 15 - pg. 32, ln. 24.

As to the concern that Dr. Reichard might be called to testify, that was true whether defense counsel objected to the evidence being admitted or not. However, it is highly unlikely that Dr. Reichard would have suddenly been called from New Mexico to testify, if the state hadn't planned for that in advance. In this respect, it is far more likely that the evidence would have been excluded with a timely trial objection and that the state would not be able to produce Dr. Reicherd to testify on such short notice. Further, as will be discussed below, there were specific advantages to having Dr. Reichard testify and be cross-examined, rather than have others interpret (and misinterpret) his report. However, defense counsel was not aware of these advantages, possibly because he never spoke to Dr. Reichard prior to trial. Depo., p. 28, ln. 3-5. Counsel said he believed speaking to Dr. Reichard "wasn't necessary" given his theory of the case. Depo., pg. 28, ln. 21. Note that this failure to investigate and prepare with regard to Dr. Reichard was itself objectively unreasonable performance. ABA Defense Function Standard 4-4.1(a) states that counsel should "explore all avenues leading to facts relevant to the merits of the case" and make "efforts to secure information in the possession of the prosecution[.]" *See Rompilla v. Beard,* 545 U.S. 374, 383 (2005). *See also, Wiggins v. Smith,* 539 U.S. 510, 533 (2003), stating, ' "[S]trategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation"' (quoting *Strickland,* 466 U.S., at 690-691).

Petitioner was prejudiced because had counsel objected on confrontation grounds, the state would have had no testimony as to any head or alleged brain injuries and the timing of those injuries and thus, could not have obtained a conviction. Dr. Reichard's information was the

state's only basis of proof for the nature of head and alleged brain injuries, the only basis for testimony as to the timing of the head and alleged brain injuries, and the only basis for the state's claim that [redacted] had suffered a tear to the corpus callosum and axonal shearing.

The state used Dr. Reichard's testimony to great effect during the entire trial. For example, in response to the defense motion for acquittal or in the alternative a new trial, the state argued that Dr. Reichard was the one person who actually examined the brain and therefore was a more credible witness than Dr. Arden. (Prosecutor Spickler said in discounting Dr. Arden's testimony, that he "was trying to contradict the findings of an expert in New Mexico who actually had the brain and actually took a look at the brain in toto, as opposed to one or more slides." Exhibit B, pg. 1486, ln. 8-12.)

Moreover, had Dr. Reichard provided testimony at trial, several major issues could have been explored by the defense. These include the significance of the APP staining -- he would likely have testified consistently with his report that the vascular axonal injury pattern precluded a diagnosis of traumatic axonal injury, and, consistently with his own publication, that the PAI pattern did not indicate the presence of more diffuse axonal injury. Had his testimony been to the contrary, he could have been impeached with his own report and publication. In addition, defense counsel could have exposed the inconsistencies between Dr. Reichard's opinions and those expressed by both Dr. Ross and Dr. Harper. In particular, both Drs. Ross and Harper claimed that Dr. Reichard's report contained conclusions about the nature of the injury and its consequences which the report did not contain. Dr. Reichard could have clarified for the jury that Drs. Ross and Harper did not understand the report and were drawing false conclusions from

it. Dr. Reichard also could have been confronted with the photographic evidence that Dr. Arden produced regarding the brain laceration being an artifact, which would have countered the only positive evidence of a primary brain injury. Confronted with that evidence, Dr. Reichard likely would have agreed that the laceration was or could have been an artifact. Either outcome would have led to the state being unable to prove its time line and therefore Mr. Grove's guilt by proof beyond a reasonable doubt. Dr. Reichard could also have been confronted with the evidence Dr. Arden produced concerning the age of the subdural hemorrhage, which contradicted his report. See Report of Consultation attached to the Affidavit of Dr. Arden.

c. Counsel's performance was deficient because he failed to make a hearsay objection to the Reichard testimony

Further, the testimony of Drs. Chin, Hunter, Harper and Ross which related the facts and data in Dr. Reichard's report, was inadmissible under IRE 703. That rule states, in relevant part, that: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Thus, the evidence, in addition to violating the confrontation clause was also inadmissible under the rules of evidence. See argument at pages 7-8 above.

d. Counsel's performance was deficient because he failed to make a hearsay objection to the Nash testimony

Counsel rendered deficient performance in failing to object to hearsay testimony from Lisa Nash regarding the autopsy report contents. At trial, Lisa Nash testified that she was told that [redacted] had blood in his brain that could not be removed. She did not identify who told her

this and the testimony was admitted without limitation including for the truth of the matter asserted. Exhibit B, p. 755, ln. 16-25. Defense counsel did not object on hearsay grounds. Had counsel objected, the objection would have been granted. The testimony was plainly an out-of-court statement offered for the truth of the matter asserted and is quintessential hearsay under I.R.E. 801(c). At the deposition, defense counsel agreed the statement was hearsay and could not say why he failed to object. Depo., pg. 77, ln. 1-19.

e. Counsel's performance was deficient because he failed to make a foundation or relevancy objection to the Stocking testimony

Counsel rendered deficient performance in failing to object to the testimony of Steve Stocking, a paramedic, that Mr. Grove was too calm in his opinion when the paramedics arrived in response to the 911 call. Exhibit B, pg. 838, ln. 22. Mr. Stocking was not a psychologist or psychiatrist and had no qualifications as an expert on the appropriate reactions in a crisis. His opinion testimony was not relevant under I.R.E. 401 and 402, was unfairly prejudicial under I.R.E. 403 and did not fall within the scope of admissible opinion testimony by a lay witness under I.R.E. 701 because it involved specialized knowledge of the appropriate reaction of people in crisis. *See Bloching v. Albertson's*, Inc., 129 Idaho 844, 846, 934 P.2d 17, 19 (1997) ("[A]court should disregard lay opinion testimony relating to the cause of a medical condition, as a lay witness is not competent to testify to such matters.") *See also State v. Missamore*, 119 Idaho 27, 32, 803 P.2d 528, 533 (1990) (lay opinion testimony about mental state of defendant held inadmissible). Defense counsel admitted that the testimony was not relevant and made Mr. Grove appear to be uncaring about Kyler's condition. He could not think of why he did not object to that testimony. Depo., pg. 78, ln. 2-20.

f. Counsel's cross-examination of Dr. Chinn was deficient

Defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that there was "no way we would have missed any of the[] injuries" described in the autopsy report. Exhibit B, pg. 851, ln. 5-6. Defense counsel failed to cross-examine Dr. Chin on this claim even though, according to Dr. Ross, some of the injuries in autopsy were old enough that they did exist when he saw [redacted] specifically, Dr. Ross testified that the injury to the left thigh and the injuries on the back were older. Exhibit B, pg. 978, ln. 23 - pg. 979, ln.17; pg. 987, ln. 9-20. Defense counsel could not think of a reason why he did not cross-examine Dr. Chin with Dr. Ross's statements. Depo., pg. 79, ln. 9-13.

Defense counsel's performance was also deficient because he failed to object to Dr. Chin's testimony that what he "read in this autopsy report is the most brutal case" he had ever seen. Exhibit B, pg. 851, ln. 6-7. This testimony was not relevant under I.R.E. 401 and 402 and served only to inflame the passions and prejudices of the jury. Thus, to the extent it had any probative value, it was inadmissible as unfairly prejudicial under I.R.E. 403. Defense counsel testified that he did not know why he failed to object to that testimony and could not think of any advantage to the defense for the jury to hear that testimony. Depo., pg. 30, ln. 3-9.

g. Counsel's cross-examination of Dr. Hunter was deficient

Defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that subarachonoid hemorrhage has to have immediate symptoms. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22. There was insufficient foundation for that testimony as Dr. Hunter admitted that he is not a pathologist. Exhibit B, pg. 874, ln. 24-25.

Further defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that [redacted] was either "ejected from an automobile" or "was beaten very severely." Exhibit B, pg. 871, ln. 12-14. Again, there was insufficient foundation for Dr. Hunter to give this opinion.

Defense counsel's performance was also deficient because he failed to object 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 failed to impeach that testimony. Exhibit B, pg. 888, ln. 16-20. This evidence was inadmissible because there was no foundation for this opinion. Further, Dr. Hunter's opinion could have been impeached with medical research published in peer-reviewed medical journals. See Plunkett, J., "Fatal Pediatric Head Injuries Caused by Short-Distance Falls," The American Journal of Forensic Medicine and Pathology, Vol. 22, No. 1 (March 2001) (attached to the Affidavit of Dennis Benjamin previously filed). The author of that article, John Plunkett, M.D., a forensic pathologist, documented 18 cases of fatal head injuries where an infant had fallen 3 meters or less. "The author concludes that an infant or child may suffer a fatal head injury from a fall of less than three meters (10 feet). The injury may be associated with a lucid interval and bilateral retinal hemorrhages." Exhibit A, pg. 1 In this case, there was testimony that [redacted] had both bilateral retinal hemorrhages and a possible lucid interval. And this 2001 study was readily available to defense counsel at the time of the trial.

Defense counsel's performance was also deficient because he failed to object to Dr. Hunter's opinion, stated without any qualification as an expert in the area, that [redacted] had sure signs of shaken baby syndrome. Exhibit B, pg. 869, ln. 4-16.

h. Counsel's cross-examination of Dr. Ross was deficient

Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that, although he did not see certain hemorrhages in the psoas and retroperitoneal areas, he was told about them by the transplant surgeon. Exhibit B, pg. 938, ln. 20-23. That surgeon did not testify at trial. His statements to Dr. Ross, however, were simply admissible hearsay and defense counsel was ineffective for failing to make a timely objection. Defense counsel admitted that this testimony was hearsay and could not say why he failed to object. Depo., pg. 81, ln. 17-23. He also admitted this evidence was damaging to his theory of the case and supported the state's version of the events. Depo., pg. 88, ln. 4 - pg. 24.

This evidence, as it turned out, was very important in the state's case. The testimony at trial from the state's doctor witnesses was that those injuries would have been very painful to [redacted] The state used that testimony to argue that Mr. Grove must have cause those injuries because [redacted] was not showing signs of internal distress or pain when Lisa Nash left for work:

> They all testified that, at a minimum, having sustained the belly injuries, let's call them, he would be in extreme pain. He wouldn't be able to eat, he wouldn't be able to run around, wouldn't be able to play with his sister, wouldn't be able to sit up and watch television on Monday morning.
>
> . . . .
>
> Moreover, there's no testimony whatsoever that at any time [redacted] behaved like he had received those abdominal injuries. No testimony from the defendant, no testimony from his mother, no testimony from the grandparents, from anyone, that at any time, whether it's healing or not healing, did he behave like he suffered those severe, severe injuries.

Exhibit B, pg. 1418, ln. 19-24; pg. 1419, ln. 21 - pg. 1420, ln. 2. This argument would not have been available to the state had a proper hearsay objection been made by defense counsel.

Counsel rendered deficient performance in not moving to exclude any reference by any witness, including Dr. Ross, to the brain autopsy because no valid chain of custody for the brain was presented. The state failed to present any evidence that the brain examined at the pathology laboratory in New Mexico was Kyler's brain.

Defense counsel's performance was also deficient because he failed to object to the foundation for Dr. Ross's testimony regarding the head and alleged brain injuries because Dr. Ross also testified that he had never viewed any of the slides or recuts himself. Exhibit B, pg. 959, ln. 10-15.

Defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that Dr. Reichard's observation of a tear in the corpus callosum shows there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12. First, as noted above, that testimony violates the confrontation clause. Further, that testimony is not admissible under I.R.E. 703 because there was no foundation for Dr. Ross's opinion about the amount of force needed.

Defense counsel's performance was deficient because he failed to point out the differences between Dr. Reichert's report and the state witnesses' conclusions drawn from that report. In particular, the PAI identified by Dr. Reichard (assuming for discussion that it was present) is a localized phenomenon and, by his own publication, does not imply that more diffuse or widespread axonal injury is present. Dr. Reichard did not diagnose diffuse traumatic axonal injury in the brain of [redacted] Martin, while Dr. Ross opined at trial that the child did have

traumatic axonal injury. Counsel, however, failed to cross-examine Dr. Ross on this disagreement with Dr. Reichard, or get Dr. Ross to admit that he had not personally examined the slides from the brain, either the routine or APP stains. See Report of Dr. Arden, pg. 4-5. Counsel admitted that he did not cross-examine Dr. Ross about this and that he was unaware that Dr. Reichard had not diagnosed Diffuse Axonal Injury. Depo., pg. 99, ln. 5-20.

i. Counsel's cross-examination of Dr. Harper was deficient

Counsel rendered deficient performance in regard to the testimony of Dr. Deborah Harper. Counsel failed to object or move to strike when Dr. Harper vouched for the abilities of state's witness Dr. Ross. Exhibit B, pg. 1031, ln. 12-14. ("Dr. Ross, I'm sorry to say, is no longer our – in our Medical Examiner's Office, because he is a super clinician.") Counsel did not have a reason for his failure to object. Depo., pg. 84, ln. 9-12. Counsel also failed to object to irrelevant and unfairly prejudicial testimony regarding the estimated force needed to inflict the injuries, comparing it to the force of being hit by a car, or being dragged behind a horse, or having a horse step on Kyler's abdomen, or being hit by a baseball bat, even though there was no foundation showing she could accurately make such estimates of force. Exhibit B, pg. 1034, ln. 7-21.

Counsel's performance was deficient because he failed to cross-examine Dr. Harper, when she testified that the child had an intrinsic brain injury (suggestive of axonal injury), an opinion contrary to the clinical CT scan and to the neuropathology examination. See Report of Dr Arden, pg. 4-5. Defense counsel stated that he did not cross-examine Dr. Harper about this

because he was not aware of the difference between Dr. Reichard's report and Dr. Harper's testimony about it. Depo., pg. 100, ln. 8-15.

k. Counsel's performance during the testimony of Det. Birdsell was deficient

Counsel rendered deficient performance in failing to object to the admission of photographs taken a month after Kyler's death, which included many sympathy cards sent to the family. During Detective Birdsell's testimony, photographs taken inside the Nash trailer approximately a month after Kyler's death were admitted. Exhibit B, pg. 996, ln. 19 - pg. 997, ln. 23; Exhibit C (State's Exhibits 4, 5 and 6). The photos were inflammatory because they included a large display of sympathy cards sent to Lisa Nash and thus were inadmissible under I.R.E. 403 because the danger of unfair prejudice outweighed any probative value. Defense counsel could not think of why he did not make an objection to this evidence. Depo., pg. 46, ln. 2-12.

l. Counsel's performance was deficient during the direct and cross-examination of Mr. Grove

Defense counsel's performance was deficient because he introduced evidence in the direct examination of Mr. Grove regarding the bad relationship between Mr. Grove and his son Alex. Exhibit B, pg. 1074, ln. 1-24. There was no valid strategic purpose for introducing this evidence as, even if it were expected to be brought up by the state, it could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence. Defense counsel could not say why he brought out this evidence. Depo., pg. 93, ln. 9-17.

Defense counsel's performance was deficient because he failed to object to the prosecutor questioning Mr. Grove about the fact he was behind on child support. Exhibit B, pg. 1115, ln. 21-24. The state's cross-examination about this topic was improper as discussed in Section B above. Moreover, even if it were relevant, this evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence.

Further, in his cross-examination of Mr. Grove, the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11. While defense counsel's objection was sustained, counsel did not ask that the comments be stricken, that the jury be instructed to disregard the comments or that the prosecutor be reprimanded for his blatant misconduct. *Id.*

Defense counsel's performance was also deficient when he failed to object to the prosecutor asking Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Exhibit B, pg. 1120, ln. 9-12. This questioning was clearly objectionable because it went beyond the Court's procedure at the time of the medical recess, which only informed the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and did not mention Mr. Grove or the nature of the medical situation. Exhibit B, pg. 1067, ln. 3-5.

m. Counsel's performance was deficient during the preparation for his testimony and in the direct and cross-examination of Dr. Arden

Defense counsel rendered deficient performance in the presentation of the expert testimony of Dr. Jonathan Arden. Specifically, Dr. Arden requested that defense counsel provide him with all existing microscopic slides for examination prior to trial. Defense counsel, however, did not comply with that request and did not provide any special stain slides, including iron stains, to Dr. Arden for review. Those slides existed and have been provided to Dr. Arden for review in connection with this post-conviction Petition. Had defense counsel provided the iron stain slides to Dr. Arden prior to trial, Dr. Arden could have testified to his observations of the slides which would have both confirmed and extended his testimony on the ages of the injuries sustained by [redacted].

Upon his review of the iron stains slides, in preparation for this post-conviction action, Dr. Arden was able to confirm some of the findings recorded by Dr. Ross. Dr. Arden was also able to make some additional observations that support and extend his (Dr.Arden's) opinion on the ages of the injuries. Some of the iron-staining is co-existent with the fresher-appearing hemorrhage; this in conjunction with the inflammatory response, indicates that the hemorrhage is in the early stages of response. This observation is consistent with and strengthens the opinion offered by Dr. Arden that the injuries sustained by [redacted] had occurred several days to five days prior to death. Dr. Ross testified that the fresher hemorrhage was coincidentally located with the positive iron staining, thus representing older and newer injuries in the same locations. Dr. Arden disagrees with this interpretation, which relies on coincidence and fails to synthesize the

totality of the findings into a unified diagnosis. Based upon Dr. Arden's post-trial examination of the iron stains, he has found positive iron staining trapped within connective tissue (i.e., separate from the visible hemorrhage), which represents the remnants of much older healed bleeding.

Had Dr. Arden been allowed to review the iron stains prior to trial, he could have testified that the iron stain autopsy slides contain evidence not only of significant aging of the more recent injuries such that they were not particularly consistent with having been incurred just prior to clinical presentation, (i.e., when Stacey Grove was with [redacted] but also of much older bleeding, reflective of older injuries. And had Dr. Arden been allowed to review the iron stains prior to trial, he could have testified that [redacted] had been injured at some much earlier time or times, unrelated to when he was with Stacey Grove.

Defense counsel's performance was deficient because he failed to provide slides from the brain examination to Dr. Arden for the doctor's examination prior to trial. Dr. Arden did not have the opportunity to examine APP stained slides from the neuropathology examination prior to trial. He has not been able to review the slides since the trial as their location is unknown. Performing his own independent examination of the APP stained slides prior to trial would have afforded him the opportunity to assess all of the evidence related to penumbral axonal injury and potentially would have allowed him to have rebutted Dr. Ross's opinion that there was a laceration of the brain structure, but absent being provided those slides, he could not do so.

Defense counsel's performance was deficient for failing to object to the prosecutor attempting to impeach Dr. Arden with alleged "gross mismanagement" when he was the Medical

Examiner in the District of Columbia. Exhibit B, pg. 1382, ln. 6 - pg. 1388, ln. 12. These allegations of administrative errors and allegations of sexual harassment were irrelevant under IRE 401 and 402 because they did not impeach Dr. Arden's medical testimony. Further, the allegations' unfair prejudice outweighed any probative value and were inadmissible under IRE 403. The allegations were also not admissible under IRE 404, nor did the state give any notice of its intent to use the evidence to the extent it claims the evidence was admissible under IRE 404(b). Defense counsel's performance was also deficient for failing to attempt to rehabilitate Dr. Arden on re-direct examination by pointing out that the allegations of mismaganment had nothing to do with his abilities as a forensic pathologist or his conclusion in this case. Defense counsel admitted that he was aware of these allegations prior to trial, Depo., pg. 85, ln. 12-13, so he could have moved in limine to exclude that evidence. Or, failing that, he could have alerted the jury to those allegations himself. Defense counsel stated, "I should have [alerted the jury to the allegations]. I should have pulled that thorn. That was a mistake." Depo., pg. 85, ln. 18-22.

Finally, defense counsel could not think of a reason why he did not object to the prosecutor's allegation that Dr. Arden was on a "special mission." Depo., pg. 47, ln. 6-16.

n. It was deficient performance for defense counsel to fail to introduce photographs of [redacted] taken at St. Joseph's Hospital soon after he arrived in an ambulance

Photographs taken of [redacted] when he arrived at St. Jospeh's Hospital are attached (under seal) to the Affidavit of Dennis Benjamin, previously filed with this Court. These photographs show no redness or bruising and therefore are inconsistent with the state's theory that Mr. Grove

had just brutally beaten [redacted] which resulted, in part, in serious abdominal injuries. It was deficient performance for defense counsel to fail to introduce those photographs.

o. Defense counsel's performance was deficient because he failed to move for a mistrial after many jurors fell asleep during the testimony

Counsel admitted that he was made aware by his paralegal that a juror was asleep during his cross-examination of Dr. Ross. In fact, however, counsel was aware during the trial that jurors were falling asleep during the testimony of Drs. Ross and Arden. He was also put on notice regarding the sleeping jurors because the Court was required to take unscheduled recesses because of it. See e.g., Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6; pg. 983, ln. 9-13; pg. 1351, ln. 19-25. As set forth in Section C above, jurors' sleeping during the presentation of evidence is a form of juror misconduct which deprives the defendant of due process of law and it was deficient performance for defense counsel to fail to move for a mistrial.

p. Defense counsel's performance was deficient because he failed to question paramedic David Chenalt about Lisa Nash's reaction to [redacted]'s injury

Mr. Chenalt could have testified that Ms. Nash's behavior was "the most bizarre reaction we've ever seen for especially a kid call." See Grand Jury Tr. p. 214, ln. 5 - pg. 217, ln. 15.[5] The fact that defense counsel allowed the prosecutor to elicit evidence from Steve Stocking that Mr. Grove's affect was "too calm," while failing to bring out evidence from a paramedic that Lisa Nash's behavior was "the most bizarre reaction we've ever seen" demonstrates the absence of a strategy regarding this type of evidence. If counsel believed Mr. Stocking's opinion was

[5] The Grand Jury Transcript is a confidential document in the criminal case of which the Court has taken judicial notice.

admissible, there would be no conceivable reason to fail to call Mr. Chenalt to testify about Ms. Nash's affect. Defense counsel testified that he did not know why he failed to introduce this testimony. Depo., pg. 95, ln. 1-8.

q. Defense counsel's performance during closing argument was deficient

Defense counsel's performance during closing argument was deficient in several respects. First, he failed to argue that the state had failed to carry its burden of proof because Dr. Reichard did not testify and the other doctors did not have an adequate basis for their opinions of when the injury happened. Defense counsel's performance during the state's closing and rebuttal arguments was deficient because he failed to object to multiple instances of misconduct by the prosecutor. These instances are discussed in Section B above. At the deposition, defense counsel could not say why he did not object to the prosecutor's comments about Dr. Arden's "financial position," Depo., pg. 47, ln. 6-16; pg. 57, ln. 11-15, or the proesecutor's comments about having evidence that Mr. Grove had been violent with [redacted] in the past, Depo., pg. 60, ln. 10-12, or his comments that "we don't want to let a murderer go free," Depo., pg. 60, ln. 13-16, or his comments that Mr. Grove had "a different kind of emotional breakdown" which resulted in the injuries to [redacted] Depo., pg. 62, ln. 7-13.

Defense counsel's performance was also deficient because he failed to move for a mistrial or curative instructions after the prosecutor's closing and rebuttal arguments. While defense counsel expressed doubts about the efficacy of curative instruction, Depo., pg. 63, ln. 10-14, such a request would have at least preserved the prosecutorial misconduct issue for appeal. Depo., pg. 65, ln. 14-18.

r. Mr. Grove was prejudiced

As noted above, in analyzing a claim of ineffective assistance of counsel, the Court should not look to each example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *Boman v. State,* 129 Idaho at 527, 927 P.2d at 917 and *Reynolds v. State*, 126 Idaho at 32, 878 P.2d at 206. See also *Sanders v. Ryder*, 342 F.3d at 1001. The cumulative effect here demonstrates a reasonable probability of a different result had defense counsel's performance not been deficient. Crucial state's evidence would have been excluded, exculpatory defense evidence would have been presented, and egregious prosecutorial misconduct would have been prevented or resulted in a mistrial, or a mistrial would have been granted due to juror misconduct.

III. CONCLUSION

Mr. Grove has established a Confrontation Clause violation, that he was deprived of due process of law by Prosecutorial and Juror Misconduct and that he was deprived of the Effective Assistance of Counsel. Consequently, this Court should deny the state's motion, grant Mr. Grove's motion for summary disposition and vacate the criminal judgment and conviction.

Respectfully submitted this 12th day of March 2013.

Deborah Whipple Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on March 12, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE Petitioner, v. STATE OF IDAHO Respondent	CASE NO. CV- 12-01798 REPLY BRIEF IN SUPPORT OF STATE'S MOTION FOR SUMMARY DISPOSITION and RESPONSE to PETITIONER'S BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY DISPOSITION

Respondent, State of Idaho, by and through its counsel of record, Nez Perce County Deputy Prosecuting Attorney, Nance Ceccarelli, submits the following in support of the State's Motion for Summary Disposition currently before this Court, and in response to the Petitioner's brief in support of the Petitioner's Motion for Summary Disposition currently before this Court.

FACTUAL and PROCEDURAL BACKGROUND

Petitioner was convicted of first-degree felony murder following a jury trial in July 2008; Petitioner was sentenced in January 2009 to life in prison with 22 years fixed. Petitioner appealed the conviction. In March 2011, the Idaho Court of Appeals affirmed the conviction and sentence. On September 12, 2011, the Idaho Supreme Court denied Petitioner's Petition for Review. Petitioner filed a Petition for Post-Conviction Relief and accompanying Affidavits in Support of the Petition for Post-Conviction Relief on September 7, 2012. The State and the Petitioner have each filed Motions for Summary Disposition.

APPLICABLE STANDARDS

The crux of the Petitioner's arguments rests in various assertions and allegations that attempt, but do not succeed in raising issues of material fact. Petitioner surmises as to the intent of witnesses, trial counsel, and jurors present at trial and supports those conclusions based on his reading and hind-sight analysis of the trial transcript. *(see various citations to the trial transcript in Petitioner's Brief in Response to State's Motion. . .)*

"Summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted." *State v. Payne*, 146 Idaho 548, 561 (2008); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002). Petitions that are unverified and conclusory may be dismissed by motion for summary disposition. I.C. § 29-4906. Conclusory or unverified allegations are "insufficient to entitle petitioner to an evidentiary hearing." *King v. State*, 114 Idaho 442, 446 (Ct.App.1988).

The Petitioner bears the burden of *proving*, by a preponderance of the evidence, the allegations upon which his request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869 (1990); *Goodwin v. State*, 138 Idaho 269, 271 (Ct.App.2002) (*emphasis added)*. Petitioner has requested that the Court take judicial notice of transcripts, affidavits, lodged documents, exhibits, and the entire record. Additionally, the Petitioner has provided the Court with numerous citations to state and federal case law as if the allegations made in the petition are true; however, few of the allegations are substantiated or corroborated with anything more than affidavits by family members who were present during the trial (and could have brought the alleged failings of jurors and defense counsel to the attention of the Petitioner) or a backwards-looking interpretive analysis of what happened and conjuring a different result.

ARGUMENTS

Petitioner fails to meet the requirements of I.C. §19-4901(a) for Post-Conviction Relief because he fails to assert claims that are valid under The Uniform Post-Conviction Procedure Act, he has failed to support his claims with affidavits or evidence sufficient to provide an issue of material fact, and he raises issues that could have been raised on direct appeal but were not. Therefore, the petition fails to raise a claim for relief and should be summarily dismissed.

Petitioner alleges five causes of actions for post-conviction relief. Each cause of action is addressed individually.

1. Whether Petitioner was denied the right to confront witnesses against him when State's witnesses testified at trial about tests and results they personally did not perform nor had personal knowledge.

Petitioner asserts that his right to confront witnesses against him was violated when the State's witnesses testified at trial about neuropathology tests and examination results which they neither performed nor had personal knowledge; and further, that the neuropathologist, Dr. Reichard, who performed the tests and examination, was not a witness at trial. Trial counsel for the Petitioner admits that he was aware of the report of Dr. Reichard, the contents of the report, that State experts witnesses relied upon and opined based on the contents of the report, and trial counsel did not raise objections to the testimony of the various State expert witnesses, because of "where we were going and what we were trying to accomplish in the defense "(Depo. pg. 18, ln.4 – pg. 32, ln. 25).

Petitioner's trial counsel admits familiarity with *Crawford v. Washington* and its import related to the confrontation clause and specifically admits that he did not object to the expert testimony and specifically did not make any objections based on confrontation clause during trial for the "same reasons we've talked about" (*referring to his trial plan, strategies, objectives, and overall defense of the Petitioner* Depo. pg. 37, ln 19).)

Petitioner's Sixth Amendment rights related to the confrontation clause were not violated because he had opportunity to plan, prepare, and present a defense that confronts the information relied upon by State witnesses and specifically did not.

Petitioner's claim should be summarily dismissed.

2. Whether the prosecutor committed misconduct (a) outside the presence of the Court during trial, (b) during the state's case-in-chief, (c) during the cross-examination of Petitioner and (d) during closing and rebuttal argument.

Petitioner asserts that the prosecutor committed misconduct in multiple ways:

- first, he projected family photos of the victim prior to the Court going on record, thus exposing the jury to extra-judicial evidence;
- second, he appealed to the emotions, passions, and prejudices of the jury through the use of inflammatory tactics by eliciting testimony of the victim's sister;
- third, he elicited inadmissible evidence during cross-examination of Petitioner and Dr. Arden; and,
- finally, comments during his closing and rebuttal arguments constitute conduct sufficiently egregious as to result in fundamental error.

Petitioner is precluded from raising issues in a post-conviction petition that could have been raised on direct appeal but that Petitioner failed to raise previously. Furthermore, issues that could have been raised on direct appeal but were not are precluded and cannot be raised in post-conviction proceedings. I.C. § 19-4901(b). Petitioner's allegations of prosecutorial misconduct should have been raised on direct appeal and are not valid claims for post-conviction relief under I.C. § 19-4901(a) and should be summarily dismissed.

The deposition of Petitioner's trial counsel makes it very clear that:

> 1) Certain instances of allegations of prosecutorial misconduct were unobserved by trial counsel (setting up power point exhibits Depo. pg.38 – 40, ln. 23);
> 2) State's exhibits at trial are now construed by Petitioner to be inflammatory and prejudicial when in fact it is impossible to discern from the photographs what kind of cards were on display and therefore impossible to determine what effect, *if any,* the photographs had on the jury at that time (Depo. pg. 45 ln. 18-pg. 46 ln. 12 and State's trial exhibits 4, 5, 6);
> 3) Trial counsel did not see any grounds for a mistrial because "if I (*sic*) had . . . I would have made that motion. And again, I didn't want to hammer it home." (*reference to the concept of not highlighting or emphasizing negative things to a jury* Depo. pg. 52 ln. 6).

Reading all of this voluminous record, including the transcript of the trial and of trial counsel's deposition, there is no evidence of *egregious* conduct by the prosecutor and consequently of any fundamental error, as alleged by the Petitioner. There is nothing in the record, too, to suggest that appellate counsel was deficient for failing to raise the issue of prosecutorial misconduct when it appears that there was no notice of prosecutorial misconduct observed by or brought to the attention of the Court by trial counsel or Petitioner or of "observers" who now come forward with affidavits. Thus, this claim should be summarily dismissed.

3. Whether Petitioner was denied due process when jurors engaged in misconduct by allegedly sleeping during the presentation of evidence.

Petitioner asserts that jurors engaged in misconduct when they were allegedly sleeping during the presentation of evidence as various points throughout the trial. Petitioner engages in a discussion attempting to distinguish this case from *Murphy v. State*, 143 Idaho 139 (Ct.App.2006):

> Murphy did not identify which day of the five-day jury trial the juror allegedly slept, describe the length of time the juror allegedly slept, or explain what testimony or evidence the juror allegedly slept through. In the absence of such evidence, there was no showing of deficient performance or prejudice. Therefore, it was proper for the court to dismiss this claim.

Id. at 150.

However, although Petitioner presents affidavits that identify days in which jurors allegedly slept, and while there is <u>*some*</u> indication in <u>*some*</u> of the affidavits referencing testimony that jurors allegedly slept through, the allegation does not indicate <u>*which*</u> jurors were allegedly sleeping through the referenced testimony. Thus, does Petitioner expect us to assume that all jurors were sleeping all of the time, or through all of the important testimony, or through only the testimony that was in support of Petitioner's defense?

In fact, trial counsel was aware of only one specific time during Dr. Ross's testimony in which a juror was "falling asleep" (Depo. pg. 67 ln. 1 – pg. 70 ln. 1). Without any specific information as to the amount of "important" testimony allegedly missed by the jurors, with the single documented exception noted above during the cross examination of Dr. Ross by trial counsel, it is unfathomable that for a trial lasting more than a week that these audience members, who now recall jurors sleeping, would not have shared this critically important information with trial counsel or the Petitioner. There is nothing in this vast record that supports any claim of due process violations because of juror misconduct. Further there is nothing in this vast record that supports any claim of appellate counsel or trial counsel being ineffective for deficient performance for failing to raise the issue of juror misconduct.

Petitioner's allegations of juror misconduct should be summarily dismissed.

4. Whether appellate counsel was ineffective for deficient performance for either failing to raise the issue of prosecutorial misconduct or juror misconduct.

Nothing in Petitioner's petition or in the record supports an argument that appellate counsel's representation fell below an objective standard of reasonableness. Further, there is nothing in the record to support a claim that either of these allegations of misconduct occurred other than in hindsight. Finally, trial counsel specifically admits that his lack of making a record on these issues was likely strategic (Depo. pg. 52 ln. 6; Depo. pg. 67 ln. 1 – pg. 70 ln. 1; *and, other multiple references within the Deposition to trial counsel's reasoning*).

Petitioner's claim of deficient performance by appellate counsel should be summarily dismissed.

5. Whether trial counsel was ineffective for numerous actions such as failing to present an adequate analysis, failing to move for a mistrial, failing to challenge for cause a juror, and for rendering deficient performance.

Petitioner offers a laundry list of claims that trial counsel was ineffective. However, the deposition of Petitioner's trial counsel makes it clear that there was a competent, strategic defense planned around a theory that the Petitioner was innocent and that the Petitioner could not have murdered [redacted] (Depo pg 104 ln 7 – pg. 105 ln 9).

Therefore, Petitioner's claims that trial counsel was ineffective and deficient should be summarily dismissed.

Petitioner fails to meet the standards set forth in *Strickland v. Washington* for purposes of determining whether counsel was ineffective. This Court cannot ". . . 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*..." *State v. Payne*, 146 Idaho 548, 561 (2008); *Pratt v. State*, 134 Idaho 581, 584 (2000). In addition, "[t]here is a strong presumption that counsel's performance fell within the wide range of professional assistance." *Aragon v. State*, 114 Idaho 758, 760 (1988).

Petitioner has not shown that any of trial counsel's strategic decisions (e.g., summoning a new jury pool, or peremptory challenge of a juror) resulted from inadequate preparation or ignorance of the relevant law (Deposition of Scott Chapman in its entirety).

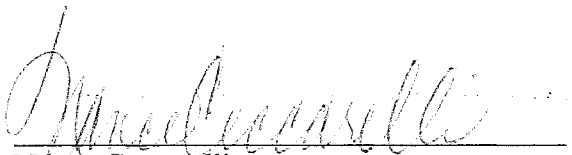
Therefore, Petitioner's claims of ineffective trial counsel cannot be the basis for his relief and should be summarily dismissed.

CONCLUSION

Petitioner fails to meet the requirements of I.C. §19-4901(a) for Post-Conviction Relief because he has failed to support his claims with affidavits or evidence, he fails to assert claims that are valid under The Uniform Post-Conviction Procedure Act, and he raises issues that could have been raised on direct appeal but were not.

The State respectfully requests that this Court grant the State's Motion for Summary Dismissal because the Petitioner has failed to demonstrate any genuine issue of material fact and therefore, the petition fails to raise any claims for relief that may be granted under The Uniform Post-Conviction Procedure Act.

DATED this 29th day of March, 2013



Nance Ceccarelli
Deputy County Prosecutor

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing, BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION, was hand delivered via court basket to:

(1) X ~~hand delivered~~, or electronically
(2) _____ hand delivered via court basket, or
(3) _____ sent via facsimile, or
(4) _____ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Deborah Whipple
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

DATED this 29th day of March, 2013.

Joan C. Way
Civil Legal Assistant

FILED

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PATTY O. WEEKS
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Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV-12-01798 **AFFIDAVIT OF ANDREW PARNES**

Andrew Parnes, being duly sworn and upon oath, hereby states:

1. I am an attorney who has been licensed to practice in the State of Idaho since 1990.

2. I graduated from Williams College (B.A. 1967); Stanford University (M.A., 1971; Ph.D., 1973) and Boalt Hall School of Law, University of California at Berkeley (J.D., 1978).

3. I am also admitted to the State Bar of California and U.S. District Court,

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Northern District of California (1978); U.S. Court of Appeals, Ninth Circuit (1981); and the U.S. Supreme Court (1982).

4. I am AV rated by Martindale-Hubbell and have been named one of the "Best Lawyers in America." I am a past president of the Idaho Association of Criminal Defense Lawyers and a member of National Association of Criminal Defense Lawyers.

5. My practice focuses on criminal defense, including appellate and post-conviction practice, in both the state and federal courts. I have represented clients in numerous capital cases in Idaho, California and Utah over the past twenty five years.

6. I was asked to provide my opinions regarding any deficient performance of trial counsel regarding the failure to object to the introduction of inadmissible hearsay in violation of the defendant's constitutional right of confrontation and the failure to object to instances of prosecutorial misconduct during trial. In preparation of this affidavit, I have reviewed the following materials:

a. The Amended Petition for Post-Conviction Relief filed in this matter;

b. The Answer filed by the State of Idaho;

c. The Briefs filed by Mr. Grove and the State of Idaho regarding the Motions for Summary Disposition;

d. The opinion of the Court of Appeals in *State v. Grove,* 151 Idaho 483, 259 P.3d 629 (Ct. App. 2011);

e. The deposition of Scott Chapman, dated January 24, 2013;

f. Portions of the discovery related to the reports provided by Drs. Chin, Harper, Hunter, Ross and Reichard;

g. The report of Dr. Arden, dated December 4, 2012;

h. Portions of the trial transcript including the testimony of Dr. Chin, Dr. Hunter, Dr. Ross, Dr. Harper and Dr. Arden;

i. The trial transcript containing the opening and closing statements of counsel for the State and Mr. Grove.

7. Based upon my experience and the review of the above materials, it is my professional opinion that trial counsel, Scott Chapman, did not provide effective assistance of counsel as required by *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny in several respects as set forth in more detail herein below.

8. The central issue in the case was the timing of the injuries to the child. Mr. Chapman acknowledged this fact in both his opening statement and closing argument at trial. See, also, Chapman Deposition, p. 18. In its opinion, the Court of Appeals referred to the issue as "the central disputed question in this case – when the injuries which ultimately caused K.M.'s death occurred and whether it was likely that K.M. would have lost consciousness and/or shown severe symptoms immediately after the injuries were inflicted." *State v. Grove*, 151 Idaho at 490. Thus, exclusion of any evidence supporting the prosecution's theory that the injuries occurred only in the morning when Mr. Grove

was alone with the child was critical to the defense of the case, and a reasonably competent attorney would have taken all steps necessary to seek exclusion of such evidence. Since the basis for the testifying experts' opinions about the time of the injuries was based upon the report of Dr. Reichard, who was not listed as a prosecution witness and was not called by the prosecution, a reasonably competent attorney should have sought to exclude all reference to Dr. Reichard's report.

9. In preparation for trial, Mr. Chapman contacted a forensic pathologist to review the findings of the experts provided in the State's discovery; however, Mr. Chapman did not interview Dr. Reichard at any point before or during trial. See, Chapman Deposition, p. 28. A reasonably competent attorney preparing for trial in this matter would have interviewed Dr. Reichard for a number of reasons, including to obtain an understanding of why Reichard made the conclusions about the laceration of the corpus callosum. This is especially critical in light of the contrary conclusions reached by the defense expert, Dr. Arden. In my experience, experts, such as Dr. Reichard, are willing to discuss their findings with defense attorneys.

10. Mr. Chapman stated that his main reason for not objecting to the Reichard report was that he believed that Dr. Arden would, in large degree, "poke enough holes in that to make – I guess in a sense hopefully make reliance on that report misplaced." Chapman Deposition, p. 19. Mr. Chapman also "guess[ed]" that he had to take into account the possibility that the State could have called Dr. Reichard to testify. Chapman

Deposition, p. 20.

11. A reasonably competent attorney would have at least known at the beginning of trial that Dr. Reichard was not listed as a witness by the State or identified as a witness during the jury voir dire process. In addition, the reasons given by Mr. Chapman provide no valid excuse for his failure to investigate the basis for Reichard's opinions by contacting Reichard before trial. Mr. Chapman's stated concern, that Dr. Reichard might be called to testify if he objected, is unreasonable given Dr. Reichard's unavailability and the fact that Dr. Reichard could have been called as a rebuttal witness to Dr. Arden, irrespective of whether a confrontation clause objection had been made.

12. A reasonably competent attorney preparing for a first degree murder trial in 2008 should have been aware of the Idaho Rules of Evidence relating to the introduction of expert evidence and the limitation placed upon the reliance by experts on the reports of others as set forth in Rule 703. An objection to the testifying doctors' reliance on the Reichard report as well as an objection to the introduction of the autopsy report (trial exhibit 11), which included the Reichard report, should have been made on the basis of the rules of evidence. Mr. Chapman provided no tactical reason for his failure to object to the report on the basis of this rule. See, Chapman Deposition, p. 32.

13. Furthermore, reasonably competent attorneys preparing for trial in 2008 should have been aware of the decision in *Crawford v. Washington*, 541 U.S. 36 (2004) and used it as a basis to seek exclusion of the Reichard report and the testifying doctors'

reliance on that report. Mr. Chapman could not recall if he even considered *Crawford* as a means of excluding this harmful evidence at the time of trial. Chapman Deposition, pp. 37-38.

14. The opinion of the Idaho Court of Appeals notes that "the Confrontation Clause violation issue complained of in this case implicates a constitutional right (a conclusion not disputed by the state). . . ." *Grove*, 151 Idaho at 491. However, because Mr. Chapman failed to object to the evidence at trial, the appellate court did not reach the merits of the constitutional violation. A critical part of trial counsel's duty is to make proper objections so that his client will be able to seek an appeal on those objections, if the defendant is convicted at trial. Because Mr. Chapman did not object to the Reichard report, he failed to represent his client as required by the Sixth Amendment.

15. Trial counsel also has a responsibility to assure that instances of prosecutorial misconduct are brought to the attention of the trial judge so that the judge can admonish the prosecutor, exclude the evidence or improper comment, or if the objection is overruled, so that there is a basis for an appellate court to review the objections.

16. In this case, there are numerous instances where Mr. Chapman failed to object to such misconduct. Mr. Chapman could not recall why he failed to make such objections but speculated that he might not have wanted to highlight the improper evidence or argument to the jury. Chapman Deposition, pp. 43, 47, 78. However, during

the prosecutor's closing argument, Mr. Chapman did make one objection in front of the jury which was sustained by the judge and the jury was instructed to disregard that comment. See, Trial Transcript, pp. 1430. It is therefore unlikely that the speculative reasons given by Mr. Chapman for his failure to object to other instances of misconduct support a finding that he was acting as a reasonably competent attorney.

17. A reasonably competent attorney would have objected if family photos not admissible in evidence were projected on a screen when the jury was present. Such family photos are highly inflammatory and prejudicial as well as lacking in relevance. The State did not even seek to introduce these photos and their being placed in front of the jury in this circumstance should have been the basis for an objection, including a motion for mistrial and at least curative instructions. Similarly, a reasonably competent attorney would have objected to the admission of trial exhibits 4, 5 and 6, which depicted the trailer home of Lisa Nash and were taken on August 1, 2006, weeks after K.M.'s death. Mr. Chapman failed to object to these photos which may have been of slight relevance related to the testimony of the officer regarding the dimensions of the trailer but contained highly prejudicial evidence of what appear to be numerous sympathy cards sent after K.M.'s death. A reasonably competent attorney would have sought to exclude these photographs as irrelevant under I.R.E 401 and 402, or alternatively more prejudicial than probative under I.R.E. 403, as there was no dispute about the dimensions of the trailer.

18. Having filed an objection to the admission of Kaylee's testimony and having obtained a specific limitation on that testimony from the trial judge, a reasonably competent attorney would have objected to any extension of her testimony beyond the court ruling, including the prejudicial testimony of her last goodbye to her brother.

19. On the day that Mr. Grove was originally scheduled to testify, he suffered a medical condition and based upon that condition, the court briefly continued the trial. The court informed the jury of a general medical matter but did not reference Mr. Grove or the nature of the condition. During cross-examination of Mr. Grove, the prosecutor asked Mr. Grove about his prescription for Ativan and his "emotional condition" on Friday, without objection from defense counsel. A reasonably competent trial counsel would have objected to those questions, which were irrelevant to the case. Instead of objecting, Mr. Chapman brought that testimony up during his closing argument telling the jury this evidence had "nothing to do with anything," in essence acknowledging that he should have objected to the questioning. During closing argument, the prosecutor referred to this testimony, again without objection, trying to connect Mr. Grove's medical condition during trial to his "emotional breakdown, an instantaneous fit of anger" when Mr. Grove allegedly hit K.M.

20. During closing arguments, the prosecutor made other improper and objectionable comments to the jury, including attacks on the defense expert, references to the number of child abuse cases and murders throughout the country and in the county,

reasons why the prosecutor did not call K.M.'s father to testify, as well as an argument that the jury should not let a murderer "go free." Mr. Chapman objected to none of these comments. A reasonably competent attorney would have objected to these inflammatory comments in order to obtain a curative instruction from the court or possibly a mis-trial if the prosecutor continued to make these types of comments to the jury. There is no tactical reason to fail to object to such instances of prosecutorial misconduct.

DATED this 11th day of April, 2013.

Andrew Parnes

SUBSRIBED AND SWORN TO
before me this 11th day of April, 2013.

EMILY DION
STATE OF IDAHO
NOTARY — • — PUBLIC

Notary Public for the State of Idaho
Residing at: Hailey
My Commission Expires: 8-31-18

CERTIFICATE OF SERVICE

I CERTIFY that on April 12, 2013, I caused a true and correct copy of the foregoing document to be:

___ mailed

___ hand delivered

X faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY DISPOSITION**

Petitioner, Stacey Grove, submits the following reply brief in support of his motion for summary disposition.

I. INTRODUCTION

Summary disposition of a petition for post-conviction relief may be granted if this Court determines no genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. The Court must liberally construe the facts and reasonable inferences in favor of the nonmoving party. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010). Here, the Court may consider the verified allegations in the Amended Petition, the

admissions by the state in its Answer, the files and records of the criminal case proceedings, the deposition of Scott Chapman and the many affidavits filed, including the affidavits of Andrew Parnes and Dr. Jonathan Arden. The state has not filed any affidavits in response. As explained below, no genuine issue of material fact exists and summary disposition should be granted in favor of Mr. Grove.

II. ARGUMENT

A. *Mr. Grove's Right to Confront Witnesses Against Him was Violated*

Mr. Grove set out at pages 3-14 of his Brief in Response to State's Motion for Summary Disposition and In Support of Petitioner's Motion (Petitioner's Brief) why there is no genuine issue of fact and why summary disposition should be granted in his favor because his Sixth Amendment right to confront the witnesses against him was violated. At pages 3-4 of his brief, Mr. Grove set out the relevant law. At pages 5-14, Mr. Grove set out why the application of the relevant law to the uncontroverted facts before this Court requires that post-conviction relief be granted to him on the confrontation claim.

The state's Reply Brief in Support of State's Motion for Summary Disposition and Response to Petitioner's Brief in Support of Petitioner's Motion for Summary Disposition (State's Brief) does not address either Mr. Grove's statement of the law or his discussion of the application of the law to this case. State's Brief page 4. Rather, the state argues that trial counsel was familiar with *Crawford v. Washington,* 541 U.S. 36 (2004), and did not object to the violation of Mr. Grove's constitutional rights in accord with a trial plan, strategies, objectives and overall defense. State's Brief at page 4. The state further asserts without citation to

authority that because Mr. Grove had an opportunity to prepare a case to confront the evidence against him and did not do so, there was no confrontation clause violation. *Id.*

The state's failure to dispute either Mr. Grove's statement of the relevant law or his analysis of the application of the law to the facts indicates the state's agreement with Mr. Grove's analysis. *See State v. Almaraz,* ___ Idaho ___, ___ P.3d ___, 2013 WL 1285940 (2013), holding that the state's failure to argue harmless error precluded a finding of harmless error even in the face of the "unassailable" evidence of guilt. 2013 WL 1285940 (Jones, J., dissenting).

The state's argument, rather than denying a violation of the confrontation clause, appears to be that even though the facts would ordinarily establish a violation, there was no constitutional error because defense counsel was aware of *Crawford* and did not object and because Mr. Grove had an opportunity to present a defense. State's Brief at 4.

However, the state offers no authority for its underlying premise - that a knowing, voluntary and intelligent waiver of confrontation rights may be made by counsel without his client's consent. *See State v. LaMere,* 103 Idaho 839, 858, 655 P.2d 46, 65 (1982) (Bistline, J., concurring in part and dissenting), "[C]ounsel had a right - better said - a duty - to challenge evidence obtained in violation of statutory or constitutional rights, or both." Because the state offers no authority for the finding that counsel could waive Mr. Grove's constitutional rights without his consent, this Court should not consider the state's argument and should grant summary disposition in Mr. Grove's favor on the confrontation claim.

Finally, the state's argument that Mr. Grove's right to confront witnesses was not violated because "he had opportunity to plan, prepare, and present a defense that confronts the

information relied upon by the State witnesses and specifically did not," State's Reply Brief, pg. 4, is a *non sequitur*. The opportunity to defend against "the information relied upon by the State witnesses" is not related to the question of whether that information was improperly admitted in violation of the confrontation clause. Plainly, Mr. Grove could not confront the source of critical evidence relied upon by the state, *i.e.,* the observations and report of Dr. Reichard and the observations of the unnamed transplant surgeon because those people were not called to testify. He could not cross-examine the missing witnesses. But insofar as the state is again arguing that Mr. Grove's counsel somehow waived Mr. Grove's rights by failing to make proper confrontation clause objections, it again cites no authority for the proposition that counsel may waive such a right without Mr. Grove's knowledge and consent. *Contra, State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010) ("In Idaho, we permit a defendant to waive a right of constitutional magnitude, so long as the defendant does so knowingly, voluntarily, and intelligently."); *State v. LePage*, 102 Idaho 387, 391, 630 P.2d 674, 678 (1981) ("While ordinarily a client is bound by his attorney's actions . . . . an attorney may not waive a 'fundamental' right of a client without the client's informed consent.").

Moreover, even if the state's unsupported argument is considered, summary disposition should be granted in Mr. Grove's favor based upon the following.

The state argues that Mr. Chapman had a strategic reason to fail to object to the evidence which was inadmissible under I.R.E. 703, the confrontation clause, or both. However, this Court need not defer to strategic decisions which result "from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." *Estrada v. State*, 143 Idaho

558, 561, 149 P.3d 833, 836 (2006). What Mr. Chapman said at the deposition was he had two reasons he did not object to the introduction of the autopsy report (which included Dr. Reichard's report). The first was that "[t]here wasn't anything in that autopsy report that didn't work with . . . what my, I guess, thrust of the case was going to be." Depo., pg. 18, ln. 15. Mr. Chapman goes on to explain his "thrust of the case" as: "That the injuries that occurred to [redacted] were inflicted at a time when Stace was not around or with the child in any fashion that it could have happened." *Id.*, ln. 20-23. But this statement proves that it was an objectively unreasonable decision to not object because Dr. Reichard's report contained the most important fact pointing to the injury occurring when Mr. Grove was alone with [redacted] *i.e.*, the laceration in the corpus callosum. If Mr. Chapman had objected to the admission of the report (and the many testimonial descriptions of Dr. Reichard's findings by other state witnesses), the jury would have been unaware of the existence of the alleged laceration at all, a plainly better position for the defense to be in. In fact, Mr. Chapman frankly admits that "Dr. Reichard's report undermined the thrust of [the] defense." Depo., pg. 19, ln. 10-13. Further, he admits "[t]hat finding is particularly damaging to the thrust of [his] defense of Stace Grove." Depo., pg. 21, ln. 1-4. And, he admitted that "[f]rom a strategic point of view, it would have been better for [his] theory of the case to keep out this evidence if [he] could." Depo., pg. 22, ln. 21-25. Thus, Mr. Chapman's decision to not make meritorious hearsay and confrontation clause objections due to his belief that Dr. Reichard's findings worked with the thrust of his case is objectively unreasonable.

Mr. Chapman also speculated that he might have a second reason to not object. He said, "Also had to, *I guess*, take into consideration the possibility that Dr. Reichard could have been made a witness and come to testify and then have him and Arden sitting there at opposing

positions." Depo., pg. 20, ln. 1-5 (emphasis added). This, of course, is pure speculation on Mr. Chapman's part. Moreover, it is objectively unreasonable. Mr. Chapman admits that he never even spoke to Dr. Reichard prior to trial:

> Q. Okay. Prior to the trial, did you ever speak to Dr. Reichard?
>
> A. No.
>
> Q. Did you make any efforts to speak to him?
>
> A. No.
>
> . . .
>
> Q. Do you recall why you did not speak to Dr. Reichard in this case?
>
> A. Again, I had a theory, and it was based on where we – "we" as in where Stace was at at given times and places, and it wasn't necessary.
>
> Q. But Dr. Reichard's conclusion was due to the tear in the brain that your theory of the case was impossible?
>
> A. Dr. Reichard's conclusion, yes.

Depo., pg. 28, ln. 3-25. Thus, Mr. Chapman did not speak to Dr. Reichard because he believed that Dr. Arden's testimony would counteract Dr. Reichard's testimony. Consequently, it cannot be that he failed to make hearsay and confrontation clause objections because he was afraid that Dr. Reichard might testify.[1]

---

[1] As previously argued, Mr. Chapman's decision to allow highly damaging inadmissible evidence to be introduced because he believed Dr. Arden's testimony would counter it was also an objectively unreasonable decision. Petitioner's Brief in Response to State's Motion for Summary Disposition and in Support of Petitioner's Motion ("Petitioner's Brief"), pg. 42-43.

Moreover, had defense counsel spoken to Dr. Reichard, he would have learned that Dr. Reichard had not been contacted by the prosecutor about testifying[2] and could have made his objections at trial knowing that the doctor was in New Mexico and not available to testify. But even without speaking to Dr. Reichard, it should have been obvious to Mr. Chapman that Dr. Reichard was not going to testify because he was not among the trial witnesses provided by the state to the Court. See Exhibit B (Trial Transcript), pg. 137, ln. 9 - 138, ln. 6 (where the court reads a list of forty witnesses not including Dr. Reichard to the jury panel during voir dire). Thus, Mr. Chapman's failure to object, to the extent it was based upon a concern that Dr. Reichard might be called to testify, was based upon inadequate preparation and ignorance of the law, ICR 16 (b)(7), on his part.[3]

Further, the absence of objection to the evidence was due to ignorance of the law. Mr. Chapman did not testify that he was familiar with *Crawford v. Washington, supra,* at the time of the trial. He was asked whether he was currently familiar with the case. Depo., pg. 37, ln. 5 - pg. 38, ln. 9. And, he testified that he could not say whether he was aware of the case at the time of the criminal trial. Depo., pg. 37, ln. 23-25. Moreover, Mr. Chapman erroneously described the holding in *Crawford* as, "[t]hat there was a confrontation right that trumps hearsay exceptions."

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[2] This assertion is based upon a telephone conversation held between counsel for Mr. Grove and Dr. Reichard on March 25, 2013, where he stated that he was never contacted by either the prosecutor or defense counsel with regard to his autopsy report.

[3] In addition, a decision to not object in order to avoid Dr. Reichard testifying in person would be objectively unreasonable because Dr. Reichard's findings were, in some respects, more favorable to Mr. Grove than the opinions of the other doctors. For example, Dr. Ross suggested that there was evidence of shear injury, *i.e.* diffuse axonial injury, in the brain. Exhibit B, pg. 942, ln. 14-17. Dr. Reichard, however, noted in his report that "[t]he extensive nature of V[asular]A[xonial]I[njury] precludes interpretation for diffuse axonial injury." Reichard Report, pg. 2.

Depo., pg. 37, ln. 9-12. This does not show the level of legal knowledge needed to make an intelligent decision about whether an objection to the evidence would be meritorious. To the contrary, Mr. Chapman's belief regarding the holding of *Crawford* shows that he is not - even now - familiar with the import of that case.

Counsel also admitted that the testimony about the particulars of Dr. Reichard's report by other doctors was inadmissible under I.R.E. 703. Depo., pg. 31, ln. 15 - pg. 32, ln. 19. When asked why he did not make a Rule 703 objection he said: "I cannot sit here and specifically tell you why I did not, other than, again, my general thought process about where we were going and what we were trying to accomplish in the defense." Depo., pg. 32, ln. 20-23. But, as shown above, his "general thought process" in this regard was based upon inadequate preparation (because he failed to determine that Dr. Reichard was not going to be called as a witness), ignorance of the relevant law (due to his incomplete understanding of *Crawford v. Washington*) and other shortcomings capable of objective review (his opinion that the admission of Dr. Reichard's report and the testimony about his findings by the other doctors would not harm the thrust of his defense when the true effect was precisely the opposite). Consequently, under *Estrada*, this Court owes counsel no deference.

As to the hearsay evidence regarding the abdominal injuries, counsel could not say why he failed to object.

> Q. Okay. When Dr. Ross[4] testified that he had been told by the transplant surgeon about hemorrhaging in Kyler's abdomen, you failed to object to that. Can you tell me why?

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[4] In addition, Dr. Harper also testified without objection about what the transplant surgeon observed. Exhibit B, pg. 1032, ln. 20 - pg. 1030, ln. 11.

A. No.

Q. Would you agree that that would be hearsay?

A. Yes.

Depo., pg. 81, ln. 17-23. Counsel acknowledged that the evidence was important to the state's theory of the case.

Q. Okay. Would you agree that an important piece of evidence at trial was the evidence of the internal injuries of [redacted] that were found during the transplant procedure?

A. I think they were important, but I think the brain was the focus.

Q. And one of the reasons why the internal injuries evidence was important was because the doctor said that [redacted] would have been in excruciating pain, correct?

A. Yes.

Q. Okay. And that hurt your theory of the case because biological mom and Stace did not report [redacted] being in excruciating pain, correct?

A. I would agree that they did not report him being in excruciating pain.

Depo., pg. 88, ln. 4-19. Again, it was objectively unreasonable for defense counsel to fail to make a meritorious objection to this evidence.

Finally, if counsel failed to exercise Mr. Grove's right to confront witnesses without Mr. Grove's permission, that would only be additional proof that Mr. Grove did not receive the constitutionally mandated effective assistance of counsel.

B. *The Misconduct by the Prosecutor Deprived Mr. Grove of a Fair Trial*

The state now argues that the prosecutorial misconduct issue cannot be raised now because it could have been raised on direct appeal.[5] In doing so, it again fails to even acknowledge much less discuss *State v. Perry*, which held that:

> If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

150 Idaho at 228, 245 P.3d at 980. On direct appeal, it could not be shown that Mr. Chapman's failure to object was not the result of an intentional waiver on the part of trial counsel and Mr. Grove. Thus, the claim could not have been raised upon appeal. See also Affidavits of Diane Walker and Eric Frederickson. Thus, the state's argument that the issue should have been raised on direct appeal should be rejected.

However, it is now clear that there was not such a waiver by Mr. Grove. Further, Mr. Chapman could not have intended to waive his objection to some of the misconduct because he admitted that he may not have been aware of the misconduct that had occurred. In particular, Mr. Chapman stated he could not recall whether the prosecutor projected autopsy photos along with family photos of [redacted] in the mornings prior to testimony while the jury entered the jury room

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[5] At the same time, the state argues that appellate counsel's performance was not deficient notwithstanding the failure to raise the issue on appeal. State's Brief, pg. 7. As previously argued, the state cannot have it both ways in this regard. Petitioner's Brief, pg. 34-35. The state fails to even attempt to reconcile this fundamental contradiction in its briefing.

through the courtroom. Depo., pg. 40, ln. 1-24. Thus, he could not say whether he had a reason for failing to object.

Further, at the deposition, defense counsel could not say why he did not object to the prosecutor's misconduct in exceeding the scope of this Court's ruling regarding the admissibility of Kylee Bandel's testimony. Depo., pg. 43, ln. 5-8. He could not think of a reason why he failed to object to the admission of State's Exhibits 4-6 (showing the family living room and approximately 25 sympathy cards) at the trial, Depo., pg. 46, ln. 10-12, or to the prosecutor's comments that Dr. Arden was on a "special mission," Depo., pg. 47, ln. 14-16, or to the prosecutor's comments about Dr. Arden's "financial position" affecting his testimony, Depo., pg. 47, ln. 6-16; pg. 57, ln. 11-15, or the prosecutor's comments in closing argument about how it was common for parents to kill babies, Depo., pg. 59, ln. 8-11, or his comment that Dr. Ross had the "unenviable task of taking Kyler's body apart piece by piece," Depo., pg. 59, ln. 14-18, or his comment about having evidence that Mr. Grove had been violent with [redacted] in the past, Depo., pg. 60, ln. 10-12, or to the prosecutor's comments that "we don't want to let a murderer go free," Depo., pg. 60, ln. 13-16, or his comments that Mr. Grove had "a different kind of emotional breakdown" which resulted in the injuries to [redacted] Depo., pg. 62, ln. 7-13. Mr. Chapman did not testify that he made an intentional decision to not object.

The state also argues that trial counsel's decision to not ask for a mistrial based upon misconduct was a reasonable strategic decision because Mr. Chapman said he did not want to "hammer it home." State's Reply, pg. 5, quoting Depo., pg. 52, ln. 6. This argument is without force because it ignores that a motion for mistrial is not made before the jury and thus defense counsel's decision could not have logically been made on that basis.

Next, the state argues that it was not clear that State's Exhibits 4-6 were improper because it is not possible to discern from the photographs what kind of cards were on display. State's Reply, pg. 5. The photographs speak for themselves in this regard. The exhibits clearly show the presence of many sympathy cards. Moreover, one would not expect Christmas cards to still be on display on August 1, the day when the photographs were taken by Detective Birdsell, but one would expect sympathy cards as [redacted] passed away on July 10. Exhibit B, pg. 996, ln. 23-2.

Finally, it is important to note that the state does not argue that the many instances of misconduct did not occur. Instead, the state weakly suggests that prosecutorial misconduct must be *"egregious"* or "fundamental error" before it can be raised in post-conviction. State's Reply Brief, pg. 6 (emphasis in original). In addition to being offensive to the ideals of fair play and justice for the prosecutor to argue his intentional misconduct should be tolerated because *it just wasn't all that bad*, the state fails to cite to any authority in support of that proposition. *Id.* In an earlier pleading, it did argue that a conviction will be set aside for prosecutorial misconduct only when conduct is sufficiently egregious to result in fundamental error. State's Answer and Amended Motion for Summary Disposition and Dismissal ("State's Motion"), pg. 5, citing *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127 (1997). However, the "fundamental error" rule in *Porter* refers to the scope of review when the appellate court is asked to reverse based upon unobjected-to error raised for the first time on appeal: "Because Porter did not object . . .we can address this issue only if it constitutes fundamental error." *Id.* This is clear because there is no indication in *Porter* that there was a contemporaneous objection to the prosecutor's comment that a defense witness was "lying" or to alleged errors during closing arguments. Further the

Porter Court relied upon *State v. LeMere*, 103 Idaho 839, 655 P.2d 46 (1982), a case which also dealt with a claim of prosecutorial misconduct raised for the first time on appeal. Recently, the Supreme Court cited *Porter* for exactly this proposition: "Accordingly, when an objection to prosecutorial misconduct is not raised at trial, the misconduct will serve as a basis for setting aside a conviction only when the "conduct is sufficiently egregious to result in fundamental error. *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997)." *State v. Severson*, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009); *see also State v. Erickson*, 148 Idaho 679, 683, 227 P.3d 933, 937 (Ct. App. 2010) ("Accordingly, when an objection to prosecutorial misconduct is not raised at trial, the misconduct will serve as a basis for setting aside a conviction only when the 'conduct is sufficiently egregious to result in fundamental error.' *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997)."). The cases cited by the state are thus not apposite to this case.

C. *Juror Misconduct Deprived Mr. Grove of a Fair Trial*

In this section of its Reply Brief, the state merely repeats its previous citation to *Murphy v. State*, 143 Idaho 139, 139 P.3d 741, 752 (Ct. App. 2006), but totally fails to address Mr. Grove's argument that *Murphy* is distinguishable from this case. See Petitioner's Brief, pg. 29-30. In addition, it ignores Mr. Grove's argument that the state has the burden of proving the constitutional error, *i.e.*, the jurors' misconduct, is harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). *See also, State v. Almaraz, supra,* reversing a murder conviction where the state failed to make any argument to carry its burden of proving *Chapman* harmless error. Thus, the state's repeated complaints that Mr. Grove has not specifically proved which jurors were sleeping during precisely what portions of the testimony flips the burden of proof upside down. It is the state which must prove that the jurors were not

sleeping during any evidence which may have made a difference in the deliberations. However, it has not supported its (implicit) claim of harmless error with any evidence and thus no genuine question of material fact exists. Consequently, summary disposition in favor of Mr. Grove should be granted.

D. ***The Ineffective Assistance of Appellate Counsel Claim***

The state does not argue in its Reply Brief that any of the claims other than Prosecutorial Misconduct have been forfeited under I.C. § 19-4901(b) because they could have been raised on appeal. That argument was addressed above and need not be repeated here.[6]

E. ***Mr. Grove was Deprived if the Effective Assistance of Trial Counsel***

The state fails to respond to Mr. Grove's objection that the state's motion for summary disposition is not sufficiently specific under *DeRushé v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) and I.R.C.P. 7(b)(1), which requires grounds for a motion be stated with "reasonable particularity." Compare Petitioner's Brief, pg. 35-36 with State's Reply, pg. 8. Mr. Grove takes this as an implied concession of the point especially in light of the state's cursory and desultory one-page reply to his detailed argument in support of summary disposition in his favor. Compare Petitioner's Brief, pg 35-60 with State's Reply, pg. 8.

Mr. Grove set forth seventeen general areas of deficient performance (subsections (3)(a)-(q) of section E) in his brief. Of these, the state mentions only argument (3)(a), *i.e.,* trial counsel's failure to summon a new jury pool after prejudicial comments made by a venire

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[6] Earlier the state argued that the Juror Misconduct claim should have been raised on appeal and asked the Court dismiss on that basis. State's Motion, pg. 8, 13. The reason why that argument is incorrect was addressed in the Petitioner's Brief, pg. 33-35. The state has apparently abandoned that argument as it makes no attempt to address Mr. Grove's arguments.

member and the failure to peremptorily challenge Juror #5. It claims that those decisions were not shown to have been the result of "inadequate preparation, ignorance of the relevant law . . . " State's Brief, pg. 8, quoting *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123 (2008). However, that deference to trial counsel's actions is only applicable to strategic decisions made by counsel. It does not apply in this instance because counsel never claimed that the decision to not seek a new jury pool was strategic. He said that while it "would have been [of] some concern," he did not see it as "an earth shattering concern." Depo., pg. 73, pg. 18-20. Likewise, defense counsel could not say why he did not challenge Juror #5 for cause. Depo., pg. 77, ln. 1-3. Thus the state's reliance upon *Payne* is misplaced as there is no evidence that either shortcoming was a matter of strategy. (Why counsel's performance was deficient during voir dire is explained at page 39-41 of the Petitioner's Brief.)

Instead of addressing the other sixteen issues raised, the state merely observes that "the deposition of trial counsel makes it clear that there was a competent, strategic defense planned around a theory that Petitioner was innocent and that the Petitioner could not have murdered [redacted] State's Reply, pg. 8. However, while having a theory of defense is necessary to provide effective representation, it is not sufficient by itself to provide constitutionally adequate representation. Here, the state simply fails to address the multiple instances of deficient performance and fails to raise a material question of fact as to any of them. And as Mr. Grove has also established that counsel's deficient performance was prejudicial (and the state has never argued otherwise), his motion for summary disposition should be granted.

III. CONCLUSION

The Court should grant Mr. Grove's motion for summary disposition, vacate the conviction and order a new trial.

Respectfully submitted this 10th day of April 2013.

Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on April 10, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Dennis Benjamin, ISB #4199
Deborah Whipple, ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
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(208) 343-1000

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **SECOND AFFIDAVIT OF DENNIS BENJAMIN**

Dennis Benjamin, being duly sworn and upon oath, hereby says:

1. I am an attorney duly licensed to practice law in the State of Idaho.

2. Deborah Whipple and I represent the Petitioner herein.

3. Attached hereto as Exhibit A is a copy of email correspondence between Dr. Marco Ross, then of the Spokane County Medical Examiner, and Dr. Ross Reichard, then of the New Mexico Office of the Medical Investigator.

4. This correspondence shows that Dr. Reichard was contacted on August 3, 2006, three weeks after [redacted] Martin's death, by Dr. Ross in regards to conducting neuropathology consultations "in cases that have a significant potential to require his services as an expert

witness in court."

5. Dr. Ross writes Dr. Reichard that "we usually obtain neuropathology consults in just about all of our infant and child homicides (or suspected homicides)[.]"

6. Dr. Ross writes Dr. Reichard that "we are primarily interested in sending our brains from pediatric homicides and pediatric suspicious deaths[.]"

7. Dr. Ross asks Dr. Reichard about his fee schedule and Dr. Reichard responds by noting his fees to conduct the examination and his additional fees for testimony.

8. Attached hereto as Exhibit B is a Spokane County Medical Examiner Chain-of-Evidence Form.

9. The form shows that tissue was sent from the Spokane Medical Examiner to the New Mexico Office of Medical Investigations on August 14, 2006, and was received on August 15, 2006.

10. These documents demonstrate that Dr. Reichard was contracted to produce a report about [redacted] Martin which could be used in future criminal trial proceedings and that Dr. Reichard was aware that was the case.

11. These documents show that Dr. Reichard's findings and opinions expressed in his autopsy report are "core testimonial statements" under *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004), as the report contains "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" and also because the statements contained therein are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted).

This ends my affidavit.

Dennis Benjamin

Dennis Benjamin

SUBSCRIBED AND SWORN TO
before me this 10 day of April, 2013.

Kristin M. Brown

Notary Public for the State of Idaho
Residing at: Nampa, ID
My commission expires: 12/4/15

KRISTIN M. BROWN NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on April 10, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecuting Attorney
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

Ross, Marco

From: R. Ross Reichard [RReichard@salud.unm.edu]
Sent: Thursday, August 03, 2006 11:53 AM
To: Ross, Marco
Subject: Re: Neuropathology Consults

Attachments: Ross Reichard CV May06.doc

Ross Reichard CV May06.doc (58...

Dr. Marcos,
I appreciate your inquiry and would be interested in providing neuropathology service for your office. I've been out of town the last couple of days, hence the delay in my response. For outside brain consultations I typically have the referring pathologist fix the brain for 2-weeks in 20% formalin and then ship it. I'll cut it the week I receive it. If only H&Es are needed then I usually have a finalized report within 2 weeks of receiving the brain. If I have to order immunostains or special stains then that adds another week or so, depending on the complexity of the case. We charge $1250 and that includes slides and stains. Of course, if I have to come testify that is additional. Our office charges $350/hr or $2800/day. I also return all slides, photos, tissue, blocks etc to you.

I hope this answers some of your questions. Please do not hesitate to call me, office 505-272-0722 or cell 505-379-9509. I've also attached a copy of my CV.

Ross

Ross Reichard, MD
Medical Investigator
Director of Neuropathology
Assistant Professor of Pathology
MSC11 6030
1 University of New Mexico
Albuquerque, NM 87131-0001
Phone: (505) 272-0722
Fax: (505) 272-0727

>>> "Ross, Marco" <MRoss@spokanecounty.org> 7/27/2006 4:44 PM >>>
Dr. Reichard:

A couple of months ago you replied to the Name-L listserv that you would be interested in doing neuropathology consults. We usually obtain neuropathology consults in just about all of our infant and child homicides (or suspected homicides) and selected adult cases. The neuropathologist that we currently use provides very thorough and timely consultations. However, because of the demands of his private practice, he has expressed reluctance to do cases that have a significant potential to require his services as an expert witness in court.
Obviously, those are usually the infant homicide cases. So we hope to find another neuropathologist who can help us out.

I would appreciate finding out about what you might be able to offer us, what your fee schedule is, and anticipated turnaround times. We are primarily interested in sending our brains from pediatric homicides and pediatric suspicious deaths, but would also send our other neuropathology consults, as well, if you desired.

Marco Ross

Marco A. Ross, M.D.
Deputy Medical Examiner

EXHIBIT A 302

SPOKANE COUNTY MEDICAL EXAMINER

CC Y

MEDICOLEGAL CUSTODY FORM (CHAIN-OF-EVIDENCE)

OUTSIDE REFERRAL TESTING/EXAMINATION

The below-listed specimen(s) is/are transferred to the listed institution for further analysis at the request of Dr. Sally Aiken/Dr. Marco Ross. Please sign and return this form upon receipt of specimen(s) to:

Spokane County Medical Examiner
5901 N. Lidgerwood, Suite 24B
Spokane, WA 99208

Call immediately if seal is broken, or contents are not as listed (509) 477-2296.

DECEDENT'S NAME	CASE #	SAMPLE	DATE OBTAINED
Kyler Martin	06-1798	Urine	7-12-06

Released By:

Signature	Please Print	Date	Time
R. Shaber	R. Shaber	8-14-06	1435

Received By:

Signature	Please Print	Date	Time
	Alana K Goff	8-15-06	1500

ONI New Mexico
Name of Institution

Name of courier service transporting specimen: Fed X

EXHIBIT 5

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA# 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **AFFIDAVIT OF STACEY GROVE IN OPPOSITION TO STATE'S MOTION FOR SUMMARY DISPOSITION**

Stacey Grove, being duly sworn and upon oath, hereby says:

1. That I am the Petitioner herein.

2. That I am told that the Respondent argued at the hearing on the State's Motion for Summary Disposition, held on April 30, 2013, that Scott Chapman and I devised a trial strategy together where I would waive my right to cross-examine Dr. Ross Reichard. I state the following in response to that argument.

3. I did not know and I was never informed by Mr. Chapman that I had a right to confront witnesses.

4. In particular, I was never told by my attorney that the right to confront witnesses meant more than just the right to cross-examine the witnesses actually called by the state at trial.

5. While I knew that I had the right to have my attorney cross-examine the witnesses actually called by the state at trial, I did not know that evidence coming from a person who did not testify could be excluded in some cases if Mr. Chapman did not have the opportunity to cross-examine that person.

6. I never told Mr. Chapman that I was willing to waive the right to have such evidence excluded from trial.

7. I never gave Mr. Chapman permission to waive for me the right to have such evidence excluded from trial.

8. Mr. Chapman and I never devised a trial strategy together. Mr. Chapman did not involve me in matters of trial strategy, saying that he had the case "under control."

9. We never spoke about a trial strategy that involved my waiver of my right to confront witnesses.

10. I never waived or intended to waive my right to confrontation.

This ends my affidavit.

Stacey Grove

SUBSCRIBED AND SWORN TO
before me this 2 day of May, 2013.

Notary Public for the State of Idaho
Residing at: Clearwater County
My commission expires: March 17, 2016

BECKY LYNN NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I CERTIFY that on May ___, 2013, I caused a true and correct copy of the foregoing document to be:

___ mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
Deputy Nez Perce County Prosecutor's Office
P.O. Box 1267
Lewiston, ID 83501

Deb Grove

Deb Grove

FILED

2013 MAY 8 PM 2 03

PATTY O. WEEKS
CLERK OF THE DIST. COURT
BY PATTY ROGERS

ORIGINAL

DANIEL L. SPICKLER
Prosecuting Attorney

NANCE CECCARELLI
Deputy Prosecutor
Nez Perce County, Idaho
Post Office Box 1267
Lewiston, Idaho 83501
Telephone (208) 799-3073
ISBN 7787

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

STACEY L. GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV2012-0001798 MOTION TO STRIKE

COMES NOW, Respondent, State of Idaho, by and through its attorney of record, NANCE CECCARELLI, Deputy Prosecuting Attorney, Nez Perce County, Idaho, and hereby requests that the Affidavit of Stacey Grove in Opposition to State's Motion for Summary Disposition be stricken from the record in the above-entitled proceedings. This motion is based on the reasons that the presentation and filing of the affidavit is untimely and blatantly unfair.

Petitioner, and opposing counsel, were provided ample opportunity to share opinions and

offer evidence pursuant to the Court's briefing schedule and date set for oral argument. (See attached Exhibit A) Petitioner, through opposing counsel, had the "last word" in oral argument during the April 30, 2013, hearing on both the State's and Petitioner's Motion for Summary Dismissal.

Petitioner now submits an affidavit in response to the State's oral arguments after the Judge has taken the case under advisement. Thus presented, the State is unable to research, contradict, or respond to allegations made as factual statements in the Petitioner's affidavit. Petitioner is attempting, it appears to raise a genuine issue of material fact regarding the quality of the representation of trial counsel and the existence of a concerted trial strategy presented to the jury. The premise that Petitioner participated in and contributed to the development and conduct of his defense and the trial strategy was raised and specifically argued in the State's "Answer and Amended Motion for Summary Disposition and Dismissal" (filed in February 2013) to which opposing counsel replied and responded.

Petitioner should have presented his affidavit along with his initial petition pursuant to Idaho Code §19-4903, or the amended petition, or following receipt and review of the deposition of Petitioner's trial counsel, or at any time up to the date of oral argument.

The State respectfully requests that this Court strike the affidavit of Stacey Grove and rule according to the record as complete following the oral arguments of April 30, 2013. Or in the alternative, if this Court does not grant the State's Motion to Strike, then the State respectfully requests leave and sufficient time to properly respond to the allegations in this new affidavit.

DATED this 8th day of May, 2013.

Nance Ceccarelli
Deputy Prosecuting Attorney

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a full, true, complete and correct copy of the foregoing MOTION TO STRIKE was

(1) ✓ electronic ~~hand delivered, or~~

(2) _____ hand delivered via court basket, or

(3) _____ sent via facsimile, or

(4) ✓ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Deborah Whipple
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

DATED this 8th day of May, 2013.

Joan C. Way

JOAN C. WAY
Civil Legal Assistant

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV12-01798 ORDER SCHEDULING BRIEFS AND ARGUMENT

THEREFORE, IT IS HEREBY ORDERED:

1) Petitioner's Response to State's Motion for Summary Disposition and Petitioner's Brief in Support of Petitioner's Renewed Motion for Summary Disposition due on or before March 15, 2013;

2) State's Reply Brief in Support of its Motion for Summary Disposition and State's Response to Petitioner's Motion for Summary Disposition due on or before March 29, 2013;

3) Petitioner's Reply Brief in Support of Petitioner's Renewed Motion for Summary Disposition due on or before April 12, 2013;

4) Oral argument shall take place before the above-entitled Court in the Courtroom of the Nez Perce County Courthouse on April 30, 2013, commencing at 1:30 p.m.

DATED this 12th day of February, 2013.

CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER SCHEDULING BRIEFS AND ARGUMENT was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 12th day of February, 2013, on:

Dennis Benjamin
Debra Whipple
P O Box 2772
Boise ID 83701

Nance Ceccarelli – valley messenger
P O Box 1267
Lewiston ID 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY · STATE OF IDAHO · EX-OFFICIO AUDITOR AND RECORDER

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
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Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **OBJECTION TO STATE'S MOTION TO STRIKE**

Petitioner, Stacey Grove, objects to the State's Motion to Strike dated May 8, 2013. Mr. Grove objects to the motion because it is based upon a misstatement of the proceedings to date in this Court.

The State has moved to strike the affidavit of Mr. Grove filed following the April 30, 2013, hearing on cross-motions for summary judgment on the grounds that the affidavit is untimely and unfair. Mr. Grove filed the motion in response to the State's theory, raised for the first time during the April 30, 2013, hearing, that he and Scott Chapman devised a trial strategy together according to which Mr. Grove would waive his constitutional right to cross-examine Dr.

Ross Reichard.

The State claims in its motion that "The premise that Petitioner participated in and contributed to the development and conduct of his defense and the trial strategy was raised and specifically argued in the State's 'Answer and Amended Motion for Summary Disposition and Dismissal'[.]" State's Motion to Strike page 2. The State does not offer a page citation within its fourteen page Answer and Amended Motion to support its claim. However, review of the entire document demonstrates that the State's Answer and Amended Motion for Summary Disposition and Dismissal does not raise "the premise" that Mr. Grove acted in concert with Mr. Chapman to voluntarily waive his constitutional right to confrontation. This theory was first raised by the State in its oral argument on April 30, 2013. Mr. Grove could not have responded to this new theory prior to the oral argument because he had no idea that the State intended to make such an argument. In assessing the lack of notice to Mr. Grove, it should be noted that none of the State's pleadings nor the deposition of Mr. Chapman ever in any way alluded to the State's current claim that Mr. Grove acted in concert with Mr. Chapman to waive his constitutional confrontation rights. See Chapman Deposition, pg. 104, ln. 6 - pg. 106, ln. 11; pg. 109, ln. 2-6 (entirety of questioning by State of Mr. Chapman). Nor has the State ever offered any citation to any statement from either Mr. Grove or Mr. Chapman which would support such a theory.

Mr. Grove requests that the State's Motion to Strike be denied.

Respectfully submitted this 8th day of May, 2013.

Deborah Whipple
Attorneys for Stacey Grove

Dennis Benjamin

CERTIFICATE OF SERVICE

I CERTIFY that on May 8, 2013, I caused a true and correct copy of the foregoing document to be:

___ mailed

___ hand delivered

___ faxed to (208) 799-3080

X emailed to nancecceccarelli@co.nezperce.id.us

to: Nance Ceccarelli
Deputy Nez Perce County Prosecutor
P.O. Box 1267
Lewiston, ID 83501

Dennis Benjamin

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

STACEY GROVE, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 2012-1798 **OPINION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION**

This matter came before the Court on the State's Motion for Summary Disposition and the Petitioner's Motion for Summary Disposition.[1] The Petitioner was represented by Dennis Benjamin, of the firm Nevin, Benjamin, McKay & Bartlett. The State was represented by Nance Ceccarelli, Nez Perce County Deputy Prosecuting Attorney. Oral argument was heard on April 30, 2013. The Court, being fully advised in the matter, hereby renders its decision.

[1] Following the hearing on these motions, the Petitioner submitted the Affidavit of Stacey Grove in Opposition to the Respondent's Motion for Summary Disposition. The State filed a Motion to Strike, which is granted. The affidavit was not timely, and further, the testimony presented within can be addressed at the evidentiary hearing held on this matter.

BACKGROUND

Following a trial by jury, Stacey Grove was found guilty of first degree felony murder by aggravated battery of a child under twelve years old. The victim was twenty-three month old [redacted] Martin. The jury returned the guilty verdict on July 30, 2008. Judgment of conviction was entered on January 28, 2009. The Court of Appeals of Idaho considered the Petitioner's appeal of his judgment of conviction. On March 25, 2011, the Court issued an appellate opinion which affirmed Grove's conviction of first degree felony murder.

A detailed factual summary of this case is found in the Court of Appeals Opinion, *State v. Grove*, 151 Idaho 483, 485-489, 259 P.3d 629, 631-635 (Ct. App. 2011). Facts of this case which are pertinent to issues below are set forth in detail in the following analysis. However, a brief timeline of events is as follows: The victim was in the custody of his father on July 9, 2006, and then returned to his mother's home early that evening. In the morning hours of July 10, 2006, paramedics arrived at the home of the victim's mother, and immediately transported the victim to the hospital in Lewiston, Idaho. The emergency room physician immediately recognized the child needed more specialized care than the hospital could provide, and thus arranged transport to a hospital in Spokane, Washington. The victim was declared brain dead on July 11, 2006; cardiac death occurred on July 12, 2006, when an organ donation procedure was performed. An autopsy of the body was performed on July 12, 2006.

The Petitioner initiated this proceeding for post-conviction relief by filing a Verified Petition for Post-Conviction Relief on September 7, 2012. On October 5, 2012, the State filed a motion for summary disposition. The Petitioner filed a motion for

summary disposition on October 15, 2012. On January 2, 2013, an Amended Verified Petition for Post-Conviction Relief was filed by the Petitioner. On April 30, 2013, the Court heard oral argument on the parties' cross-motions for summary disposition.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post-conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a)

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285,

287, 912 P.2d 653, 655 (Ct. App. 1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

In a proceeding for post-conviction relief, the petitioner bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941 (Ct. App.1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court's own initiative. However, "[s]ummary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief." *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655. "If the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue." *Sanchez*, at 711, 905 P.2d at 644. "It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing." *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

ANALYSIS

The petition before this Court has been appropriately filed pursuant to the Uniform Post-Conviction Procedures Act (hereafter "UPCPA")[2]. "[T]he UPCPA was instituted as the exclusive vehicle to present claims regarding whether a conviction or sentence was entered in violation of constitutional or statutory law." *Eubank v. State*, 130 Idaho 861, 863, 949 P.2d 1068, 1070 (Ct. App. 1997); *Still v. State*, 95 Idaho 766, 768, 519 P.2d 435, 437 (1974). The Petitioner asserts five claims within the Amended Petition.

1. **Whether Petitioner was denied the right to confront witnesses against him in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 12 of the Idaho Constitution.**

The Petitioner asserts that his right to confront witnesses was violated during the criminal trial. This alleged violation occurred when witnesses called by the State testified about neuropathology tests and examination results which were relied upon and incorporated into the autopsy report for purposes of determining the cause and manner of death of the victim. The Petitioner contends medical witnesses relied on results of neuropathology testing; however, those witnesses neither performed nor had personal knowledge of the neuropathology testing and examination. The right to confront witnesses was further violated when the neuropathologist who did perform the tests was not a witness at the trial.

[2] The Petitioner's claims do not fall under the constitutional remedy of habeas corpus. "A writ of habeas corpus, on the other hand, is the appropriate method for challenging unlawful conditions of confinement." *Id.*; *Olds v. State*, 122 Idaho 976, 979, 842 P.2d 312, 315 (Ct. App. 1992). The distinction between a petition for post-conviction relief and a writ of habeas corpus is important because the constitutional remedy of habeas corpus has no time limitation. *Id.*

a. Testimony at trial

An autopsy of the victim's body was performed on July 12, 2006, shortly after his death, for the purposes of determining the cause and manner of death. Forensic pathologist Dr. Marco Ross performed the autopsy.[3] Dr. Ross removed the victim's brain, and consistent with his office's procedures, he sent the brain to Dr. Ross Reichard, a neuropathologist at the University of New Mexico. Dr. Reichard performed the autopsy of the brain and sent a report of his findings and conclusions to Dr. Ross.[4] Dr. Ross incorporated the Neuropathological Diagnoses, taken directly from Dr. Reichard's report, into the Autopsy Report. Other than the incorporated Neuropathological Diagnoses, Dr. Reichard's report was not offered or admitted at the trial.

Dr. Ross later testified at Grove's criminal trial.[5] During the trial Dr. Ross's autopsy report was introduced, without objection, as State's Exhibit 11.[6] Dr. Ross relied on Dr. Reichard's report for purposes of completing his autopsy report. Dr. Ross reached the following conclusions regarding cause and manner of death in the autopsy report:

> The cause of death is cerebral edema and subdural hemorrhage due to blunt force impact to the head. The intra-abdominal contusions are the result of blunt force impacts to the abdomen. The manner of death is homicide.

Autopsy Report, at 3(State's Exhibit 11).

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[3] Dr. Ross was the Deputy Medical Examiner at the Spokane County Medical Examiner's Office. The victim died at the hospital in Spokane, Washington, and the autopsy was performed by the Spokane County Medical Examiner's Office on behalf of Nez Perce County, Idaho.

[4] Dr. Reichard's Autopsy Report is included in this record as Plaintiff's Exhibit I, attached to the Deposition of Scott M. Chapman, taken on January 24, 2013. Dr. Ross relied on this report, and included the Neuropathological Diagnoses in the Autopsy Report, at page 2 (See State's Exhibit 11, included within Exhibit C, attached to the Verified Petition of Post-Conviction Relief). Dr. Reichard's full report was not introduced or admitted at trial.

[5] Dr. Ross's testimony can be found in the record of this case as Exhibit B, Volume II, attached to the Verified Petition for Post-Conviction Relief. Dr. Ross's testimony is located in the trial transcript at pages 892-988.

[6] A copy of Dr. Ross's autopsy report can be found in the record of this case as State's Exhibit 11, included within Exhibit C, attached to the Verified Petition of Post-Conviction Relief.

The State also called Dr. Deborah Harper to testify. Dr. Harper is a pediatrician from Spokane who has special training regarding physical and sexual abuse and neglect of children.[7] Dr. Harper had examined the victim at the hospital in Spokane, Washington, prior to his death. In addition to her own observations, Dr. Harper spoke with the victim's parents, relied on the autopsy reports of Dr. Ross and Dr. Reichard,[8] and also reviewed various medical records, including notes from the organ harvest team. Dr. Harper used this information to come to a conclusion about the victim's death and his physical manifestations of injury prior to death.

Two other doctors also testified at the trial. Dr. Hunter[9] was the emergency room physician who attended to the victim at St. Joseph's Regional Medical Center, in Lewiston, Idaho, when the paramedics brought him to the emergency room. Dr. Hunter relied on the autopsy report submitted as State's Exhibit 11. He testified that based upon his review of the report, the injuries suffered by the victim should have produced immediate symptoms such as unconsciousness, given the degree of injury described in the autopsy. In addition to Dr. Hunter, another emergency room physician also testified. Dr. Chin is an emergency room physician at Tri-State Memorial Hospital, in Clarkston, Washington. Dr. Chin examined the victim at the emergency room on July 8, 2006, two days before [redacted] was taken to St. Joseph's Regional Medical Center, and ultimately to

[7] Dr. Harper's testimony can be found in the record of this case as Exhibit B, Volume II, attached to the Verified Petition for Post-Conviction Relief. Dr. Harper's trial testimony is located in the transcript at pages 1021-1059.

[8] Dr. Harper also relied on the surgery notes from the organ harvest procedure that occurred after the victim was declared brain dead, but before his body was taken off life support.

[9] Dr. Hunter's testimony can be found in the record of this case as Exhibit B, Volume II, attached to the Verified Petition for Post-Conviction Relief. Dr. Hunter's testimony is located in the trial transcript at pages 857-891.

the hospital in Spokane.[10] Dr. Chin also reviewed the autopsy report and testified [redacted] did not have the types of injuries that were present within the autopsy report at the time he was examined at Tri-State Hospital on July 8, 2006. Dr. Chin explained why he reached this conclusion, based upon Kyler's actions and responses during his exam. Further, Dr. Chin testified that based on what he had read in the autopsy this was the most brutal case he had ever seen.

The Petitioner asserts that his right to confront witnesses was violated when the autopsy report prepared by Dr. Reichard was admitted into evidence, and also referred to in testimony by four witnesses during the trial. As indicated above, Dr. Reichard's autopsy report was not separately admitted into evidence; only a portion of the report was incorporated into Dr. Ross's Autopsy Report that was admitted as State's Exhibit 11.

b. Confrontation Clause analysis from *Crawford v. Washington* until present.

The Confrontation Clause found within the Sixth Amendment confers upon the accused the right to be confronted with witnesses against him.

> The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

[10] The victim's father, Todd Martin, had taken [redacted] to the emergency room at Tri-State while [redacted] was in his custody days prior Kyler's death. Martin was concerned about a sore on Kyler's nose and some bruises the child had, as well as the fact [redacted] had broken his leg--incidents that Martin felt may be the result of child abuse. Dr. Chin's trial testimony can be found in the transcript attached as Exhibit B, Volume II to the Verified Petition for Post-Conviction Relief. Dr. Chin's testimony is located at pages 845-857.

Crawford v. Washington, 541 U.S. 36, 42-43, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177(2004).[11] The Idaho Supreme Court first applied *Crawford* in *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007).[12]

> *Crawford* altered this analysis with regard to testimonial statements. In *Crawford,* the Court held that testimonial statements of witnesses absent from trial are admissible only where declarant is unavailable and where defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 59, 124 S.Ct. at 1369, 158 L.Ed.2d at 197. Although the Court declined to spell out a comprehensive definition of "testimonial," the Court did set forth some guidelines. First, the Court looked to Webster's dictionary definition of "testimony" from 1828. Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford,* 541 U.S. at 51, 124 S.Ct. at 1364, 158 L.Ed.2d at 192 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). The Court then listed three formulations of "core" testimonial statements:
>
> > (1) " *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;"
> >
> > (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and

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[11] "Prior to *Crawford,* the Supreme Court held that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears 'adequate indicia of reliability.' *Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539, 65 L.Ed.2d at 608. To meet that test, the declarant must be unavailable and evidence must either fall within a 'firmly rooted hearsay exception' or 'bear particularized guarantees of trustworthiness.'" *State v. Hooper,* 145 Idaho 139, 142-143, 176 P.3d 911, 914 - 915 (2007).

[12] The United States Supreme Court applied the Confrontation Clause analysis from Crawford in the consolidated cases *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

> In *Davis*, the Supreme Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822, 126 S.Ct. at 2273–74, 165 L.Ed.2d at __. Thus, a statement is testimonial under *Crawford* and *Davis* 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, unless made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. 547 U.S. at 822, 126 S.Ct. at 2274, 165 L.Ed.2d at __.

State v. Hooper, 145 Idaho 139, 143-144, 176 P.3d 911, 915 - 916 (2007).

> (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."
>
> *Crawford,* 541 U.S. at 51–52, 124 S.Ct. at 1364–1365, 158 L.Ed.2d at 192–193 (internal citations omitted). This is not an exclusive list of "testimonial" evidence. Rather, these formulations all share a "common nucleus" and then define the Clause's coverage at various levels of abstraction around it. *Id.*

Hooper, 145 Idaho at 142-143, 176 P.3d at 914-915. Further, "a statement is testimonial under *Crawford* and *Davis* 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, unless made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 143-144, 176 P.3d at 915-916, *citing Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006). Thus, the *Hooper* Court endorsed a primary purpose test to determine whether an out-of-court statement is testimonial.

Since *State v. Hooper*, other cases have come before the United States Supreme Court for further analysis on the issue of whether a defendant's right to confrontation was violated. The next case to be considered by the high court was *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In *Melendez-Diaz*, the trial court admitted into evidence an affidavit from a state laboratory reporting the results of forensic analysis of a substance. The affidavit attested that material seized by police, and connected to the defendant, was cocaine. The *Melendez-Diaz* Court determined that these affidavits from the state laboratory were "testimonial," and thus the affiants were "witnesses" subject to the defendant's right of confrontation under the Sixth

Amendment. *Id.* at 307-308, 129 S.Ct. at 2530. The *Melendez-Diaz* Court held that the defendant's right to confront witnesses[13] was violated. "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.* at 329, 129 S.Ct. at 2542. The *Melendez-Diaz* Court rejected several arguments offered by the State as bases for claiming the affidavits were excluded from the scope of the *Crawford* rule, including: the analysts who conducted the tests were not accusatory witnesses, statements in the affidavits were obtained by neutral, scientific testing, and that the affidavits were akin to official and business records. These arguments were not persuasive because the forensic testing on the substance taken from the defendant at arrest was performed for the limited purpose of determining whether the substance was cocaine, so that the results could be used in a later criminal prosecution against the defendant. The affidavits were prepared specifically for use in a criminal trial, and thus were "testimony against" the defendant, subject to confrontation. *Id.* at 324, 129 S.Ct. 2527.

Two cases addressing the right to confrontation were addressed by the United States Supreme Court in 2011: *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) and *Bullcoming v. New Mexico*, __ U.S. __, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In *Michigan v. Bryant*, out-of-court statements were made by the victim of a shooting to the police officers who responded to the call. The victim identified the man who shot him and described the circumstances of the shooting; he died

[13] In *Melendez-Diaz*, counsel for the defendant objected to the admission of the reports at trial, arguing that the analyst should be required to testify in person. "Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as 'prima facie evidence of the composition, quality, and the net weight of the narcotic ... analyzed.'" *Melendez-Diaz v. Massachusetts*, 557 U.S. at 309, 129 S.Ct. at 2531.

within hours. *Id.* at ___, 131 S.Ct. at 1150. The *Bryant* Court followed principals similar to *Davis v. Washington*, and determined that the ongoing emergency where an armed shooter was at large objectively indicated that the primary purpose of the police questioning was to address the emergency, and thus, the victim's statements to the police were not testimonial in nature. *Id.* at ___, 131 S.Ct. at 1166-1167.

In *Bullcoming*, the defendant was arrested on charges of driving while intoxicated, and a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold requirement was admitted. The prosecutor did not call the analyst who signed the report as a witness; instead another analyst who was familiar with the lab's procedures was called as a witness. [14] This analyst had neither participated in nor observed the test on Bullcoming's blood sample. *Id.* at ___, 131 S.Ct. at 2709.

The *Bullcoming* Court held:

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[14] Similar to *Melendez-Dias*, counsel for the defendant objected to the State calling the substitute analyst.

> The case was tried to a jury in November 2005, after our decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), but before *Melendez–Diaz.* On the day of trial, the State announced that it would not be calling SLD analyst Curtis Caylor as a witness because he had "very recently [been] put on unpaid leave" for a reason not revealed. 2010–NMSC–007, ¶ 8, 147 N.M. 487, 226 P.3d 1, 6 (internal quotation marks omitted); App. 58. A startled defense counsel objected. The prosecution, she complained, had never disclosed, until trial commenced, that the witness "out there ... [was] not the analyst [of Bullcoming's sample]." *Id.,* at 46. Counsel stated that, "had [she] known that the analyst [who tested Bullcoming's blood] was not available," her opening, indeed, her entire defense "may very well have been dramatically different." *Id.,* at 47. The State, however, proposed to introduce Caylor's finding as a "business record" during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis. *Id.,* at 44.
>
> Bullcoming's counsel opposed the State's proposal. *Id.,* at 44–45. Without Caylor's testimony, defense counsel maintained, introduction of the analyst's finding would violate Bullcoming's Sixth Amendment right "to be confronted with the witnesses against him." *Ibid.*[FN2] The trial court overruled the objection, *id.,* at 46–47, and admitted the SLD report as a business record, *id.,* at 44–46, 57.[FN3] The jury convicted Bullcoming of aggravated DWI, and the New Mexico Court of Appeals upheld the conviction, concluding that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness." 2008–NMCA–097, ¶ 17, 144 N.M. 546, 189 P.3d 679, 685.

Bullcoming v. New Mexico, 131 S.Ct. at 2711-2712.

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Id. at ___, 131 S.C.t at 2710. Thus, the blood-alcohol tests results were testimonial in nature because the report was "created solely for an 'evidentiary purpose' . . . in aid of police investigation." *Id.* at ___131 S.Ct. at 2717.

Most recently, the United States Supreme Court decided *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), where the issue was whether *Crawford* bars an expert from expressing an opinion based on facts gleaned from a laboratory report when the expert lacked firsthand knowledge regarding the preparation of the report. *Id.* at ___, 132 S.Ct. at 2227. The hearsay evidence was a DNA profile prepared by an outside laboratory using vaginal swabs collected from the victim of the crime. The *Williams* Court distinguished the forensic reports from *Melendez-Diaz* and *Bullcoming* from the DNA testing in *Williams*.

> In *Melendez–Diaz* and *Bullcoming,* the Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. There was nothing resembling an ongoing emergency, as the suspects in both cases had already been captured, and the tests in question were relatively simple and can generally be performed by a single analyst. In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating.

> The Cellmark [DNA] report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual. In identifying the primary purpose of an out-of-court statement, we apply an objective test. *Bryant,* 562 U.S., at ——, 131 S.Ct., at 1156. We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. *Ibid.*

Id. at ___, 132 S.Ct. at 2243. The *Williams* Court explained the purpose of the DNA report was not to accuse the defendant or create evidence for use at trial.

> Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate the petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile. *Id.,* at ——, 131 S.Ct., at 1157.
>
> The situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.
>
> . . .
>
> In short, the use at trial of a DNA report prepared by a modern, accredited laboratory "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Bryant, supra,* at ——, 131 S.Ct., at 1167 (THOMAS, J., concurring).

Id. at ___, 132 S.Ct. at 2243-2244. Ultimately, to determine whether there is a violation of the Confrontation Clause, the *Williams* case requires the application of an objective test, considering "the primary purpose that a reasonable person would have ascribed to

the statement, taking into account all of the surrounding circumstances." *Id.* at ____, 132 S.Ct. at 2243. If the forensic report was "made for the purpose of proving the guilt of a particular criminal defendant at trial," it is testimonial. *Id.*

In the case at hand, the Petitioner urges this Court to find Dr. Reichard's report to be testimonial, in a manner similar to the forensic analysis considered in *Melendez-Diaz* and *Bullcoming*. In support of this argument, the Petitioner relies on a case from the District of Columbia Court of Appeals, *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011). In *Moore*, the government called Dr. Jonathan Arden, chief D.C. Medical Examiner[15], and Jerry Walker, a DEA senior forensic chemist. Dr. Arden testified regarding the contents of approximately 30 autopsy reports authored by other medical examiners in his office, and Walker testified regarding 24 drug analyses, only four of which were performed by Walker. 651 F.3d at 71. The autopsy and DEA reports[16] were admitted into evidence over the defendants' objection. *Id.*

The *Moore* Court found that the autopsy reports were testimonial statements, analogous to the laboratory reports in *Bullcoming*.

> First, "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" are testimonial statements. *Melendez–Diaz,* 129 S.Ct. at 2532 (citation and quotation marks omitted). Put another way, "[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial." *Bullcoming,* 131 S.Ct. at 2717 (quoting *Melendez–Diaz,* 129 S.Ct. at 2532). The Supreme Court concluded the certifications in the laboratory report analyzing Bullcoming's BAC were testimonial because "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations," the certifying forensic analyst "tested the evidence and prepared a certificate concerning the

[15] As the Petitioner has noted in briefing, this case involves the same forensic pathologist that the Petitioner called as an expert witness at trial to refute the testimony of Dr. Ross and Dr. Harper regarding the time of injury that caused [redacted]'s death.

[16] One autopsy report was admitted into evidence pursuant to stipulation. By footnote the *Moore* Court noted the admission of this report raised no Confrontation Clause issue. *Moore*, 651 F.3d at 71.

> result of his analysis," the certificate was formalized in a signed document and headed a "report," and the document referenced court rules relating to the admissibility of certified blood-alcohol analyses. *Id.* at 2717.
>
> Analogous circumstances make the autopsy reports here testimonial. The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner]—use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports." These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez–Diaz,* 129 S.Ct. at 2532 (citation and quotation marks omitted).

Id. at 72-73. The *Moore* Court found the admission of the autopsy reports was a violation of the Confrontation Clause.[17] The Court in *Moore* did not have available to it the analysis from *Williams v. Illinois,* which was decided the following year.

After the United States Supreme Court decision in *Williams v. Illinois*, the Supreme Court of Illinois decided the issue of whether an autopsy report is testimonial in *People v. Leach*, 980 N.E.2d 570(2012). In this case an autopsy was performed by a state medical examiner who had since retired prior to defendant's criminal trial. *Id.* at 575. At trial, a different medical examiner testified, stating she had reviewed the autopsy protocol, toxicology reports, investigator's reports, and photographs that documented the

[17] In *Moore* the Court did not vacate the conviction, however, because the Court determined the admission of the autopsy report, while an error, was harmless beyond a reasonable doubt. *Id. at 73.*

retired medical examiner's external and internal examinations of the victim's body. *Id.* Ultimately, the medical examiner testified that she did not conduct the autopsy examination, but that she agreed with the retired medical examiner's finding of strangulation. *Id.* at 576.

The Illinois Supreme Court applied an objective primary purpose test, as described in *Williams v. Illinois*, in order to determine if the autopsy report was testimonial.

> The *Williams* dissent rejects this focus on the targeting of a particular individual, reminding us that *Davis* formulated the test as whether the out-of-court statement was "made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." *Id.* at ——, 132 S.Ct. at 2273 (Kagan, J., dissenting, joined by Scalia, Ginsburg and Sotomayor, JJ.) (quoting *Davis,* 547 U.S. at 822, 126 S.Ct. 2266). The dissent accuses the plurality of adopting, without explanation, a new formulation of the primary purpose test when forensic testing is involved, asking whether the report was prepared "for the primary purpose of accusing a targeted individual." *Id.* at ——, 132 S.Ct. at 2273.

Id. at 590. Ultimately, the Illinois Court determined the report was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case. *Id.* The Illinois Court determined the autopsy report was not testimonial based upon the following analysis:

> Under state law, as soon as a coroner "knows or is informed that the dead body of any person is found, or lying within his county, * * * [he] shall * * * take charge of the same and shall make a preliminary investigation into the circumstances of the death" if any one of five enumerated conditions exists. 55 ILCS 5/3–3013 (West 2010). One such condition is that the death was "sudden or violent death, whether apparently suicidal, homicidal or accidental." 55 ILCS 5/3–3013(a) (West 2010). Further, even when the police suspect foul play and the medical examiner's office is aware of this suspicion, an autopsy might reveal that the deceased died of natural causes and, thus, exonerate a suspect. For

example, an autopsy of an apparent victim of a crime could reveal that the cause of death was a ruptured congenital brain aneurysm and that the physical altercation was not a contributing cause.

In the present case, although the police discovered the body and arranged for transport, there is no evidence that the autopsy was done at the specific request of the police. The medical examiner's office performed the autopsy pursuant to state law, just as it would have if the police had arranged to transport the body of an accident victim.

The statute also requires that when the coroner or medical examiner determines that the cause of death is homicide, he shall withdraw certain specimens from the body and shall deliver these specimens to the Illinois State Police, Division of Forensic Services, "in addition to any other findings, specimens, or information that [he] is required to provide during the conduct of a criminal investigation." 55 ILCS 5/3–3013 (West 2010).

Thus, Dr. Choi, as the assistant medical examiner assigned to this case, was required by law to prepare a report and to submit that report, along with other items, to the police. Although he was aware that the victim's husband was in custody and that he had admitted to "choking" her, his examination could have either incriminated or exonerated him, depending on what the body revealed about the cause of death. See *Williams,* 567 U.S. at ——, 132 S.Ct. at 2228. In short, Dr. Choi was not acting as an agent of law enforcement, but as one charged with protecting the public health by determining the cause of a sudden death that might have been " suicidal, homicidal or accidental." 55 ILCS 5/3–3013 (West 2010).

Further, while it is true that an autopsy report might eventually be used in litigation of some sort, either civil or criminal, these reports are not usually prepared for the sole purpose of litigation. A finding of accidental death may eventually lead to claims of product liability, medical malpractice, or other tort. A finding of suicide may become evidence in a lawsuit over proceeds of a life insurance policy. Similarly, a finding of homicide may be used in a subsequent prosecution of the accused killer. But the primary purpose of preparing an autopsy report is not to accuse "a targeted individual of engaging in criminal conduct" (*Williams,* 567 U.S. at ——, 132 S.Ct. at 2242) or to provide evidence in a criminal trial (*Davis,* 547 U.S. at 822, 126 S.Ct. 2266). An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought.

And, unlike the forensic report at issue in *Melendez–Diaz,* the autopsy report was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy.

(Thus, the autopsy report would not be deemed testimonial by Justice Thomas, because it lacks the formality and solemnity of an affidavit, deposition, or prior sworn testimony.)

In the present case, the autopsy report did not bear testimony against the defendant. Nothing in the report directly linked defendant to the crime. Unlike a DNA test which might identify a defendant as the perpetrator of a particular crime, the autopsy finding of homicide did not directly accuse defendant. Only when the autopsy findings are viewed in light of defendant's own statement to the police is he linked to the crime. In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus, Dr. Choi was not defendant's accuser.

Finally, as a practical matter, because a prosecution for murder may be brought years or even decades after the autopsy was performed and the report prepared, these reports should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a "cold case") and the purpose of the autopsy is clearly to provide evidence for use in a prosecution. The potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsies were deemed testimonial merely because the cause of death is determined to be homicide.

Id. at 591-593.

The Illinois Court also acknowledged that at this time there is a split of opinion amongst various courts regarding the application of the primary purpose test to reports of forensic testing.[18] Ultimately, however, the Court determined nothing in the autopsy

[18] The Illinois Court provided the following cases regarding the split of opinion on this matter:

We acknowledge that defendant has cited several cases from other jurisdictions in which the courts of our sister states have held that an autopsy report is testimonial hearsay, either in a case in which the report was admitted or in which a medical examiner other than the one who performed the autopsy was permitted to testify to the contents of the report. See, *e.g., State v. Davidson,* 242 S.W.3d 409, 417 (Mo.Ct.App.2007) (holding that when an autopsy report is prepared at the request of law enforcement in anticipation of a murder prosecution and the report is offered to prove the victim's cause of death, the report is testimonial); *Martinez v. State,* 311 S.W.3d 104, 111 (Tex.Ct.App.2010) (holding that an autopsy report is testimonial when its primary purpose is to establish or prove past events, as demonstrated by police officer's attendance at autopsy, his taking of photographs during autopsy, and where statutory basis for performance of the autopsy was suspicion of death by unlawful means); *United States v. Moore,* 651 F.3d 30, 73 (D.C.Cir.2011) (per curiam) (classifying autopsy reports as testimonial when requested by law enforcement, officers are present during autopsies, and officers participated in preparation of diagrams and other portions of the reports), *cert. granted in part in Smith v. United States,* — U.S. —, 132 S.Ct. 2772, 183 L.Ed.2d 638 (2012).

report directly linked the defendant to the crime and that the autopsy sought only to determine how a victim died, and not who was responsible for the death. Thus, the medical examiner who prepared the report was not the defendant's accuser, as required by the Confrontation Clause.

c. Application to the case at hand

As noted by the Court of Appeals of Idaho in *State v. Grove*, 151 Idaho 483, 259 P.3d 629 (2011), the centrally disputed issue in the Petitioner's criminal trial focused on the time the injuries that caused Kyler's death occurred.

> Initially, we clarify that the crux of this issue affects the central disputed question in this case—when the injuries which ultimately caused K.M.'s death occurred and whether it was likely that K.M. would have lost consciousness and/or shown severe symptoms immediately after the injuries were inflicted. In other words, did the injuries occur on the morning that K.M. lost consciousness—and was alone with Grove—or several days prior, when it was undisputed that the injuries could not have

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However, these cases are countered by cases holding that an autopsy report may be admitted into evidence without the testimony of the pathologist who performed the autopsy without violating the defendant's rights under the confrontation clause. See, *e.g., State v. Craig,* 110 Ohio St.3d 306, 2006–Ohio–4571, 853 N.E.2d 621, at ¶¶ 80–88 (concluding that autopsy reports are admissible nontestimonial business records), *review granted by State v. Craig,* 126 Ohio St.3d 1573, 2010–Ohio–4539, 934 N.E.2d 347 (table); *United States v. Feliz,* 467 F.3d 227, 236–37 (2d Cir.2006) (holding that autopsy reports are admissible as business records and are nontestimonial "even where the declarant is aware that [the report] may be available for later use at trial"); *Banmah v. State,* 87 So.3d 101, 103 (Fla.Dist.Ct.App.2012) (autopsy reports are nontestimonial because they are prepared pursuant to statutory duty and not solely for use in prosecution); *Cato v. Prelesnik,* 2012 WL 2952183, *3 (W.D.Mich. July 18, 2012) (rejecting *Crawford* claim in *habeas* petition on basis that *Crawford* did not clearly establish that autopsy results are testimonial in nature and that even under *Melendez–Diaz,* the answer to this question is uncertain). In addition, the cases cited by defendant predate the Supreme Court's decision in *Williams.*

This split of opinion and the confusion regarding application of the primary purpose test to reports of forensic testing may eventually be resolved by the United States Supreme Court. In the meantime, while we are not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature, we conclude that under the objective test set out by the plurality in *Williams,* under the test adopted in *Davis,* and under Justice Thomas's "formality and solemnity" rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial. Further, an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible.

People v. Leach 980 N.E.2d at 593-594.

> been inflicted by Grove because he was not alone with K.M. In this regard, important to the state's theory of the case that Grove caused the fatal injuries on the morning of July 10 was the conclusion of Dr. Reichard, based on his microscopic examination of K.M.'s brain, that K.M. had suffered a laceration of the corpus callosum, which would have likely caused immediate loss of consciousness, thereby implicating Grove as the cause of K.M.'s injuries during the 36–45 minute period of time during which he was alone with K.M. Grove points out that both Dr. Ross and Dr. Harper recited Dr. Reichard's observations in this regard, as gleaned from the autopsy report, as neither was present during the autopsy nor conducted their own microscopic analysis, and relied on these observations in forming their respective opinions that K.M.'s injuries had been inflicted on July 10.
>
> By contrast, Grove's expert, Dr. Arden, testified that he did not agree with Dr. Reichard that a laceration was present and that the anomaly was the result of handling of the brain after death. He also offered his opinion, after examination of the microscopic slides, that K.M.'s injuries had been inflicted at least three days prior to death (thus absolving Grove of having caused them) and that they would not have necessarily resulted in immediate loss of consciousness.

Id. at 490, 259 P.3d 636. The testimony at issue here is limited to two issues: first, the Neuropathological Diagnoses from Dr. Reichard's report, which was incorporated into the Autopsy Report. Second, witnesses who were offered as medical experts testified regarding their reliance on Dr. Reichard's brain autopsy report.

The Petitioner claims the introduction of the Autopsy Report and the testimony from witnesses regarding Dr. Reichard's report were violations of the Petitioner's right to confront witnesses. It is undisputed that defense counsel did not object to the admission of the Autopsy Report, nor did defense counsel object when medical experts testified regarding Dr. Reichard's findings from the brain autopsy. As noted above, every case that found a violation of the Confrontation Clause originated from testimony or reports

that were admitted over objection at trial.[19] Because there was no objection[20] to the report or the testimony in this case, there cannot be a Confrontation Clause violation. Further, as noted by the Court of Appeals, the decision to not object to the autopsy report may have been a tactical decision on the part of counsel. Counsel's choice of witnesses, manner of cross-examination, and lack of objections to testimony are considered tactical, or strategic, decisions. *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). The issue of ineffective assistance of counsel will be addressed in a different section within this opinion.

In the alternative, this Court notes the issue of whether an autopsy report is testimonial is a matter of first impression in Idaho. As such, this Court follows direction from *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007). Further, this Court finds the Petitioner's reliance on *U.S. v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), unpersuasive. Instead, the more recent analysis from *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) is applicable. The *Williams* case considered DNA analysis that was performed by an outside laboratory. In this case, Dr. Ross relied on the findings of Dr. Reichard when reaching his opinion that the cause of death was:

> The cause of death is cerebral edema and subdural hemorrhage due to blunt force impact to the head. The intra-abdominal contusions are the result of blunt force impacts to the abdomen. The manner of death is homicide.

Autopsy Report, at 3(State's Exhibit 11). It is also clear that Dr. Ross adopted a portion of Dr. Reichard's report when writing the Autopsy Report which was admitted at trial.

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[19] This issue was before the Idaho Court of Appeals in *State v. Grove*. The Court considered the fundamental error doctrine and concluded that Grove could not challenge the admission of the testimony for the first time on appeal. *Id.* at 493, 259 P.3d at 639.

[20] The admission of State's Exhibit 11 can be found in the trial transcript at pages 901-902. Defense counsel asked one question in aid of objection, but elected not to object after hearing Dr. Ross's answer to his question.

There is nothing in this record which establishes that Dr. Reichard's separate report was admitted into the record at trial. Thus, this Court must consider whether the admission of Dr. Ross's autopsy report was testimonial, and whether this admission was a violation of the Confrontation Clause. Based upon the objective primary purposes test as set forth in *Williams*, the report was not testimonial for purposes of the Confrontation Clause. Nothing in this record establishes the autopsy report was "made for the purpose of proving the guilt of a particular defendant at trial." *Williams,* 567 U.S. at ___, 132 S.Ct. at 2243. Instead, the report is akin to the DNA testing and reporting that was at issue in *Williams.* Here, while it is not disputed that an autopsy report may be used during the criminal prosecution of homicide simply based upon the determination of manner of death, nothing in the testimony establishes that Dr. Ross, or Dr. Reichard, were creating autopsy reports for the purposes targeting a specific defendant.

The *Williams* Court explained that a DNA profile may provide powerful incriminating evidence, but in the alternative, the report may also exonerate a suspect who has been charged or under investigation. *Id.* at ___, 132 S.Ct. at 2243-2244. An autopsy report is much the same. In the case at hand, there is no indication that Dr. Ross knew of a potential suspect of the crime. Further, nothing in the Autopsy Reports or Dr. Ross's testimony refers to a specific defendant, nor was the Autopsy Report created solely for an evidentiary purpose in aid of police investigation, as the drug analysis reports in *Melendez-Diaz* and *Bullcoming*.

There were two witnesses who referred to Dr. Reichard's report during testimony at trial: Dr. Ross and Dr. Harper. This testimony was not objected to at trial. However, based on this Court's analysis, any objection to the testimony would have been overruled.

Petitioner also asserts trial counsel was ineffective for failing to object when the doctors referred to Dr. Reichard's report. Because there was no violation of the confrontation clause, counsel's performance could not be deficient for failing to object, thus, it is not necessary for this Court to address the ineffective assistance of counsel claims as they relate to Dr. Reichard's report. The State's motion for summary disposition is granted on this issue. The Petitioner's motion for summary disposition is denied.

2. Whether Petitioner was denied a fair trial and due process of law by multiple instances of prosecutorial misconduct.

The Petitioner sets forth several instances during the trial that he contends the prosecutor engaged in misconduct that was a gross violation of the prosecutor's duty to ensure fairness in every stage of the trial. *Amended Petition*, at 12-18. These events include the following assertions: First, that the prosecuting attorney projected family photos of the victim on a screen when jurors were entering the courtroom; second, the prosecuting attorney committed misconduct by calling and questioning the victim's sister, a young child; third, the prosecuting attorney committed misconduct while cross-examining the defense's expert witness; and lastly, allegations of prosecutorial misconduct during the closing statements at trial.

It is undisputed that the claims above were not objected to at trial. Further, the issues were not raised in the appeal before the Idaho Court of Appeals. The Petitioner asserts that the issues could not have been raised on appeal, and thus, the Court should engage in a fundamental error analysis, or in the alternative, analysis under the cumulative error doctrine.

First, this Court notes that even though the assertions were not objected to during trial, the matter could have been presented on appeal, similar to the issues regarding the

Petitioner's right to confront witnesses, as addressed above. The proper forum for considering fundamental error or cumulative error was before the Court of Appeals. Because this issue was not raised on appeal, it may not be considered in post-conviction proceedings.

> The scope of post-conviction relief is limited. An application for post-conviction relief is not a substitute for an appeal. I.C. § 19-4901(b). "[A] claim or issue which was or could have been raised on appeal may not be considered in post-conviction proceedings." *Whitehawk v. State,* 116 Idaho 831, 832-33, 780 P.2d 153, 154-55 (Ct.App.1989) (citing I.C. § 19-4901(b)).
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> Rodgers' claim of prosecutorial misconduct based on statements concerning Cox's ability to assert the Fifth Amendment privilege could have been raised during the earlier litigation that also challenged the prosecutor's conduct. 119 Idaho at 1074, 812 P.2d at 1235. Since this issue could have been raised on appeal, it is not properly before this Court in an appeal of a post-conviction proceeding.

Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997). Therefore, the State's motion for summary disposition is granted as to this issue, and conversely, the Petitioner's motion for summary disposition is denied.

3. Whether Petitioner was denied due process and the right to a jury trial due to juror misconduct.

The Petitioner alleges he was denied his state and federal constitutional rights to due process when jurors repeatedly slept during the presentation of evidence at the criminal trial. The Petitioner has submitted affidavits from several individuals who attended the trial in the audience. These individuals aver that several jurors were sleeping, most notably during the testimony of Dr. Ross, Dr. Harper and Dr. Arden. There is evidence in the record that jurors were having some difficulty staying awake during the afternoon when Dr. Ross testified. A recess occurred in the afternoon, after the following statement by the prosecuting attorney: "Your Honor, if I might, it's getting

pretty warm in here, and I've recently noticed that the jurors might be in need of a break. They're having a hard time staying awake. This might be a good time." *Petitioner's Exhibit B, Trial Transcript*, at 983. After this statement, a break was taken, after which defense counsel stated he had finished cross-examination of Dr. Ross. *Petitioner's Exhibit B, Trial Transcript*, at 984.

The Idaho Court of Appeals has expressed disfavor of allegations of juror inattentiveness being raised days, weeks, or months after a verdict has been rendered in *State v. Bolen*, 143 Idaho 437, 146 P.3d 703 (Ct. App. 2006). In that case the defendant filed a motion for a new trial based upon juror misconduct. The *Bolen* Court emphasized that if jury misconduct is known to the defendant and no request for curative action is made, a post-verdict motion for a new trial will not lie.

> With respect to the instant issue, if jury misconduct occurs during trial and is unknown to the defendant and defense counsel until after a guilty verdict, relief may lie pursuant to a motion for a new trial. In contrast, if the jury misconduct is known to the defendant or to defense counsel and no timely request is made of the trial court to ameliorate the same or take other curative action, a post-verdict motion for a new trial on that basis will not lie. In essence, the rule is a corollary of the contemporaneous objection rule as to evidence. *See* Idaho Rule of Evidence 103(a)(1). As the United States Supreme Court has noted, "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks or months after the verdict, seriously disrupt the finality of the process." *Tanner v. United States,* 483 U.S. 107, 120, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90, 106 (1987).
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> With regard to the instant circumstance of inattentive or sleeping jurors, the great weight of authority from other jurisdictions is in accord with the reasoning of *Baker* and *Fox* in that if the defendant or his counsel know that a juror is sleeping or otherwise inattentive and the matter is not brought to the attention of the trial court, post-verdict relief will not be granted pursuant to a motion for a new trial or mistrial. *See United States v. Rivera,* 295 F.3d 461, 470–71 (5th Cir.2002); *United States v. Krohn,* 560 F.2d 293, 297 (7th Cir.1977); *Whiting v. State,* 516 N.E.2d 1067, 1067–68 (Ind.1987); *Randleman v. State,* 552 P.2d 90, 93–94 (Okla.Crim.App.1976); *see generally* cases collected in George L. Blum,

> Annotation, *Inattention of Juror from Sleepiness or Other Cause as Ground for Reversal or New Trial,* § 5 Necessity of Preserving Claim of Error for Review, 59 ALR 5th 1, 58 (1998).

Id. at 440, 146 P.3d at 707. The *Bolen* Court determined that the trial court did not err in denying Bolen's motion for a new trial where it was evident that the defendant was aware of the alleged jury misconduct during the trial. *Id.* at 441, 146 P.3d at 708.

In the case at hand, there is evidence in the record that defense counsel was aware that jurors may be sleeping. First, the record reflects that the Court allowed for a recess based upon the request by the prosecutor that he was concerned jurors were having difficulty staying awake. *Petitioner's Exhibit B, Trial Transcript*, at 983.[21] Second, in his deposition, defense counsel states he was informed by his paralegal during the cross-examination of Dr. Ross that a juror was sleeping. *Deposition of Scott Chapman,* at 66-68. Defense counsel indicated he believed that a recess was taken at this time. *Id.*

As stated above, the scope of post-conviction relief is limited. Similar to the matter regarding prosecutorial misconduct, this issue could have been raised in the direct appeal of the criminal trial. The Petitioner has submitted the affidavit of appellate counsel, which states that this issue could not have been raised on direct appeal because trial counsel did not draw the misconduct to the Court's attention. *Affidavit of Diane Walker*, at 2. Nevertheless, there is some information in the record that jurors may have been having difficulty staying awake. Thus, because the matter should have been addressed on appeal, this Court will not address this issue at this juncture. *See Whitehawk v. State,* 116 Idaho 831, 832-33, 780 P.2d 153, 154-55 (Ct.App.1989) (citing I.C. § 19-4901(b)).

[21] On page 921, the Court interrupts the prosecuting attorney in order to consult with counsel whether it would be appropriate to recess early for lunch. The record indicates the trial recessed at 11:30 a.m. during Dr. Ross's direct examination.

The Petitioner has raised a question of material fact on the issue of whether counsel was ineffective for failing to bring to the Court's attention that jurors may be sleeping. Therefore, an evidentiary hearing will be held on the limited issue of ineffective assistance of counsel.

4. Whether Petitioner was denied effective assistance of counsel on appeal.

The Petitioner asserts that appellate counsel was ineffective for failing to raise two issues on direct appeal, whether appellate counsel was ineffective for failing to raise issues on appeal regarding prosecutorial misconduct or juror misconduct. Ineffective assistance of counsel claims, for trial counsel or appellate counsel, are judged under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984).

> An accused has a constitutional right to assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963). The right to counsel necessarily includes the right to effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763, 773, n. 14 (1970); *Matthews v. State,* 122 Idaho 801, 806, 839 P.2d 1215, 1220 (1992). The right to effective assistance of counsel extends to the defendant's first appeal as a matter of right. *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821, 829 (1985).
>
> To prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must show that the attorney's performance was deficient and, in most cases, must also show that prejudice resulted from the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Berg v. State,* 131 Idaho 517, 520, 960 P.2d 738, 741 (1998); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). Deficient performance is established if the applicant shows that the attorney's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Russell,* 118 Idaho at 67, 794 P.2d at 656. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance

> the outcome of the criminal case would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Russell,* 118 Idaho at 67, 794 P.2d at 656.

Mintun v. State, 144 Idaho 656, 658-659, 168 P.3d 40, 42-43 (Ct. App. 2007). The Petitioner is claiming appellate counsel was ineffective for failing to raise issues on appeal which were not objected to at trial. Appellate counsel avers that the issues could not be raised on appeal because the trial record was not sufficient, and the issues could not be raised under the fundamental error doctrine under *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009). *Affidavit of Diane Walker; Affidavit of Eric Fredericksen.* A similar matter was addressed in *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007).

> First, Idaho case law establishes no bright line delineating categories of errors that will be deemed fundamental, and thus subject to appellate review without objection below. Therefore, a rule deeming appellate counsel ineffective for failing to raise an issue of fundamental error would force appellate attorneys to raise on appeal nearly all possible errors, whether preserved by objection in the trial court or not, to avoid the risk of being declared ineffective. This would be a misuse of the resources of appellate defense counsel, the Idaho Attorney General's Office, and the Idaho appellate courts. Such a rule would also place on our trial and appellate courts in post-conviction proceedings the difficult task of determining, on a case-by-case basis, whether a particular error was actually "fundamental" and whether the record on direct appeal was sufficient to review the claim at that time.
>
> Second, it is often not to a criminal defendant's advantage to raise an issue of fundamental error on direct appeal because the record in the criminal proceeding may not be adequately developed for a full presentation of the defendant's claim. For example, Idaho's appellate courts have held that the State's violation of a plea agreement is fundamental error that may be reviewed in the absence of objection in the trial court, *State v. Jafek,* 141 Idaho 71, 74, 106 P.3d 397, 400 (2005); *State v. Rutherford,* 107 Idaho 910, 915–16, 693 P.2d 1112, 1117–18 (Ct.App.1985), but this Court has also declined to address such claims where the record on appeal is not complete enough to allow appellate examination of all the factors that must be considered on such a claim.

> *State v. Kellis,* 129 Idaho 730, 733–34, 932 P.2d 358, 361–62 (Ct.App.1997). In the latter circumstance, we have left the issue for presentation in a post-conviction proceeding, where an adequate record could be developed. We have also observed that if the appellate court were to consider, as fundamental error, the merits of a claim that cannot be adequately supported by the bare record in the criminal proceedings, it would require that we rule against the appealing defendant, and that ruling would be *res judicata,* precluding the defendant from later pursuing the issue in a post-conviction action where adequate evidence to support the claim might be presented. *See generally State v. Mitchell,* 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct.App.1993). *See also* I.C. § 19–4901(b) (precluding assertion in a post-conviction action of any issue that was or could have been raised on direct appeal).
>
> Third, a trial attorney's failure to object to inadmissible evidence or other potential errors may be done for legitimate strategic or tactical purposes. *See, e.g., Pratt v. State,* 134 Idaho 581, 584 n. 1, 6 P.3d 831, 834 n. 1 (2000). The record on direct appeal would rarely disclose this practical strategy, and it would be incorrect to grant relief to a defendant in such a circumstance.
>
> Finally, the allowance of this type of claim for ineffective assistance of appellate counsel is ordinarily not necessary to protect a defendant's rights because the defendant can bring the same claim of impropriety in the trial proceedings as a claim of ineffective assistance of his *trial counsel* for failing to object to the alleged error in the trial court.
>
> For all of the foregoing reasons, a rule allowing a post-conviction claim of ineffective assistance of appellate counsel for failing to raise an issue of fundamental error would be impractical, inefficient, and often disadvantageous to defendants whose interest would be better served by presenting such a claim in a post-conviction action asserting ineffective assistance of trial counsel.

Id. at 662, 168 P.3d at 40. For the same reasons as asserted in *Mintun*, these claims would be best addressed in this post-conviction proceeding as ineffective assistance of trial counsel claims. Therefore, the Petitioner's motion for summary disposition is denied on this claim. The State's motion for summary disposition is granted.

5. Whether Petitioner was denied effective assistance of counsel at trial.

As stated above, ineffective assistance of counsel claims are judged under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984).

> To prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must show that the attorney's performance was deficient and, in most cases, must also show that prejudice resulted from the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Berg v. State,* 131 Idaho 517, 520, 960 P.2d 738, 741 (1998); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). Deficient performance is established if the applicant shows that the attorney's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Russell,* 118 Idaho at 67, 794 P.2d at 656. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance the outcome of the criminal case would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Russell,* 118 Idaho at 67, 794 P.2d at 656.

Mintun v. State, 144 Idaho 656, 658-659, 168 P.3d 40, 42-43 (Ct. App. 2007).

The Petitioner sets forth several claims that trial counsel was ineffective. The Petitioner has raised issues of material fact regarding whether trial counsel was ineffective, thus, an evidentiary hearing will be held on this matter, limited to the issues set forth below.

a. Issues which are summarily dismissed

The State's motion for summary dismissal is granted with respect to the issues set forth below. For each of these issues, the Petitioner has failed to set forth material facts which establish that trial counsel's performance was deficient, or that the deficiency prejudiced the defendant at trial.

i. Whether counsel's performance was deficient for failing to object when expert witnesses referred to Dr. Reichard's report

This issue was addressed at length in the foregoing analysis. Because this Court has determined that the expert's reliance and testimony regarding Dr. Reichard's report was not in violation of the Confrontation Clause, trial counsel could not have been deficient in his performance for failing to object to this testimony. Therefore, the State's motion for summary dismissal is granted as to these claims of ineffective assistance of counsel.

ii. Whether counsel's performance was deficient during voir dire

The Petitioner claims counsel was deficient during voir dire for failing to move for a mistrial when a potential juror stated he worked in the funeral business and knew Officers Greene and Petrie well. *See Exhibit B, Trial Transcript,* at 155-156. In addition, the Petitioner claims counsel was ineffective for failing to challenge for cause or peremptorily challenge Juror #5 who revealed he worked at St. Joseph's Hospital and knew State's witnesses who also worked there. *See Exhibit B, Trial Transcript*, at 144.

The Petitioner relies on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) in support of his argument. In *Mach*, during voir dire a potential jury member stated she was a social worker who had been involved in cases where children had accused an adult of sexual assault. The jury stated that in her experience children who testified in these cases had never been known to lie about sexual abuse. 137 F.3d at 633. In this case, the reviewing Court assumed that at least one juror may have been tainted as a result of the statements.

> The Sixth Amendment right to jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." *United States v. Eubanks,* 591 F.2d 513, 517 (9th Cir.1979); *see also United States v. Allsup,* 566 F.2d 68, 71 (9th Cir.1977). Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 945-46, 71 L.Ed.2d 78 (1982).
>
> At a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by Bodkin's expert-like statements. Given the nature of Bodkin's statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury.

Id. The case at hand is distinguishable from *Mach.* First, although the potential juror was a professional, his professional capacity as a funeral director did not rise to the same level as a social worker who works with children in a child sexual abuse case. Further, the Petitioner has not established a material issue of fact that if counsel was deficient, prejudice resulted from the deficiency, as required by *Strickland.*

> A claim for post-conviction relief will be subject to summary dismissal if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims upon which the petitioner bears the burden of proof. *DeRushé v. State,* 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief.

Hoffman v. State, 153 Idaho 898, 902, 277 P.3d 1050, 1054 (Ct. App. 2012). Thus, this issue will not be considered at the evidentiary hearing. The State's motion for summary dismissal is granted on this issue.

iii. Whether counsel's performance was deficient because he failed to make a hearsay objection to the Nash testimony.

The Petitioner asserts that counsel was deficient for failing to offer a hearsay objection when the victim's mother testified she was told [redacted] had blood in his brain that could not be removed. The victim's mother was testifying regarding the events that occurred at Sacred Heart Hospital after her son had been transferred there. *Exhibit B, Trial Transcript*, at 754-756. Ms. Nash was not testifying as to the truth of the matter asserted, but rather explaining her understanding of the events of the day. Thus, the Petitioner has failed to establish that a hearsay objection would have been sustained. Further, the Petitioner has not established a material issue of fact that if counsel was deficient, prejudice resulted from the deficiency, as required by *Strickland*. Thus, this issue will not be considered at the evidentiary hearing. The State's motion for summary disposition is granted as to this issue.

iv. Whether counsel's performance was deficient for failing to make a foundation or relevancy objection to the Stocking testimony

The Petitioner asserts counsel was deficient for failing to object to the testimony from paramedic Steve Stocking regarding the Petitioner's demeanor when the paramedics arrived in response to the 911 call. *See Exhibit B, Trial Transcript,* at 838-839. The paramedic stated that he felt the Petitioner was too calm, because parents are usually excitable when their child is very sick. The Petitioner relies on *Bloching v. Albertson's Inc.*, 129 Idaho 844, 846, 934 P.2d 17,19 (1997), wherein the Court found the plaintiff could not testify to the medical opinion that seizures he had were a result of the pharmacist providing a different type of insulin than he was prescribed. The Court held a lay witness was not competent to testify to such an opinion. *Bloching* is distinguishable

from the case at hand where the testimony was about the witness's perception of the Petitioner's demeanor.

In *State v. Missamore*, 119 Idaho 27, 32, 803 P.2d 528, 533 (1990), the Court held that a dialogue between the prosecutor and a victim was prejudicial where the victim repeatedly stated the defendant was harassing.

> Generally, a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, as long as two conditions are met. First, the witness's opinion must be based on his or her perception; and second, the opinion must be helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. I.R.E. 701; *accord State v. Rosencrantz,* 110 Idaho 124, 714 P.2d 93 (Ct.App.1986). The admissibility of such testimony turns upon its underlying factual basis, not the fact that it is in the format of an opinion. *See* Report of the Idaho State Bar Evidence Committee, comments to I.R.E. 701 at 4 (1983 and 1985 Supp.).

Id. In the case at hand, the paramedic's statement was based on his perception of the scene of the call, and also was helpful to a clear understanding of the witness's testimony. The Petitioner has not raised an issue of material fact that counsel was deficient for failing to object to this statement. Further, the Petitioner has not established a material issue of fact that if counsel was deficient, prejudice resulted from the deficiency, as required by *Strickland.* Thus, this issue will not be considered at the evidentiary hearing. The State's motion for summary disposition is granted as to this issue.

v. Whether counsel's performance was deficient during the testimony of Detective Birdsell

The Petitioner asserts counsel rendered deficient performance in failing to object to the admission of photographs of Nash's home, taken a month after Kyler's death, which included a view of sympathy cards sent to the family. *See Exhibit B, Trial Transcript*, at 996-1007; *Exhibit C, State's Exhibits 4,5, and 6.* Detective Birdsell

provided a diagram of Nash's home, and described the location where the paramedics found the victim. Detective Birdsell also discussed the height of the kitchen counter and whether the floor indicated a fall had happened.

The pictures in question portray the furniture in the room, and a collection of cards is visible upon the entertainment center located in the living room. However, the Petitioner fails to establish how sympathy cards sent to Nash were inflammatory or unduly prejudicial to the Petitioner. A review of the testimony establishes that sympathy cards were never mentioned. The Petitioner has not raised an issue of material fact that counsel was deficient for failing to object to the pictures. Further, the Petitioner has not established a material issue of fact that if counsel was deficient, prejudice resulted from the deficiency, as required by *Strickland.* Thus, this issue will not be considered at the evidentiary hearing. The State's motion for summary disposition is granted as to this issue.

vi. Whether counsel was deficient for failing to introduce photographs of [redacted] taken at St. Joseph's hospital soon after he arrived by ambulance

Photographs of the victim were taken after the paramedics took him to St. Joseph's Regional Medical Center. The Petitioner alleges counsel was deficient for failing to have these photographs introduced. Petitioner's argument centers on the idea that the photos show no redness or bruising, and thus, are inconsistent with the State's theory that the Petitioner had just brutally beaten the victim. State's Exhibit 12 provided a full view of Kyler's body before the autopsy. This photo is also void of any evidence of redness or bruising. *See Petitioner's Exhibit C, Trial Exhibit 12.* Further, Dr. Ross testified regarding the presence or absence of bruising on the child during the autopsy.

With respect to Exhibit 12, Dr. Ross explained that most of the discoloration found on the child's body was due to Betadine or iodine based solution to sterilize the body surface prior to surgery. *Exhibit B, Trial Transcript,* at 904. A review of the record establishes that at no time was there significant redness or bruising visible on the victim's body. Thus, the Petitioner has failed to establish a material question that the Petitioner was prejudiced by counsel's failure to present the photos taken at St. Joseph's. Further, the Petitioner fails to establish he was prejudiced by this decision of counsel.

vii. Whether counsel was deficient for failing to question paramedic David Chenault regarding Lisa's reaction to Kyler's injury

The Petitioner claims counsel was deficient for failing to call paramedic David Chenault as a witness in this case. During the grand jury proceedings, Chenault testified that the victim's mothers reaction to Kyler's injuries during the 911 call were the "most bizarre reaction we've ever seen especially for a kid call." The Petitioner asserts Chenault should have been called to testify in order to rebut Paramedic Stocking's testimony. In his deposition, trial counsel avers that his theory of the case was that "the injuries that occurred to [redacted] were inflicted at a time when Stace was not around or with the child in any fashion that it could have happened." The testimony that Petitioner claims Chenault would have testified about does not further the theory of the case as stated by trial counsel.

The Petitioner has established that this decision by counsel was a strategic decision. "[T]actical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation." *Howard v. State*, 126 Idaho

231, 233, 880 P.2d 261, 263, *citing Davis v. State,* 116 Idaho 401; 406, 775 P.2d 1243, 1248 (Ct.App.1989). Because this was a tactical decision, summary dismissal is appropriate on this issue.

b. Issues to be addressed at the evidentiary hearing

The Petitioner has raised issues of material fact on the following claims, and thus, an evidentiary hearing will be held for the presentation of facts on these limited issues:

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

The Petitioner asserts counsel's performance was deficient during the direct and cross-examination of the Petitioner during the criminal trial. Specifically, the Petitioner claims counsel was deficient because he introduced evidence regarding the Petitioner's relationship with his son, Alex, and then failed to object when the prosecuting attorney asked whether the Petitioner was behind on child support payments. Finally, the Petitioner asserts defense counsel was deficient for failing to object when the prosecutor questioned the Petitioner regarding an Ativan prescription. The Petitioner will be allowed to address these claims in an evidentiary hearing.

ii. Whether counsel was deficient during the direct and cross-examination of Dr. Arden

The Petitioner has presented a question of material fact regarding whether counsel rendered deficient performance in the presentation of the expert testimony of Dr. Arden. The Petitioner asserts that Dr. Arden was not supplied with all existing microscopic slides for examination prior to trial. Further, the Petitioner asserts counsel was deficient for failing to object when the Prosecutor elicited testimony for purposes of impeaching Dr. Arden. The Petitioner will be allowed to address these claims at the evidentiary hearing.

iii. Whether counsel was deficient for failing to move for a mistrial because jurors may have been sleeping during the presentation of testimony

As addressed above, Petitioner has raised a material issue of fact regarding whether defense counsel was deficient for failing to bring to the Court's attention that jurors may be sleeping. Therefore, this issue may be addressed at the evidentiary hearing.

iv. Whether defense counsel's performance during closing argument was deficient

Lastly, the Petitioner asserts that counsel's performance was deficient during closing statements because he failed to object to multiple instances of misconduct by the prosecuting attorney. Further, defense counsel failed to move for a mistrial or curative instruction following the prosecutor's closing and rebuttal arguments. The Petitioner has raised a question of material fact on this issue, and therefore, will be allowed to address this claim at the evidentiary hearing.

CONCLUSION

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. The Petitioner's motion for summary disposition is denied.

ORDER

The Petitioner's Motion for Summary Disposition is hereby DENIED.

The State's Motion for Summary Disposition is hereby DENIED in part, and GRANTED in part, based upon the foregoing opinion.

IT IS SO ORDERED.

DATED this 11th day of July, 2013.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON MOTION FOR SUMMARY DISPOSITION was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 11th day of July, 2013, to:

Dennis Benjamin
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Boise ID 83701

Nance Ceccarelli
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PATTY O. WEEKS, Clerk

By _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **MOTION FOR RECONSIDERATION**

Petitioner, Stacey Grove, asks this Court, pursuant to I.C.R. 11(a)(2)(B), to reconsider its order granting in part the Respondent's Motion for Summary Disposition. A memorandum of law in support of this motion is filed contemporaneously herewith.

Dated this 9th day of August, 2013.

Deborah Whipple Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on August 7, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Nance Ceccarelli
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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV-12-01798

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

Stacey Grove submits the following in support of his motion for reconsideration of the Court's order granting in part the Respondent's Motion for Summary Disposition. Reconsideration should be granted because the Court's Confrontation Clause analysis is in error. Moreover, there is a similar case now pending before the United States Supreme Court, and this Court should not dismiss Mr. Grove's claim prior to decision in that case. Further, the Prosecutorial and Jury Misconduct claims could not have been raised on appeal and should not have been dismissed on that basis here. In the alternative, if the issues could have been raised on

appeal, it was ineffective assistance for appellate counsel to fail to do so and so the claims should be heard in an evidentiary hearing as elements of the ineffective assistance of appellate counsel claim. Finally, many of the ineffective assistance of trial counsel claims have been dismissed without mention or discussion by the Court.

II. WHY RECONSIDERATION SHOULD BE GRANTED

A. *The Court Should not Have Dismissed the Confrontation Clause Claim*

The Court should reconsider its conclusion that the admission into evidence of the portion of the autopsy report which contained Dr. Reichard's findings and the testimony about those findings did not violate Mr. Grove's Sixth Amendment right to confront witnesses. The Court has two bases for its ruling: 1) that the evidence was not objected to by defense counsel, and 2) the evidence was not "testimonial." See, Opinion and Order on Motions for Summary Disposition ("Opinion") pg. 22. First, the Court dismissed this claim on a theory not advanced by the moving party. Second, a constitutional violation may be raised for the first time in a post-conviction petition, even when there was an opportunity to object at trial. Third, the Court's confrontation clause analysis is incorrect, especially as to the ineffective assistance of counsel claim. Fourth, the evidence was inadmissible under the Idaho Rules of Evidence. And, lastly, a claim similar to Mr. Grove's is currently pending before the United States Supreme Court in a petition for a writ of certiorari, and this Court may wish to defer any ruling dismissing Mr. Grove's claim until after the petition is decided.

1. <u>The Court dismissed without prior notice on a basis not raised by the state</u>

First, Mr. Grove objects to the Court dismissing this claim on a ground which was not argued by the state in its motion. The state first argued that the evidence was admissible under

I.R.E. 702 and 703 and thus there was no confrontation clause violation. See Respondent's Answer and Amended Answer for Summary Disposition and Dismissal ("State's Brief"), pg. 3-4. It later argued that trial counsel's failure to object was part of a legitimate trial strategy. Respondent's Reply Brief in Support of State's Motion for Summary Disposition and Response to Petitioner's Brief in Support of Petitioner's Motion for Summary Disposition ("State's Reply Brief"), pg. 4. It never argued that Dr. Reichard's report was not "testimonial" evidence for purposes of the Sixth Amendment.

The Court summarily dismissing on grounds not raised by the state violated Mr. Grove's constitutional right to due process and his statutory right to twenty days notice of the grounds for a *sua sponte* dismissal. In *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (1982), instead of accepting the State's sole argument that the petition was untimely, the court relied on different grounds and dismissed Gibbs's petition "*upon its own initiative.*" *Id.* (emphasis in original). On appeal, the Court of Appeals found that the district court improperly dismissed because it did not give the 20-days notice required by I.C. § 19-4906(b).[1] The Supreme Court later endorsed the holding in *Gibbs*, writing that "[w]here the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice." *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995).

Reconsideration should be granted on this basis alone. In addition, both of the Court's bases for dismissing the Confrontation Clause claim are in error.

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[1] When a court is satisfied . . . that the applicant is not entitled to post-conviction relief . . . it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal."

2. This claim may be raised in post-conviction

This Court finds that "because there was no objection to the report or the testimony in this case, there cannot be a Confrontation Clause violation." Opinion, pg. 22. However, this conclusion is foreclosed by the text of the post-conviction statute, which does not require a contemporaneous objection before an issue may be raised. Idaho Code § 19-4901(a) states that "[a]ny person who has been convicted of, or sentenced for, a crime, and who claims . . . that the conviction or the sentence was in violation of the constitution of the United States . . . may institute, without paying a filing fee, a proceeding under this act to secure relief." No contemporaneous objection is required under the statute.

In addition to the absence of textual support for the ruling, there is no support for the Court's position in the structure of the post-conviction act. To the contrary, to require a contemporaneous objection to a constitutional violation before the issue could be raised in post-conviction would be diametrically opposed to the provision, found in the very next section of the statute, that "[a]ny issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction." I.C. §19-4901(b). Statutes dealing with the same subject matter must be read *in para materia* in order to determine what the legislature intended. *Union Pacific R. Co. v. Board of Tax Appeals*, 103 Idaho 808, 654 P.2d 901 (1982) ("Statutes which are *in pari materia* are to be construed together to the end that legislative intent will be effected"); *Magnuson v. Idaho State Tax Commission*, 97 Idaho 917, 556 P.2d 1197 (1976) ("[A]ll sections of the applicable statutes should be considered and construed together to determine the intent of the legislature").

Reading subsection (a) of § 19-4901 to require an objection in order to raise an issue in post-conviction while reading subsection (b) to bar the raising of that same issue because, with an objection, the issue could have been raised on appeal is inconsistent with the legislative purpose of the post-conviction which is to "comprehend[] and take[] the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence." I.C. § 19-4901(b). It would, in effect, suspend the writ of habeas corpus in a large number of cases, in violation of Article I, § 5. ("The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it[.]") This would be contrary to the purpose of the post-conviction act, which has been construed by the Supreme Court "as an expansion of the writ." *Dionne v. State*, 93 Idaho 235, 459 P.2d 1017 (1969).

Finally, there is no support in the case law for such a restriction on the scope of the post-conviction act. To the contrary, the Court of Appeals has held that unobjected-to error should not be raised on direct appeal, but should be raised in post-conviction. For example, in *Mintun v. State*, 144 Idaho 656, 661-62, 168 P.3d 40, 45-46 (Ct. App. 2007), the petitioner argued that his appellate counsel was ineffective for not raising a Confrontation Clause issue on direct appeal as a claim of fundamental error. The Court of Appeals held that Mintun's appellate counsel could not be deemed ineffective for failing to raise a claim of fundamental error on an issue that was not preserved by objection in the trial court. One of the reasons given for the holding was that "it is often not to a criminal defendant's advantage to raise an issue of fundamental error on direct appeal because the record in the criminal proceeding may not be adequately developed for a full presentation of the defendant's claim." In addition, the Court of Appeals noted that claims

could be raised more effectively in post-conviction because a more complete record could be developed, especially about why no objection had been made. *Id.* (As will be seen below, there is additional evidence presented in post-conviction, which was not presented at the criminal trial, which demonstrates that Dr. Reichard's report and the testimony describing its contents was testimonial. The deposition of defense counsel also shows there was no strategic reason for failing object to the evidence.) Thus, it is clear that unobjected-to violations of a constitutional right may be raised in post-conviction proceedings.

Examples of such cases are common. Claims of ineffective assistance of counsel raised for the first time in post-conviction proceedings are too common to require citation to authority, but other unobjected-to constitutional errors have been raised too. These include:

> • **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).
>
> • **Violation of the right to testify:** *Rossignol v. State*, 152 Idaho 700, 706, 274 P.3d 1, 7 (Ct. App. 2012), *review denied* (Apr. 25, 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.")

• **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.'").

• **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, it is clear there is no case law bar to Mr. Grove rasing the confrontation issue in post-conviction. To forbid him to do so, after trying to raise it on appeal and being rebuffed by the Court of Appeals, would put Mr. Grove in a constitutional Catch-22 where he has no forum to raise his claim. This situation would deprive Mr. Grove of his state consitutional right to access to the courts under Article 1, § 18. The Court should reconsider its holding and permit the claim to proceed on its merits.

Insofar as the Court was literally holding that the Confrontation Clause cannot be violated in the absence of an objection by the defense, the Court is incorrect. *See, Michigan v. Bryant,* ___ U.S. ___, 131 S.Ct. 1143, 1150-51 (2011), citing *People v. Bryant,* No. 247039, 2004 WL 1882551 (Aug. 24, 2004) *(per curiam),* which specifically notes that Bryant was raising the Confrontation Clause claim for the first time on appeal. At no point did the U.S. Supreme Court state in *Bryant* that the failure to object at trial foreclosed a Confrontation Clause violation. *See also, People v. Leach,* 980 N.E.2d 570, 580-81 (2012), cited by this Court at pages 16-20 of its Opinion. *Leach* specifically notes that the question of whether admission of the autopsy report violated the Confrontation Clause was being reviewed for plain error because no objection was made below. The Court reached the Confrontation Clause issue because, "the issue implicates a

fundamental constitutional right and is in need of resolution by this court." 980 N.E.2d at 581, citation omitted. And, in Mr. Grove's case itself, the Court of Appeals did not decline to review the Confrontation Clause issue on direct appeal because the lack of an objection at trial precluded the existence of a constitutional violation but rather because the record available to the appellate court could not establish that counsel's failure to object was not a tactical decision. *State v. Grove,* 151 Idaho 483, 492-93, 259 P.3d 629, 638-39 (Ct. App. 2011).

Further, it is of note that the right of an accused to confront the witnesses against him or her is a fundamental right made obligatory on the states through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 1068 (1965). There is a presumption against the waiver of constitutional rights. *Brookhart v. Janis,* 384 U.S. 1, 4, 86 S.Ct. 1245, 1247 (1966). Nonetheless, the right of confrontation may be waived. *Brookhart,* 384 U.S. at 4, 86 S.Ct. at 1246-47, 16 L.Ed.2d at 317; *Diaz v. United States,* 223 U.S. 442, 452, 32 S.Ct. 250, 252-53, 56 L.Ed. 500, 504 (1912). In order for a waiver to be effective, "it must be clearly established that there was an 'intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart,* 384 U.S. at 4, 86 S.Ct. at 1247, 16 L.Ed. at 317, quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461, 1466 (1938). In this case, defense counsel did not make an intentional relinquishment of Mr. Grove's constitutional right to confrontation as evidenced by his email to the State Appellate Public Defender that he had not discussed Mr. Grove's confrontation rights. Exhibit to Chapman deposition.

3. The contents of Dr. Reichard's report were inadmissible under the Confrontation Clause

a. *Justice Alito's plurality opinion in Williams has no precedential value*

The Court finds the analysis in *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221 (2012), to be applicable. Opinion, pg. 22. That conclusion is incorrect because, while there were five Justices finding no confrontation clause violation, there was no majority rationale. Justice Thomas concurred in the result on a completely different rationale than the affirming plurality. Justice Alito, writing for the affirming plurality, set forth two rationales for the plurality result: 1) the DNA match evidence was not offered for the truth of the matter asserted, and 2) the DNA report did not have the "primary purpose of accusing a targeted individual of engaging in criminal conduct." *Williams*, 132 S.Ct. 2235-42 (plurality).

According to the Harvard Law Review, "In failing to issue a majority opinion, the Supreme Court [in *Williams*] deeply muddled Confrontation Clause doctrine." Further, "The Court's failure to issue a majority opinion is *Williams's* principal fault, leaving doctrinal confusion in the wake of its 4-1-4 vote." Leading Cases, Sixth Amendment – Confrontation Clause – Forensic Evidence: *Williams v. Illinois*, 126 Harvard Law Review 266, 272 (2012). The Ohio State University law professor Douglas Berman, less formally, but perhaps more to the point, wrote his reading of *Williams* led him "to this simple conclusion: 'What a bloody mess.'" Berman, D., "Williams v. Illinois, the latest SCOTUS Confrontation Clause ruling, finally handed down by deeply divided Court," Sentencing Law and Policy, www.sentencing.typepad.com (June 18, 2013) (last visited 8/1/2013).

In the absence of clear doctrinal guidance from the United States Court, this Court should look to the pre-*Williams* cases for guidance, as *Williams* is limited to precise facts before it due to a lack of a majority rationale. It is important to note that neither *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705 (2011), nor *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009), were overruled by *Williams* and are still controlling law; likewise *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), and *Davis v. Washington*, 547 U.S. 813, 125 S.Ct. 2266 (2006), were not overruled and remain controlling. Thus, the law continues to be that statements are testimonial if they were made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"—in other words, for the purpose of providing evidence. *Davis*, 547 U.S., at 822. Applying these controlling cases requires a finding that the Confrontation Clause was violated. See, Petitioner's Brief in Response to State's Motion for Summary Disposition and in Support of Petitioner's Motion pg. 3-14, and Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Disposition, pg. 2-8.

Nevertheless, even if the Court attempts to apply *Williams* to this case, the conclusion is the same: the evidence was not admissible. As this Court does not rely upon the first rationale of the *Williams* plurality[2], this memorandum will focus upon Justice Alito's second rationale.

b. The primary purpose of Dr. Reichard's report

(i) "primary purpose" according to Justice Alito

Even if there was a majority in support of Justice Alito's "primary purpose" test as applied in *Williams*, application of the test supports the exclusion of Dr. Reichard's evidence.

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[2] A majority of the Court rejects Justice Alito's first rationale and it therefore has no precedential value. Justice Thomas, *id.*, at 2258, and the four dissenters, *id.*, at 2268.

According to Justice Alito's plurality opinion, evidence which falls within his "primary purpose" is testimonial evidence under the Sixth Amendment. As explained by the District of Columbia Court of Appeals:

> If the four-Justice plurality would deem a statement testimonial under the targeted accusation test, the four dissenting Justices surely would deem it testimonial under the broader evidentiary purpose test. Similarly, if Justice Thomas would deem a statement testimonial employing his formality criterion along with the evidentiary purpose test, the four dissenting Justices necessarily would deem it testimonial using the evidentiary purpose test alone. It therefore is logically coherent and faithful to the Justices' expressed views to understand *Williams* as establishing—at a minimum—a sufficient, if not a necessary, criterion: a statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas's formality criterion. Otherwise put, if *Williams* does have precedential value as the government contends, an out-of-court statement is testimonial under that precedent if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.

Young v. United States, 63 A.3d 1033, 1043-44 (D.C. 2013).

The plurality explained that "if a statement is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Williams v. Illinois*, 132 S. Ct., at 2242-44, *quoting Hammon v. Indiana*, 547 U.S. 813, 829–832 (2006). Here, Dr. Reichard was engaged by Dr. Ross for the very purpose of creating an out-of-court substitute for trial testimony. Further, the state knew that Dr. Ross would rely upon the findings of Dr. Reichard as a basis for his own conclusion. This is shown by the email correspondence between Dr. Ross and Dr. Reichard which conclusively demonstrates that the primary purpose of Dr. Reichard's consultation was to develop evidence for use in a criminal case where expert testimony might be

required. See Exhibit A to the Second Affidavit of Dennis Benjamin, filed on April 12, 2013 ("Second Benjamin Affidavit").

When a Court looks for an out-of-court statement's "primary purpose," it looks "for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." *Williams*, 132 S. Ct., at 2242-44. The primary purpose of the Cellmark report in *Williams*, viewed objectively, was not to accuse the defendant or to create evidence for use at trial. In this case it was the opposite. The primary purpose of Dr. Reichard's consultation was to obtain a report from an expert who was available to provide expert testimony in homicide cases. Dr. Ross said in his email to Dr. Reichard:

> We usually obtain neuropathology consults in just about all of our infant and child homicides (or suspected homicides) and selected adult cases. The neuropathologist that we currently use . . . has expressed reluctance to do cases that have a significant potential to require his services as an expert witness in court.
>
> Obviously, those are usually the infant homicide cases. So we hope to find another neuropathologist who can help us out.
>
> I would appreciate finding out what you might be able to offer us, what your fee schedule is, and anticipated turnaround times. We are primarily interested in sending our brains from pediatric homicides and pediatric suspicious deaths[.]

Exhibit A to Second Affidavit of Dennis Benjamin.

Unlike *Williams*, where "[t]he technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both," Dr. Reichard knew that the brain he received in this case would be evidence in a homicide case. Also, unlike *Williams*, where the affirming plurality found it "significant that in many labs, numerous technicians work on each DNA profile," thus making a requirement that all of them

testify unworkable, in this case only Dr. Reichard worked on the brain. *Williams v. Illinois*, 132 S. Ct., at 2242-44. And, Dr. Reichard told Dr. Ross that he was willing and able to testify if needed. Exhibit A to Second Benjamin Affidavit.

The documents show that Dr. Reichard's report was "prepared for the primary purpose of accusing a targeted individual." This fact distinguishes Mr. Grove's case from *Williams v. Illinois*, where a rapist was unidentified, still at large and the report was prepared in order to identify and apprehend an unknown person out of millions of possible individuals. Here, Dr. Reichard's report was intended to confirm Dr. Ross's belief that a homicide had been committed by one of a very small number of possible homicide suspects, *e.g.*, Kyler's care givers. Further, unlike the case in *Williams,* "where no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database," Dr. Reichard would have known there was an extremely limited universe of possible suspects in this case and would have realized that the results of his examination would be incriminating.

The email correspondence shows that Dr. Reichard was contacted on August 3, 2006, three weeks after [redacted] Martin's death, by Dr. Ross in regards to conducting neuropathology consultations "in cases that have a significant potential to require his services as an expert witness in court." Attached as Exhibit B to the Second Benjamin Affidavit is a Spokane County Medical Examiner Chain-of-Evidence Form. That form shows that tissue was sent from the Spokane Medical Examiner to the New Mexico Office of Medical Investigations on August 14, 2006, and was received on August 15, 2006.

In short, the opinion of the affirming plurality in *Williams v. Illinois,* does not support the Court's conclusion. Since the "primary purpose" of Dr. Reichard's report was to develop expert testimony for use in a criminal trial against one of a very small number of possible homicide suspects, Mr. Grove being one, it would be considered to be "testimonial" under the plurality opinion. The email correspondence and the chain-of-custody documents demonstrate that Dr. Reichard was contracted to produce a report about [redacted] Martin which could be used in future criminal trial proceedings and that Dr. Reichard was aware that was the case. The "primary purpose," of Dr. Reichard's consultation and report was to develop evidence in a homicide case where there were a limited number of suspects. Thus Dr. Reichard's evidence was "testimonial," that term is understood by Justice Alito and the plurality, and Mr. Grove's right to confront witnesses was violated.

(ii) "primary purpose" according to Justices Thomas and Kagan

The documents also show that Dr. Reichard's findings and opinions expressed in his autopsy report fall within those "core testimonial statements" under *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004), because they are "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" and also because they are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted).

As noted by Justice Kagan,

> We have previously asked whether a statement was made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"—in other words, for the purpose of providing evidence. *Davis*, 547 U.S., at 822, 126

> S.Ct. 2266; *see also Bullcoming* [*v. New Mexico*], 564 U.S. [——], at ——, 131 S.Ct. [2705], at 2716–2717 [180 L.Ed.2d 610 (2011)]; [*Michigan v.*] *Bryant*, 562 U.S., [——] at ——, ——, 131 S.Ct. [1143], at 1157, 1165 [179 L.Ed.2d 93 (2011)]; *Melendez–Diaz* [*v. Massachusetts*], 557 U.S. [305], at 310–311, 129 S.Ct. 2527[, at 2532, 174 L.Ed.2d 314 (2009)]; *Crawford*, 541 U.S., at 51–52, 124 S.Ct. 1354.

Williams, 132 S.Ct., 2273–74 (Kagan, J., dissenting). Justice Thomas agrees with the primary purpose analysis, although he would also require the statement to be solemn or formal, akin to an affidavit. Justice Thomas notes, however, that:

> The original formulation of that test asked whether the primary purpose of an extrajudicial statement was to establish or prove past events potentially relevant to later criminal prosecution. I agree that, for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.

Id. at ——, 132 S.Ct. at 2261 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted). Thus, Justice Thomas agrees that the Supreme Court's prior precedent establishes the primary purpose test as described by Justice Kagan. And as the *Williams* plurality opinion did not and could not overrule that prior precedent, it still controls.

As there was a Sixth Amendment violation under Justice Alito's "primary purpose" test as well as under Justice Kagan's dissent, there is a majority of eight in *Williams* who would find Mr. Grove's Sixth Amendment right was violated.

c. Justice Thomas's definition of "testimonial"

Justice Thomas, concurring in the judgment in *Williams*, expressed a singular view of what evidence is testimonial. He wrote:

> In light of its text, I continue to think that the Confrontation Clause regulates only the use of statements bearing "indicia of solemnity." This test comports with history because solemnity marked the practices that the Confrontation Clause was

> designed to eliminate, namely, the *ex parte* examination of witnesses under the English bail and committal statutes passed during the reign of Queen Mary. Accordingly, I have concluded that the Confrontation Clause reaches "'formalized testimonial materials,'" such as depositions, affidavits, and prior testimony, or statements resulting from " 'formalized dialogue,' " such as custodial interrogation.

Williams v. Illinois, 132 S. Ct., 2259-60 (Thomas, J., concurring in the judgment) (internal citations omitted).

While Justice Thomas found the DNA report in *Williams* to not be testimonial, he would have found both Dr. Ross's and Dr. Reichard's autopsy reports to be covered by the Sixth Amendment. The reports were written by the doctor who did the examination, unlike the DNA report which was signed by two reviewers who did not purport to have conducted the testing. Therefore, the doctors' signatures attest to the accuracy of the findings, unlike the DNA report where the reviewers did not and could not certify the accuracy of the testing results. Further, the report here was made pursuant to Idaho law, which requires a written report of the result of any investigation into a suspected homicide. I.C. § 19-4301. Thus, Justice Thomas would find the evidence obtained from Dr. Reichard's report to be testimonial because it has sufficient indicia of solemnity.

In addition, the four dissenters would have found Dr. Reichard's report and the testimony about its contents to be testimonial. Thus, a close reading of Justice Thomas's concurring opinion shows there is a majority in favor of Mr. Grove's position here. Justice Thomas and the dissenters all agree the evidence here was testimonial.

d. The concurring opinion of Justice Breyer

In addition to the above, there is another five-person majority favoring Mr. Grove in *Williams*. The second majority consists of Justice Breyer and the four dissenters, who would all find that Mr. Grove's right to confront witnesses was violated, albeit on a different basis than Justice Thomas and the dissenters.

Justice Breyer concurred in the affirming plurality's opinion. He wrote, "I would set this case for reargument. In the absence of doing so, I adhere to the dissenting views set forth in *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, 564 U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). I also join the plurality's opinion." *Williams v. Illinois*, 132 S. Ct., at 2245 (Breyer, J., concurring). This is important because under the dissenting opinions in *Melendez-Diaz* and *Bullcoming v. New Mexico*, Dr. Reichard's statements would be considered to be testimonial. Adding Justice Breyer's vote to the four dissenting Justices in *Williams* and there is another five-vote majority for the exclusion of the evidence.

Justice Breyer joined Justice Kennedy's dissent in *Melendez-Diaz*, which states that the Confrontation Clause should be concerned with testimony from traditional witnesses. Justice Kennedy explains that:

> It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—"witnesses" being the word the Framers used in the Confrontation Clause.

> *Crawford* and *Davis* dealt with ordinary witnesses—women who had seen, and in two cases been the victim of, the crime in question. Those cases stand for the proposition that formal statements made by a conventional witness—one who has personal knowledge of some aspect of the defendant's guilt—may not be admitted without the witness appearing at trial to meet the accused face to face. But *Crawford* and *Davis* do not say—indeed, could not have said, because the facts were not before the Court—that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant's guilt. Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined. Indeed, as Justice THOMAS warned in his opinion in *Davis*, the Court's approach has become "disconnected from history and unnecessary to prevent abuse." 547 U.S., at 838, 126 S.Ct. 2266. The Court's reliance on the word "testimonial" is of little help, of course, for that word does not appear in the text of the Clause.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330-31 (Kennedy, J., dissenting). This concern was repeated by Justice Kennedy (again with Justice Breyer concurring) in *Bullcoming*, "This Court's missteps have produced an interpretation of the word 'witness' at odds with its meaning elsewhere in the Constitution, including elsewhere in the Sixth Amendment." *Bullcoming v. New Mexico*, 131 S. Ct., at 2728, (Kennedy, J., dissenting).

Dr. Reichard was not a laboratory analyst, rather, he was an ordinary witness under the *Bullcoming* and *Melendez-Diaz* dissents, and his statements would be covered by the Confrontation Clause. Thus, the views of Justice Breyer added to the views in Justice Kagan's dissent in *Williams* produces a majority for the proposition that a physician who is retained for the purpose of investigating a suspected crime and who, by him or herself, conducts an examination which leads to inculpatory evidence, is a witness whose evidence may not be presented in absence of an opportunity for cross-examination.

e. The Post-Williams autopsy report cases

The Court, in its Opinion, relies upon *People v. Leach*, 2012 IL 111534, 980 N.E.2d 570 (Ill. 2012). The *Leach* Court concludes "that whichever definition of primary purpose [Justice Alito's or Justice Kagan's] is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." *Id.*, at 590. However, *Leach* is easily distinguishable because here the evidence clearly establishes that Dr. Reichard's portion of the autopsy report fits into both categories. Dr. Reichard's services were only obtained when it was anticipated that expert testimony in a criminal trial would be required, thus meeting both the "targeted individual" and "primary purpose" requirements.

In addition, the *Leach* Court fails to take into account that the autopsy report there would be considered to be testimonial by the *Williams* majority of Justice Breyer and the dissenters. Dr. Reichard would be considered to be an ordinary witness by Justice Breyer and his out-of-court statements would be subject to the Confrontation Clause. *See* section d above.

A contrary conclusion to *Leach* was made by the New Mexico Supreme Court in *State v. Navarette,* 294 P.3d 435, (N.M. 2013). In *Navarette,* "the disputed issue was who shot Reynaldo—the driver, who was closest to Reynaldo, or Navarette, who was several feet away from Reynaldo. Relevant to this disputed issue, Dr. Zumwalt, the Chief Medical Examiner, testified at trial. He repeated the assertion of Dr. Dudley, the doctor who performed the autopsy, but who did not testify, "that this was a distant range shooting, because Dr. Dudley did not see any evidence of a close range shooting." 294 P.3d at 437. The New Mexico Court found that Dr. Dudley's findings were testimonial under the Sixth Amendment.

In so finding, the Court found that it was clear that the autopsy was performed as part of a homicide investigation and "in fact, two police officers attended the autopsy." Thus, it "is axiomatic that Dr. Dudley made the statements in the autopsy report primarily intending to establish some facts or opinions with the understanding that they may be used in a criminal prosecution." 294 P.3d at 440. In this case, Dr. Ross's report indicates that four police officers and Prosecuting Attorney Spickler were at the autopsy. State's Trial Exhibit 11, pg. 12. Thus, when the case was referred to Dr. Reichard for further examination it was for the purpose of establishing facts to be used at a later criminal trial.

Next, the New Mexico Court found "that even if a statement (in this case, a forensic report), does not target a specific individual, the statement may still be testimonial." It explained that:

> In *Williams*, four justices concluded that a forensic report was not testimonial because the report did not target a specific individual. *Id.* at ——, 132 S.Ct. at 2243 (plurality opinion). Justice Thomas rejected this approach in his concurring opinion, stating "The new primary purpose test [from the *Williams* plurality opinion] asks whether an out-of-court statement has the primary purpose of accusing a targeted individual of engaging in criminal conduct. That test lacks any grounding in constitutional text, in history, or in logic." *Id.* at ——, 132 S.Ct. at 2262 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted). Writing for four justices who dissented in *Williams*, Justice Kagan also rejected this approach, stating:
>
> > [T]he plurality states that the Cellmark report was not prepared for the primary purpose of accusing a targeted individual. Where that test comes from is anyone's guess. Justice THOMAS rightly shows that it derives neither from the text nor from the history of the Confrontation Clause. And it has no basis in our precedents.
>
> *Id.* at ——, 132 S.Ct. at 2273 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (internal quotation marks and citations omitted).

294 P.3d, at 438-439. Thus, while Dr. Reichard's report was targeted at a limited group of possible suspects, it did not have to be in order to meet the primary purpose test of a majority of the Supreme Court.

Further, the New Mexico Court concluded that "[b]ecause an autopsy conducted in the context of a death caused by this type of injury will automatically trigger a duty by medical examiners to report their findings to the district attorney, see [New Mexico Statutes] § 24–11–8, we conclude that autopsy reports regarding individuals who suffered a violent death are testimonial." *Id.* Likewise here, I.C. § 19-4301(B) requires the coroner to summon "a person authorized to practice medicine and surgery in the state of Idaho to inspect the body and give a professional opinion as to the cause of death." When a coroner is informed that a person has died as a result of a homicide or under suspicious circumstances, the coroner must "refer the investigation to the . . . chief of police[.]" I.C. § 19-4301. Under *Navarette,* autopsy reports in Idaho are also testimonial.

Similarly, the West Virginia Supreme Court found that its autopsy reports were testimonial even post-*Williams* because its state statute required the Medical Examiner to formulate opinions or testimony in judicial proceedings. *State v. Kennedy*, 735 S.E.2d 905, 922 (W.V. 2012). And as previously indicated, it does not matter that the autopsy report does not target a specific person. The observations, findings, and opinions within the report are statements that were made when Dr. Reichard understood that the statements might be used in a criminal prosecution where there were only a few possible suspects.

The State of New Mexico has filed a Petition for Writ of Certiorari in *Navarette.* The case has been assigned Docket No. 12-1256. According to the United States Supreme Court

website, the briefing has been completed and the case has been distributed to the Justices for consideration on the Supreme Court's September 30, 2013, conference. www.supremecourt.gov/docket/docket. That being the case, the Supreme Court could announce whether it will accept review of the case as soon as when the Court comes back into public session on October 7, 2013, the first Monday of October. This Court may want to defer ruling on this motion until after the United States Supreme Court has decided whether to accept review of *Navarette*.

f. Conclusion

The evidence here is testimonial under both Justice Alito's "primary purpose" test and Justice Kagan's "primary purpose" test. Thus, there are eight votes that the evidence falls within the Confrontation Clause. Even if the evidence did not fall within Justice Alito's test, it falls within Justice Thomas's "sufficient solemnity" test and is testimonial evidence when his vote is added to the four dissenting votes. Further, Justice Breyer's views, as expressed in his concurrence, added to the four dissenting votes, results in another five member majority in favor of Mr. Grove's position. Finally, while the Illinois Supreme Court found an autopsy report to not be testimonial post-*Williams*, that case is easily distinguished. At the same time, the Supreme Courts of West Virginia and New Mexico have both found autopsy reports to be testimonial. Reconsideration should be granted.

B. *The Court Should Not Have Dismissed the Prosecutorial Misconduct Claim*

The Court summarily dismissed this claim "[b]ecause this issue was not raised on appeal," noting "that even though the assertions were not objected to during the trial, the matter could have been presented on appeal, similar to the issues regarding the Petitioner's right to

confront witnesses, as discussed above." Opinion, pg. 24-25. As will be explained, this is not a proper basis to dismiss the case.

First, as the Court notes in footnote 19 of the Opinion, appellate counsel attempted to present the confrontation issue on appeal. However, the Court of Appeals found that it *could not* be raised for the first time appeal. The Court of Appeals wrote, that:

> [W]e 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. . . . As we noted above, our Supreme Court has made it clear that application of the fundamental error doctrine is to be limited, and we abide by that pronouncement and conclude here that Grove cannot challenge admission of the testimony for the first time on appeal.

State v. Grove, 151 Idaho 483, 492-93, 259 P.3d 629, 638-39 (Ct. App. 2011), *review denied* (2011). The Court of Appeals's treatment of the Confrontation Clause issue proves Mr. Grove's point: The prosecutorial misconduct claims could not have been raised for the first time on appeal. *See also*, Affidavit of Diane Walker; Affidavit of Eric Frederickson.

Second, *Rodgers v. State*, 129 Idaho 720, 725, 932 P.2d. 348, 353 (1997), the case relied upon by the Court, is not applicable to this case. In order to understand the holding in *Rodgers v. State*, that "Rodgers' claim of prosecutorial misconduct based on statements concerning Cox's ability to assert the Fifth Amendment privilege could have been raised during the earlier litigation that also challenged the prosecutor's conduct," it is necessary to first look at the arguments raised in the criminal case.

In the direct appeal, Mr. Rodgers asserted that the district court erred in not requiring co-defendant Cox to testify, even though Rodgers had entered into a stipulation with the state that the witness was unavailable to testify due to right against self-incrimination. He also argued that

"that defense counsel's failure to object to 'cloak[ing] Cox with a blanket right not to testify' is not fatal because it was fundamental error to allow the prosecutor to invoke the Fifth Amendment privilege on Cox's behalf." *State v. Rodgers*, 119 Idaho 1066, 1076, 812 P.2d 1227, 1237 (Ct. App. 1990) *aff'd*, 119 Idaho 1047, 812 P.2d 1208 (1991). The Court of Appeals disagreed with Mr. Rodgers, writing:

> We believe it is sufficient to say that under the circumstances shown above, the trial court committed no error in accepting the stipulation of counsel that Cox was an unavailable witness. Rodgers did not indicate that he needed the court's permission to call Cox if, indeed, he wanted to. Moreover, it is clear that defendant's counsel were not in any way deterred from calling Cox by the prosecutor's statements. No request was made to the trial court to grant immunity to Cox. Moreover, the record does not show that Rodgers requested the prosecutor to grant Cox use immunity.

119 Idaho at 1076-77, 812 P.2d at 1237-38.

On post-conviction, Mr. Rodgers claimed that "the prosecution misrepresented the right of Daron Cox to invoke the Fifth Amendment privilege against self-incrimination and improperly represented that Cox would refuse to testify at trial." The Supreme Court would not consider this issue noting "Rodgers' claim of prosecutorial misconduct based on statements concerning Cox's ability to assert the Fifth Amendment privilege could have been raised during the earlier litigation that also challenged the prosecutor's conduct." *Rodgers v. State*, 129 Idaho at 725, 932 P.2d at 353. That was obviously the case, because the allegation that the prosecutor had misstated Cox's ability to assert the Fifth Amendment was part of the argument that the trial court erred in not requiring him to testify. Thus, Mr. Rodgers could not raise in post-conviction an aspect of the issue he actually raised on direct appeal because a post-conviction petition is not a substitute for an appeal. I.C. § 19-4901(b).

In this case, the instances of prosecutorial misconduct alleged in the post-conviction are not aspects of any claim raised on direct appeal. Consequently, *Rodgers* is not apposite. Moreover, the claim could not have been raised on direct appeal for the same reason the Confrontation Clause issue was not permitted to been raised: There was no objection below and the record before the appellate court was incomplete as to whether the failure to object was strategic.

Moreover, since *Rodgers* the standard for what issues may be raised for the first time on appeal has changed. At the time of Mr. Rodgers's direct appeal, fundamental error was loosely defined as an error "which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process." *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991), *quoting State v. Morris*, 116 Idaho 834, 836, 780 P.2d 156, 158 (Ct. App. 1989). At the time of Mr. Grove's direct appeal, the *Mauro* standard had been modified by *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). As the Court of Appeals explained in *State v. Grove*, *supra.*:

> Recently in *Perry*, our Supreme Court summarized the analysis which applies in cases of unobjected-to error:
>
> > (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

State v. Grove, 151 Idaho 483, 490-91, 259 P.3d 629, 636-37 (Ct. App. 2011), *review denied* (Sept. 12, 2011). On direct appeal there was no "information as to whether the failure to object was a tactical decision." Therefore, the error could not have been raised under the *Perry* fundamental error doctrine. This is conclusively demonstrated by the Supreme Court's treatment of the prosecutorial misconduct claim raised in that case. It refused to consider the claim on direct appeal and stated that the claim should be raised in post-conviction:

> It appears to be a reasonable possibility, under the facts of this case, that defense counsel's failure to object to the prosecutor's improper conduct in both eliciting vouching testimony and later referencing that testimony during closing was a strategic decision. Therefore, this claim cannot properly be dealt with in a fundamental error review and is more properly pursued on post-conviction relief where additional fact-finding may be conducted to determine the motivation for defense counsel's failure to object.

State v. Perry, 150 Idaho at 229, 245 P.3d at 981; *See also*, Jeffrey W. Bower, Clarity and Balance: Appellate Review of Harmless Error, Fundamental Error, and Prosecutorial Misconduct After State v. Perry, 48 Idaho L. Rev. 85, 104-05 (2011);[3] *and State v. Skunkcap*, 34746, 2013 WL 2714563 (Idaho Ct. App. June 14, 2013) (Court refuses to consider a claim raised for the first time on appeal because "Skunkcap has failed to argue or demonstrate that the decision not to object at trial was not a tactical decision.").

Here appellate counsel could not have even attempted to raise the incident of prosecutorial misconduct where Prosecuting Attorney Spickler exposed the members of the jury

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[3] There, the author writes, "The second component [clear and obvious error] acts as a limit on the first by requiring the appellate court to probe the record for any indication that the clear or obvious error went intentionally unobjected to as part of a tactical decision by the defendant with the hopes of using the error as grounds for reversal on appeal. It was this second component of prong two that lead the court in *State v. Perry* to disregard Perry's claims of prosecutorial misconduct during the prosecutors questioning of witnesses."

to extra judicial evidence. Defense counsel testified that he did not see Mr. Spickler projecting autopsy and family photographs of [redacted] on a courtroom screen while the jury reported for duty. (According to the State, it is "very clear that: 1) Certain instances of allegations of prosecutorial misconduct were unobserved by trial counsel (setting up power point exhibits Depo. pg. 38 -40, ln. 23)[.]" State's Reply, pg. 5.) And according to the Supreme Court, "When facts outside the record are to be used as the basis of a challenge . . . such issues cannot properly be raised on appeal, but must be raised by application under the Uniform Post Conviction Procedure Act[.]" *Kraft v. State*, 99 Idaho 214, 215, 579 P.2d 1197, 1198 (1978). Thus, this unobserved, unobjected-to, incident of misconduct could not have been raised on appeal because it does not appear in the record of court proceedings. Thus, even assuming *arguendo* that the absence of an objection at trial did not prevent appellate counsel from raising the on-the-record instances of prosecutorial misconduct on appeal, *Kraft* prevented them from raising the off-the-record misconduct.

Finally, as pleaded in the Petition, if the issue could have been raised on appeal, it should have been raised on appeal and thus was deficient performance on the part of appellate counsel. This will be discussed in detail in Section D below. Even if the appellate counsel issue were not viable, Mr. Grove should be able to raise specific instances of unobjected-to prosecutorial misconduct as examples of deficient performance in his ineffective assitance of trial counsel claims. This will be explained in detail in Section E below.

C. *The Court Should Not Have Dismissed the Juror Misconduct Claim*

Similar to the prosecutorial misconduct issue, the Court finds that because "there is some information in the record that jurors may have been having difficulty staying awake" the juror

misconduct issue "should have been addressed on appeal [and therefore] this Court will not address this issue at this juncture." Opinion, pg. 27. However, the issue could not have been raised on appeal under *Perry*. Mr. Grove could not demonstrate on the scanty trial court record that any of the jurors had gone to sleep during the testimony. All the record of the trial proceedings shows is that: 1) the Court took an early lunch break during the state's direct examination of Dr. Ross (Exhibit B, pg. 921, ln. 16 - pg. 922, ln. 6); 2) the Court took a recess at the prosecutor's suggestion and observation that the jurors were "having a hard time *staying awake*" during the cross-examination of Dr. Ross (Exhibit B, pg. 983, ln. 9-13) (emphasis added); and 3) that the Court interrupted the cross-examination of Dr. Arden and, after consulting with counsel, decided to break for lunch. (Exhibit B, pg. 1351, ln. 19-25). None of these instances show that the jurors were actually asleep during the important testimony of Drs. Ross and Arden.

Therefore, on this record, appellate counsel could not have raised a fundamental error claim because they could not have demonstrated the first and second of *Perry*'s requirements: They could not show that one of Mr. Grove's unwaived constitutional rights were violated because they could not show that any of the jurors were actually asleep. Appellate counsel also could not show that the error was clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision. Reconsideration should be granted.

D. ***If the Previous Rulings Stand, the Court Should Not Have Dismissed the Ineffective Assistance of Appellate Counsel Claim***

If the Court does not reconsider its decisions dismissing the prosecutorial misconduct and jury misconduct claims, it should then reconsider its decision dismissing the ineffective assistance of appellate counsel claim. If, as the Court writes, the juror misconduct issue and prosecutorial misconduct issues could have been raised on appeal, it was deficient performance for appellate counsel to fail to raise the issues. They would have been stronger appellate issues on the merits than the challenge raised by appellate counsel to the Court's sentencing discretion. They also would have been stronger issues than the Confrontation Clause issue raised, since the Court of Appeals refused to even consider that issue. *Mintun, supra.*

Mr. Grove was prejudiced by appellate counsel's failure to raise the juror misconduct and prosecutorial misconduct issues. It is no substitute for Mr. Grove to be able to raise the claims as aspects of his ineffective assistance of trial counsel claim because the standard of prejudice under *Strickland* is higher for ineffective assistance of trial counsel claims than it is for ineffective assistance of appellate counsel claims. In his trial counsel claims, Mr. Grove must show a reasonable probability of a different result at trial. Specifically, he must show that if trial counsel's performance with respect to the prosecutorial misconduct had been adequate, there is a reasonable chance that the jury would have found him not guilty. Or, Mr. Grove must show a reasonable probability that the Court would have granted a mistrial had defense counsel made a timely challenge to the juror misconduct. *Strickland, supra.* In order to prevail on the ineffective assistance of appellate counsel claims, all Mr. Grove needs to show is the reasonable probability that he would have gained a new trial upon appeal. *Mintun, supra.*

The Court should reconsider this issue, if it does not reconsider the prosecutorial and juror misconduct issues.

E. *The Court Should Not Have Dismissed Several of the Ineffective Assistance of Trial Counsel Claims*

The Court granted an evidentiary hearing on some, but not all of the allegations of ineffective assistance of trial counsel. As with the Confrontation Clause issue, the Court summarily dismissed all of these claims on grounds not raised by the state. The state never took the time to individually analyze each of the claims and only made a general argument that all of the particular examples of deficient performance were examples of strategic decisions on the part of defense counsel. See, State's Brief, pg. 11-12; State's Reply, pg. 8. However, that was not the basis of the Court's summary dismissal. Thus, Mr. Grove's constitutional right to due process and his statutory right to twenty-days notice of the proposed grounds for a *sua sponte* dismissal were violated. *Saykhamchone v. State*, *supra*. In addition, the Court dismissed several issues without discussion. Accordingly, reconsideration should be granted.

In Paragraph 70 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in failing to assert Petitioner's state and federal constitutional rights to confrontation (Idaho Const. Art. I, § 13, United States Const. Amendments 6 and 14) and by failing to make proper evidentiary objections. The Court dismissed this claim due to its previous finding that "the expert's reliance and testimony regarding Dr. Reichard's report was not in violation of the Confrontation Clause[.]" Opinion, pg. 32. That conclusion should be reconsidered for the reasons already set forth in the Confrontation Clause section above: 1) that it

is a basis for dismissal not argued by the state, nor did the Court give notice prior to dismissal on this basis, and 2) that there was, in fact, a Confrontation Clause violation.

In addition, the Court's Confrontation Clause analysis, which relies upon the 2012 case of *Williams v. Illinois*, does not fit the analytical framework of the ineffective assistance of counsel claim which must look back in time to see what a reasonably competent attorney would have done at the time of trial. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (holding that ineffective assistance of counsel claims requires that conduct be evaluated from the counsel's perspective at the time of trial); *see also, Carrera v. Ayers*, 670 F.3d 938, 943 (9th Cir. 2011) *on reh'g en banc,* 699 F.3d 1104 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2039 (2013) (defense counsel's performance must be judged based on the law and prevailing legal standards as they existed at the time of trial).

That being the case, it is important to consider counsel's actions in the legal environment as it existed at the time of trial in July of 2008. At that time, the controlling U.S. Supreme Court's decisions were *Crawford v. Washington*, *supra.,* and *Davis v. Washington*, *supra.* *Crawford* defined "testimonial" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51, quoting 1 N. Webster, An American Dictionary of the English Language (1828). In addition, the Court listed three "core" testimonial statements: (1) "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were

made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52 (internal citations omitted). This, however, is not an exclusive list of "testimonial" evidence. *Id.* In *Davis*, the Supreme Court established a "primary purpose" test, defining statements made during an interrogation as testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S., at 822. As explained above, Dr. Reichard's statements were testimonial under *Crawford* and *Davis*.

The leading Idaho Supreme Court case in 2008 was *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007), which synthesized *Crawford* and *Davis* 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, unless made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 145 Idaho at 144, 176 P.3d at 916. The *Hooper* Court found that a forensic interview of a child witness was testimonial. "[S]ince the purpose of a forensic interview is to collect information to be used in a criminal prosecution, and there is a clear connection between the police and the STAR Center, the interview was the functional equivalent of a police interrogation. Thus, it is testimonial under *Crawford* and *Davis*, and inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." 145 Idaho at 142-143, 176 P.3d at 914-15.

Here, irrespective of the effect, if any, that *William v. Illinois* now has upon confrontation clause doctrine, at the time of the trial in Mr. Grove's case, the evidence about Dr. Reichard's

findings was testimonial under the Sixth Amendment as interpreted in *Crawford*, *Davis* and *Hooper*. A Confrontation Clause objection to that evidence at trial would have been sustained. Thus it was deficient performance to fail to make that objection because the exclusion of the evidence would have furthered defense counsel's theory of the case. The deficient performance prejudiced Mr. Grove because Dr. Reichart's findings severely undercut the defense theory of the case by purporting to show that the fatal injuries were inflicted after Lisa Nash left the house for work. Thus, the Court should permit an evidentiary hearing on this aspect of the ineffective assistance of trial counsel claim.

Finally, Mr. Grove argued that the evidence, even if it did not violate the Sixth Amendment, was inadmissible under the rules of evidence. This Court did not grant an evidentiary hearing on this claim. At the same time, it did not discuss or expressly dismiss the claim. Thus, reconsideration should be granted.

Idaho Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. *Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

Id., (emphasis added). The conclusions found in the autopsy report (State's Exhibit 11) at page 2, Section I(E), entitled "NEUROPATHOLOGY CONSULTATION (UNIVERSITY OF NEW MEXICO; ALBUQUERQUE, NM," all came from Dr. Reichard's report. In addition, the injuries noted in Section II(C) ("CLINICAL HISTORY OF RETROPERITONEAL

HEMORRHAGE AND BILATERAL PSOAS MUSCLE HEMORRHAGES") were not seen by Dr. Ross but were noted by transplant surgeon. Exhibit B, pg. 938, ln. 20 - pg. 389, ln. 3 ("I did not see this, but the surgeon who did the transplant surgery in his notes described . . . ."). Thus, these portions of the autopsy report were not admissible under I.R.E. 703.

In addition to the testimony quoted immediately above, Dr. Ross also testified at length about Dr. Reichard's findings. Exhibit B, pg. 940, ln. 21 - pg. 942, ln. 23; pg. 945, ln. 2-12; pg. 948, ln. 23 - pg. 950, ln. 17; pg. 984, ln. 22 - pg. 985, ln. 6; pg. 987, ln. 4-8. This testimony about the transplant surgeon's and Dr. Reichard's findings were also inadmissible. Thus, defense counsel was ineffective for failing to object to the evidence on that basis. Defense counsel could not specifically say why he failed to make an I.R.E. 703 objection. Chapman Depo., pg. 32, ln. 20-25. However, defense counsel admitted that making such an objection would not have run counter to his theory of the case. *Id.*, pg. 36, ln. 10-14. In fact, it would have forwarded the defense strategy because an objection would have kept out evidence which showed that [redacted] would have had an immediate and acute reaction to the fatal head injuries.

While I.R.E. 703 permits the disclosure of inadmissible evidence if the court specifically determines that the probative value of the inadmissible evidence in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect, a majority of the *Williams v. Illinois* Court rejects the validity of that portion of the rule. First, Justice Thomas wrote, "Of course, some courts may determine that hearsay of this sort is not substantially more probative than prejudicial and therefore should not be disclosed under Rule 703. But that balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the

accused." 132 S.Ct., at 2259 (Thomas, J., concurring in the judgment). Justice Kagan, in the dissent, also rejected the approach:

> [U]nder the plurality's approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, "the best DNA witness I have ever heard"), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given ("the DNA extracted from the vaginal swabs matched Sandy Williams's")—all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion's basis. (And this tactic would not be confined to cases involving scientific evidence. As Justice THOMAS points out, the prosecutor could similarly substitute experts for all kinds of people making out-of-court statements.) The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick-but really, what a way to run a criminal justice system. No wonder five Justices reject it.

132 S.Ct., at 2272 (Kagan, J., dissenting).

Moreover, the trial record in the criminal case shows that the Court was never asked to perform the Rule 703 balancing test. But even if the evidence had been deemed admissible after the balancing test, the Confrontation Clause analysis would continue to bar the evidence even if it was admissible under Rule 703.

Reconsideration should be granted because the Court's analysis of the *Williams* case is incorrect and, more to the point, it is not relevant to this claim because it had not been decided at the time of the criminal trial. In addition, the Court does not expressly dismiss or even address the I.R.E. 703 claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. Therefore, the Court should address this issue upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 71 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in failing to object to hearsay testimony from Lisa Nash regarding the autopsy report contents. At trial, Lisa Nash testified that she was told that [redacted] had blood in his brain that could not be removed. Defense counsel did not object on hearsay grounds. The Court dismissed this claim finding that the evidence was not hearsay because she "was not testifying as to the truth of the matter asserted, but rather explaining her understanding of the events of the day." Opinion, pg. 34. However, no limiting instruction was requested or given and there is no reason to believe the jury self-limited its use of the evidence to its non-hearsay purpose. Thus, the failure to object to the testimony and obtain a limiting instruction was deficient performance. Counsel's failure to do so prejudiced Mr. Grove because, as noted above, had counsel asserted Petitioner's constitutional confrontation rights or made the proper evidentiary objection to the Dr. Reichard evidence, the state would have had no proof of cause of death other than Ms. Nash's hearsay testimony. Without that testimony, Mr. Grove would not have been convicted.

In Paragraph 72 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in failing to object to the testimony of Steve Stocking, a paramedic, that Petitioner was too calm in his opinion when the paramedics arrived in response to the 911 call. Exhibit B, pg. 838, ln. 22. Mr. Stocking was not a psychologist or psychiatrist and had no qualifications as an expert on the appropriate reactions in a crisis. His opinion regarding Petitioner was not relevant (IRE 401 and 402) and did not fall within the scope of admissible opinion testimony by a lay witness (IRE 701) because it involved specialized knowledge of the appropriate reaction of people in crisis.

The Court dismissed this claim finding that the testimony was "based upon his perception of the scene of the call, and also was helpful to a clear understanding of the witness's testimony." Opinion, pg. 35. However, that was not the case.

First, Mr. Stocking's testimony that Mr. Grove was "too calm" was not based upon his perception. His perception was that Mr. Grove appeared calm. The testimony that Mr. Grove was "too calm" was merely his opinion. The foundation for his lay opinion was never established by the state. Thus, his opinion was not "rationally based upon the perception of the witness" as required by subsection (a) of the rule. This is shown by Mr. Stocking's admission that he had never met Mr. Grove before and did not have any idea how Mr. Grove usually reacts to similar situations. Exhibit B, pg. 838, ln. 22 - pg. 839, ln. 2. Mr. Stocking's opinion was only backed up by the testimony that "[p]arents are usually excitable when their child is very sick." *Id.*, pg. 839, ln. 5-6. This testimony does not show what Mr. Stocking's past experience was with regard to parents in similar situations. It also shows that he was judging Mr. Grove's demeanor by erroneously comparing him to the usual reactions of parents, even though Mr. Grove was not Kyler's father.

As the Supreme Court wrote in *State v. Missamore*, 119 Idaho 27, 32, 803 P.2d 528, 544 (1990), "The admissibility of such testimony turns upon its underlying factual basis[.]" Here, the evidence does not meet that test as there was no showing of Mr. Stocking's factual basis for his opinion, *i.e.*, the number of times he had observed parents in similar situations, and, moreover, the evidence showed that Mr. Stocking's opinion was based upon the false assumption that Mr. Grove was Kyler's parent.

Second, his opinion that Mr. Grove's demeanor was too calm does not aid the jury's understanding of his testimony, which was merely a narration of arriving at the home, staying there for two minutes --"tops"– before leaving in the ambulance with [redacted] *Id.,* pg. 837, ln. 25 - pg. 838, ln. 1. Thus, it was inadmissible under subsection (b) of Rule 701 as well. *See Hudelson v. Delta Int'l Mach. Corp.*, 142 Idaho 244, 249, 127 P.3d 147, 152 (2005) (Lay witness opinion that a van pulled out into traffic "safely," was not admissible under I.R.E. 701.) The Supreme Court in *Huddleson*, affirmed the district court determination that "Ms. Victor could testify at trial regarding what she observed," but held that "her opinion of whether Mr. Phibbs's conduct was safe or unsafe would not be helpful to a clear understanding of her testimony or to the determination of an issue of fact." *Id.* Similarly here, the testimony that Mr. Grove was calm was admissible under Rule 701, the testimony that he was too calm was not.

Moreover, even if the testimony was admissible under I.R.E. 701, that fact does not overcome the relevancy problem with the testimony. Mr. Grove's demeanor, when compared to the typical parent does not make any fact of consequence to the action more or less likely. Even if it was proper lay opinion, the testimony was still inadmissible under I.R.E. 401 and 402.

The Court should reconsider its ruling on this claim and permit it to go to an evidentiary hearing.

In Paragraph 73 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that there was "no way we would have missed any of the[] injuries" described in the autopsy report. Exhibit B, pg. 851, ln. 5-6.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 74 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Chin's testimony that what he "read in this autopsy report is the most brutal case" he had ever seen. Exhibit B, pg. 851, ln. 6-7. This testimony should have been objected to because it was not relevant under IRE 401 and 402. In addition, it was unfairly prejudicial under IRE 403.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 75 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that subarachonoid hemorrhage has to have immediate symptoms. Exhibit B, pg. 874, ln. 24 - pg. 875, ln. 22. There was insufficient foundation for that testimony as Dr. Hunter admitted that he is not a pathologist or neurologist. Exhibit B, pg. 874, ln. 24-25.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 76 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Hunter's testimony that [redacted] was either "ejected from an automobile" or "was beaten very severely." Exhibit B, pg. 871, ln. 12-14.

There was insufficient foundation for Dr. Hunter to give this opinion.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 77 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object 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 failed to impeach that testimony. Exhibit B, pg. 888, ln. 16-20. That evidence was inadmissible because there was no foundation for his opinion. Further, Dr. Hunter's opinion could have been impeached with medical research published in peer-reviewed medical journals.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 78 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Hunter's opinion, stated without any qualification as an expert, that [redacted] had sure signs of shaken baby syndrome. Exhibit B, pg. 869, ln. 4-16.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 79 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that, although he

did not see certain hemorrhages in the psoas and retroperitoneal areas, he was told about them by the transplant surgeon. Exhibit B, pg. 938, ln. 20-23. That testimony was inadmissible hearsay under I.R.E. 703.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 80 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to the foundation for Dr. Ross's testimony regarding the head and alleged brain injuries because Dr. Ross also testified that he had never viewed any of the slides or recuts himself. Exhibit B, pg. 959, ln. 10-15.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 81 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to object to Dr. Ross's testimony that Dr. Reichard's observation of a tear in the corpus callosum showed there was "a very significant force" applied, something comparable to a "very high fall" of "a couple of stories or so," or a "motor vehicle accident, or inflicted blunt force trauma." Exhibit B, pg. 945, ln. 5-12. That testimony was not admissible under IRE 703. Further, there was no foundation for Dr. Ross's opinion about the amount of force necessary to cause such an injury.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 82 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in regard to the testimony of Dr. Deborah Harper. Counsel failed to object or move to strike when Dr. Harper vouched for the abilities of state's witness Dr. Ross. Exhibit B, pg. 1031, ln. 12-14. ("Dr. Ross, I'm sorry to say, is no longer our – in our Medical Examiner's Office, because he is a super clinician.") Counsel also failed to object to irrelevant and unfairly prejudicial testimony regarding the estimated force needed to inflict the injuries, comparing it to the force of being hit by a car, or being dragged behind a horse, or having a horse step on [redacted]s abdomen, or being hit by a baseball bat, even though there was no foundation showing she could accurately make such estimates of force. Exhibit B, pg. 1034, ln. 7-21.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 83 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in failing to object to the admission of photographs taken a month after Kyler's death, which included many sympathy cards sent to the family. The Court dismissed this claim finding that Mr. Grove had not shown the cards were unduly prejudicial to him, especially as the sympathy cards were never mentioned during the testimony. Opinion, pg. 36. However, it is well established that appeals to emotion, passion or prejudice of the jury

through use of inflammatory tactics are impermissible. *State v. Phillips*, 144 Idaho 82, 86-87, 156 P.3d 583, 587-88 (Ct. App. 2007). This is true whether the appeal is subtle or overt.

As the Court observes in this case, Detective Birdsell provided a diagram of Lisa Nash's home. He testified that he took detailed measurements of the home, entered the measurements into a computer program called "Crime Zone, which then makes scaled diagrams based on the information . . . you put into the system." Exhibit B, pg. 1000, ln. 14-23. These diagrams were entered into evidence as State's Exhibits 7 and 8. He also testified that the kitchen counter was 36 inches off the ground. *Id.*, pg. 1006, ln. 7-8. Thus, the photographs of the entertainment center with the sympathy cards had no probative value because it did not depict the area of the house in question, *i.e,* the counter and the floor where [redacted] fell. Rather, the purpose of its admission was to have the jury discover the 25 sympathy cards for themselves while examining the exhibits during deliberations thus evoking sympathy for Lisa Nash and unfair prejudice against Mr. Grove.

This Court should grant an evidentiary hearing on this claim.

In Paragraph 84 of the Amended Petition, Mr. Grove alleged that defense counsel rendered deficient performance in not moving to exclude any reference by any witness to the brain autopsy because no valid chain of custody for the brain was presented. In particular, the state failed to present any evidence that the brain examined at the pathology laboratory in New Mexico was Kyler's brain.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 85 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to move to strike the prosecutor's comments after his objection to prosecutorial misconduct during cross-examination was sustained. Exhibit B, pg. 1113, ln. 12-13. In particular, during his cross-examination of Mr. Grove, the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, pg. 1113, ln. 8-11. While defense counsel's objection was sustained, it was deficient performance to fail to ask the Court to strike the comments and instruct the jury to disregard them.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. It would be manifestly unfair to dismiss Mr. Grove's prosecutorial misconduct claim and then also deny him the opportunity to raise this issue as a part of his ineffective assistance of counsel claim. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

In Paragraph 93 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to question paramedic David Chenalt about Lisa Nash's reaction to Kyler's injury. The Court dismissed this issue finding that "this decision by counsel was a strategic decision." Opinion, pg. 37. However, what Mr. Chapman said in his deposition was that he did not know why he failed to introduce this testimony. Depo., pg. 95, ln. 1-8.

At most, the decision happened to not be inconsistent with the general defense strategy that the injuries were inflicted at a time when Mr. Grove was not present, but was not made as

part of that strategy. At the same time, the evidence that Ms. Nash's reactions also appeared unusual would have added to the defense by neutralizing the state's evidence that Mr. Grove was too calm by showing that people have a wide range of reactions to similar circumstances.

This Court should grant an evidentiary hearing on this claim.

In Paragraph 99 of the Amended Petition, Mr. Grove alleged that defense counsel's performance was deficient because he failed to point out the differences between Dr. Reichard's report and the state witnesses' conclusions drawn from that report. In particular, the PAI identified by Dr. Reichard (assuming for discussion that it was present) is a localized phenomenon and, by his own publication, does not imply that more diffuse or widespread axonal injury is present. Thus, Dr. Reichard did not diagnose diffuse traumatic axonal injury in the brain of [redacted] Martin while Dr. Ross opined at trial that the child did have traumatic axonal injury. However, defense counsel failed to cross-examine Dr. Ross on this disagreement with Dr. Reichard or get Dr. Ross to admit that he had not personally examined the slides from the brain, either the routine or APP stains.

Counsel also failed to cross-examine Dr. Harper, the pediatrician, when she testified that the child had an intrinsic brain injury (suggestive of axonal injury), an opinion contrary to the clinical CT scan and to the neuropathology examination.

The Court does not expressly dismiss or even address this claim in its Opinion. At the same time, it did not grant Mr. Grove an evidentiary hearing on it. The Court should address this claim upon reconsideration and grant an evidentiary hearing on it.

III. CONCLUSION

For all the reasons above, this Court should grant reconsideration. The Court's Confrontation Clause analysis is in error and not applicable to the Ineffective Assistance of Counsel claim because it is based on cases not decided at the time of trial. The Prosecutorial and Jury Misconduct claims could not have been raised on appeal and should not have been dismissed on that basis. Finally, many of the ineffective assistance of trial counsel claims have been dismissed without mention or discussion by the Court and reconsideration should be granted on that basis.

Respectfully submitted this 7th day of August, 2013.

Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on August 7, 2013, I caused a true and correct copy of the foregoing document to be:

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to: Nance Ceccarelli
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Dennis Benjamin

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

A. ***The Court Should Not Have Dismissed the Confrontation Clause Claim***

The state complains that the document showing the emails between Drs. Ross and Reichard "was never admitted, was never offered as testimony or evidence[.]" Motion Objecting to Petitioner's Motion for Reconsideration ("Respondent's Objection"), pg 2. But it is no surprise that the emails were never admitted, or offered as testimony or evidence because there has not been an evidentiary hearing on the Confrontation Clause claim or any other claim. At this point presenting evidence through affidavits is sufficient to avoid summary disposition, I.R.C.P. 56(b). The document in question is attached to the Second Affidavit of Dennis

ORIGINAL

Benjamin as Exhibit A and was before the court at the time of the hearing on the cross-motions. Thus, it may be considered for purposes of granting or denying summary disposition. The state has not moved to strike the document, nor has it alleged that the document is not authentic or that it is not a true and correct copy of the actual email exchange.

Idaho Rule of Civil Procdure 56(e) states that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." However, the Supreme Court has said that "we have not required the trial court to rule on the admissibility of the affidavit when there is no objection to it. If there is no timely objection, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e)." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 917-18, 188 P.3d 854, 859-60 (2008), *citing State, Dept. of Agric. v. Curry Bean Co. Inc.*, 139 Idaho 789, 86 P.3d 503 (2004) (conclusory affidavit); *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993) (statements containing hearsay and lacking adequate foundation); *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 837 P.2d 805 (1992) (statements lacked adequate foundation). In *Esser*, the Court held that "[b]ecause Esser Electric did not object to the affidavit of Lost River's president, the district court did not err in relying upon it when granting Lost River's motion for summary judgment." *Id. See also James v. Mercea*, 152 Idaho 914, 918, 277 P.3d 361, 365 (2012) (citing *Esser* and holding court did not abuse its discretion in considering allegedly insufficient affidavit); *Antim v. Fred Meyers Stores, Inc.*, 150 Idaho 774, 782, 251 P.3d 602, 610 (2011) (Ct. App. 2011) (citing *Esser* and noting lack of objection). Here

Mr. Grove does not even seek to use the documents in support of his motion for summary disposition, although it would be proper under the authority cited above. He only seeks to use them to avoid summary disposition and obtain the opportunity to fully prove the facts at an evidentiary hearing.

The state also complains that the emails "served only in a capacity for reference for the purpose of informing an expert opinion." Respondent's Objection, pg. 2. Mr. Grove is not able to fully respond to this statement because its meaning and import are obscure. First, the phrase that the emails "served only in a capacity for reference" is unintelligible in this context, at least to Mr. Grove. Second, if the purpose of the emails was to "inform[] an expert witness," as claimed by the state, that purpose supports Mr. Grove's position that Dr. Reichard's report is testimonial evidence under *Young v. United States*, 63 A.3d 1033, 1043-44 (D.C. 2013). As previously noted, *Young* analyzed the four-Justice plurality in *Illinois v. Williams*, — U.S. —, 132 S.Ct. 2221 (2012) and saw:

> *Williams* as establishing—at a minimum—a sufficient, if not a necessary, criterion: a statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas's formality criterion. Otherwise put, if *Williams* does have precedential value as the government contends, an out-of-court statement is testimonial under that precedent if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.

63 A.3d at 1043-44.

What the emails show is that Dr. Ross engaged Dr. Reichard with the purpose that he should develop evidence for use in future criminal prosecutions where he might be required to testify in court and that Dr. Reichard was aware of this. The chain of custody form (Exhibit B to

the Second Affidavit of Dennis Benjamin) shows that the brain was sent to the Office of the Medical Examiner in New Mexico on August 14, 2002, eleven days after the email exchange. At that point, the state had detemined that [redacted]s death was a homicide and targeting the very few people who had been with [redacted] shortly before he died – specifically Lisa Nash and Stace Grove. Thus, both the primary purpose test and the targeted accusation test of Justice Alito are demonstrated by the email exchange. When the four plurality votes are added to the four dissenting votes, there is an eight member majority in *Williams* for the proposition that Dr. Reichard's report was testimonial for Confrontation Clause purposes. Here, Dr. Reichard's report was developed for the purpose of assisting the prosecution in a case of suspected homicide where only a few persons could have committed the offense.

Further the state totally fails to address the other arguments as to why there was a Confrontation Clause violation here as set forth at pages 2-22 of the Memorandum in Support of Motion for Reconsideration ("Petitioner's Memorandum"). In particular, the state fail to address the argument that the Court dismissed this claim on grounds not argued by the state in its pleadings. In *Nava v. Rivas Del-Toro*, 151 Idaho 853, 264 P.3d 960 (2011), the Supreme Court reversed the grant of summary judgment on a basis not raised by the moving party. It wrote:

> When filing a motion for summary judgment, the moving party must notify the opposing party of the particular grounds for the motion. The motion must "state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed and shall set forth the relief or order sought." Idaho R.Civ. P. 7(b)(1). . . . If a ground for summary judgment is not stated with particularity in the moving papers, the opposing party need not address that ground.

151 Idaho at 862, 264 P.3d at 969. Summary disposition should be reconsidered here because the Confrontation Clause issue and the ineffective assistance of counsel issue were both dismissed on grounds not argued by the state.

In addition, the state fails to address Mr. Grove's arguments about why *People v. Leach*, 2012 IL 111534, 980 N.E.2d 570 (Ill. 2012) is distinguishable from this case and why *State v. Navarette*, 294 P.3d 435, (N.M. 2013) is better reasoned, more applicable to the facts here and should be followed.

All the state does in this regard is to repeat its previous argument that "Petitioner's trial counsel had a particular trial strategy in mind in presenting a defense," which involved the intentional waiver of Mr. Grove's right to confront witnesses. Neither the Deposition of Mr. Chapman nor the Affidavit of Stacey Grove in Opposition to Respondent's Motion for Summary Disposition (pending the State's Motion to Strike) support this theory. More to the point, the argument is irrelevant with regards to Mr. Grove's Motion for Reconsideration because this Court did not rely on that argument in dismissing the Confrontation Clause claim or the aspects of the Ineffective Assistance of Counsel claim which related to Mr. Chapman's failure to object to the admission of Dr. Reichard's testimonial evidence. Thus, further discussion of this point is not currently called for and has, in any case, been refuted in detail elsewhere. *See e.g.*, Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Disposition, pg. 4-9.

In sum, the state presents no reason for the Court to not grant reconsideration on this issue.

B. ***The Court Should Not Have Dismissed the Prosecutorial and Jury Misconduct Claims***

Regarding the Prosecutorial and Juror Misconduct claims, the state writes that "it is difficult to distinguish legitimate, tactical trial strategy and true error by counsel." Respondent's Objection, pg. 2. This statement is tantamount to a concession by the state that an evidentiary hearing is needed on these claims. And, indeed, the Court has granted hearings on some aspects of those issues, but only within the context of the Ineffective Assistance of Counsel Claims. The state does not address Mr. Grove's arguments that those claims are independent of the Ineffective Assistance of Counsel claims. Thus, no reply is needed.

The state does parrot the Court's citation to *Rodgers v. State*, 129 Idaho 720, 725, 932 P.2d. 348, 353 (1997), but it does not address the reasons Mr. Grove has presented as to why that case is not applicable here. Petitioner's Memo, pgs. 22 -26. In particular it does not address Mr. Grove's argument that the instances of prosecutorial misconduct alleged in the post-conviction petition were not aspects of any claim raised on direct appeal and, consequently, *Rodgers* is not apposite. Moreover, the state ignores the fact that the Prosecutorial Misconduct claim could not have been raised on direct appeal for the same reason the Confrontation Clause issue was not permitted to been raised: There was no objection below and the record before the appellate court was incomplete as to whether the failure to object was strategic.

The state also fails to acknowledge that the standard for what issues may be raised for the first time on appeal has changed since *Rodgers* was decided. *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Nor does it address the fact that trial counsel could not have objected to the misconduct by Prosecuting Attorney Spickler which exposed the members of the jury to

extra judicial evidence because he was unaware of it. Likewise, this particular claim could not have been raised on appeal because it does not appear in the record of court proceedings.

C. *The Court Should Not Have Dismissed the Ineffective Assistance of Counsel Claims*

Finally, the state argues that the Court did not need to specifically address why it dismissed many of the individual ineffective assistance of counsel claims. Respondent's Objection, pg. 3. However, that is not the case. Mr. Grove has a due process and statutory right to be informed of the basis for the court's dismissal of his petition before it occurs. The notice must come either from the state's motion for summary disposition or by the court giving *sua sponte* notice and granting twenty days to respond to that notice. *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (1982) (district court improperly dismissed petition because it did not give the 20-days notice required by I.C. § 19-4906(b)). In this case, the ineffective assistance of counsel claims were all dismissed on grounds not raised by the state in violation of *Nava v. Rivas-Del Toro*, *supra*, as was discussed above.

Further, there is no way to know why the Court dismissed the claims it did not discuss. Thus, Mr. Grove's right to prior notice and a fair opportunity to respond have been violated. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995) ("Where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice."). While Mr. Grove has responded in this Motion to the reasons for dismissal set forth by the Court, he cannot respond to the claims which were dismissed without discussion. Consequently, reconsideration should be granted.

Finally, the state does not address the merits of Mr. Grove's arguments why reconsideration should be granted as to the issues which were discussed by the Court so no reply is needed. See Petitioner's Memo pgs. 30-45.

D. *Conclusion*

For all the reasons above and in the Petitioner's Memorandum, this Court should grant reconsideration and order an evidentiary hearing on all the claims.

Respectfully submitted this 3rd day of September, 2013.

Deborah Whipple

Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on September 3, 2013, I caused a true and correct copy of the foregoing document to be:

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Dennis Benjamin

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

STACEY GROVE, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 2012-1798 **OPINION AND ORDER ON PETITIONER'S MOTION FOR RECONSIDERATION**

This matter came before the Court on the Petitioner's Motion for Reconsideration. The Petitioner was represented by Dennis Benjamin, of the firm Nevin, Benjamin, McKay & Bartlett.[1] The State was represented by Nance Ceccarelli, Nez Perce County Deputy Prosecuting Attorney. Oral argument was heard on October 28, 2013. The Court, being fully advised in the matter, hereby renders its decision.

BACKGROUND

The Petitioner asks this Court to reconsider the Opinion and Order on Motions for Summary Judgment, issued on July 11, 2013 (hereinafter July Opinion). A summary of

[1] Mr. Benjamin participated via teleconference.

the underlying criminal case and the history of this case are set forth in the July Opinion. The Petitioner is seeking reconsideration of this Court's ruling on five issues contained within the July Opinion.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post-conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a)

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285,

287, 912 P.2d 653, 655 (Ct. App. 1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

In a proceeding for post-conviction relief, the petitioner bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941 (Ct. App.1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court's own initiative. However, "[s]ummary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief." *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655. "If the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue." *Sanchez*, at 711, 905 P.2d at 644. "It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing." *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

MOTION FOR RECONSIDERATION STANDARD

On a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), the court must take into account any new facts that may affect the correctness of the prior interlocutory

order. *Nationsbanc Mortgage Corp. v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995), *citing Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). The burden is on the moving party to bring the new facts to the court's attention; the court is not required to search the record to determine whether there are any new facts that would affect its earlier decision. *Coeur d'Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. Finally, the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

ANALYSIS

The Petitioner is seeking reconsideration of this Court's ruling on five issues: dismissal of Confrontation Clause claims; dismissal of the prosecutorial misconduct claim; dismissal of the juror misconduct claim; dismissal of ineffective assistance of counsel claims with respect to prosecutorial and juror misconduct; and dismissal of other ineffective assistance of counsel claims. The Court will first consider the dismissal of the Confrontation Clause claims, and then discuss the remaining claims together.

1. Dismissal of Confrontation Clause claims

a. I.C. §19-4906(b) notice requirement

The Petitioner asserts that reconsideration should be granted because the Court did not give the Petitioner twenty-days notice that the claims would be dismissed, pursuant to I.C. § 19-4906(b).[2] The Petitioner asserts the Court dismissed the application

[2]I.C. § 19-4906 states in pertinent part:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the

on grounds different than those asserted in the State's motion, thus the Court dismissed the claims on its own initiative. The Petitioner relies on *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

> Where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice. *Gibbs v. State,* 103 Idaho 758, 653 P.2d 813 (Ct.App.1982).

Id. at 322, 900 P.2d at 798. In the case at hand, the Court granted the State's motion for summary disposition in part, and denied it in part, reserving certain issues to be addressed at an evidentiary hearing. The Court reviewed the record as a whole in reaching its determination. The Court's ruling is made pursuant to I.C. § 19-4906(c); however, in the alternative, the Petitioner was given an opportunity to reply to the dismissal as a result of the motion for reconsideration currently before this Court. The Court has considered the information set forth in the detailed Memorandum in Support of Motion for Reconsideration as a reply to the dismissal in this case. Thus, the Petitioner's reliance on I.C. § 19-4906 is not a basis for allowing an evidentiary hearing on the issues related to the Confrontation Clause claims which have been summarily dismissed.

b. **Consideration of *State v. Navarette***

The Petitioner asserts the Court erred in the determination that the Confrontation Clause was not violated by the testimony of witnesses in reference to Dr. Reichard's

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application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.
(c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

report following a separate autopsy of the victim's brain. The Petitioner provides additional analysis on this issue, and asks the Court to consider the determination of the New Mexico Supreme Court in *State v. Navarette*, 294 P.3d 435 (N.M. 2013). The Court has reviewed *Navarette*, and finds the case is distinguishable from the matter before this Court. In the case at hand, Dr. Ross performed the autopsy of the body of the victim, and made observations about the body, and also limited observations of the victim's brain. Dr. Ross then had the brain sent to Dr. Reichard for further in depth autopsy. Dr. Ross incorporated a portion of Dr. Reichard's report into the autopsy which was admitted into evidence in this case. Further, Dr. Ross made some reference to Dr. Reichard's report when he was testifying in open court.

In *Navarette*, the forensic pathologist who completed the autopsy of the victim, Reynaldo, was not available to testify in court. Instead, the Chief Medical Examiner, Dr. Zumwalt, testified based upon his review of her autopsy report. *Navarette*, 294 P.3d at 437. The defendant objected to both Dr. Zumwalt's testimony, and also the admission of Dr. Dudley's autopsy report. The objections were overruled, the testimony was heard, and the report was admitted. *Id.* The *Navarette* Court made the following determination:

> [T]he importance of a bright-line constitutional rule that requires the out-of-court declarant to be subjected to cross-examination is readily apparent. Dr. Zumwalt testified that evidence of soot, stippling, or gunpowder cannot always be easily seen by the naked eye and often ends up on the clothing, rather than the skin, and therefore autopsy photographs of the body would not necessarily capture such evidence. Consequently, in material respects, the autopsy findings do not involve objective markers that any third party can examine in order to express an independent opinion as to the existence or non-existence of soot or stippling. Such observations are not based on any scientific technique that produces raw data, but depend entirely on the subjective interpretation of the observer, who in this case was Dr. Dudley. How Dr. Dudley reached the conclusion that there was no evidence of soot or stippling on Reynaldo's body or clothing should have been the subject of cross-examination. Inquiry into

her training, the equipment used to arrive at her subjective conclusion, whether the evidence of soot or stippling might have been masked by blood, or any other variables that would influence her decision should have been tested in the crucible of cross-examination. "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.' " *Bullcoming,* —— U.S. at ——, 131 S.Ct. at 2715 (quoting *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 319 n. 6, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

This is not to say that all material contained within an autopsy file is testimonial and therefore inadmissible. Without attempting to catalogue all material in a file that could be admissible, we note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause. *See Aragon,* 2010–NMSC–008, ¶¶ 26–30, 147 N.M. 474, 225 P.3d 1280 (confrontation case framing the question presented as whether the testifying analyst was testifying to his own opinion or merely parroting the opinion of the analyst who performed the forensic analysis and noting that the testifying analyst had not analyzed the raw data to reach his conclusion). For example, in this case, after being shown the autopsy photographs, Dr. Zumwalt expressed his own opinion about the entry and exit wounds, explaining the basis for his opinion. He did not simply parrot the opinion or subjective statement of the pathologist who performed the autopsy and took the photographs. Thus, he was available for cross-examination.

Because Dr. Zumwalt related testimonial hearsay from Dr. Dudley to the jury, and it was not established that Dr. Dudley was unavailable and Navarette had a prior opportunity to cross-examine Dr. Dudley, Navarette's confrontation rights were violated. We therefore reverse his convictions and remand for a new trial consistent with this opinion.

Id. at 442-443.

In the case before this Court, Dr. Ross was the lead forensic examiner. He performed the autopsy of the victim, and made personal observations of every part of the victim's body, including the brain. However, he then sent the brain to another pathologist for more in-depth examination. Dr. Ross testified as to his observations and opinions regarding the cause of death. Dr. Ross was available, and subjected to, thorough cross-examination. The testimony of Dr. Ross was further scrutinized through the

defendant's presentation of an expert witness. Thus, the case is distinguishable from *Navarette*, where the attending forensic pathologist was not available to testify in court.

This Court notes there is a split of authority on this issue, and referred to some cases considered by the Supreme Court of Illinois, in the analysis from *People v. Leach*.

> We acknowledge that defendant has cited several cases from other jurisdictions in which the courts of our sister states have held that an autopsy report is testimonial hearsay, either in a case in which the report was admitted or in which a medical examiner other than the one who performed the autopsy was permitted to testify to the contents of the report. See, *e.g., State v. Davidson,* 242 S.W.3d 409, 417 (Mo.Ct.App.2007) (holding that when an autopsy report is prepared at the request of law enforcement in anticipation of a murder prosecution and the report is offered to prove the victim's cause of death, the report is testimonial); *Martinez v. State,* 311 S.W.3d 104, 111 (Tex.Ct.App.2010) (holding that an autopsy report is testimonial when its primary purpose is to establish or prove past events, as demonstrated by police officer's attendance at autopsy, his taking of photographs during autopsy, and where statutory basis for performance of the autopsy was suspicion of death by unlawful means); *United States v. Moore,* 651 F.3d 30, 73 (D.C.Cir.2011) (per curiam) (classifying autopsy reports as testimonial when requested by law enforcement, officers are present during autopsies, and officers participated in preparation of diagrams and other portions of the reports), *cert. granted in part in Smith v. United States,* —— U.S. ——, 132 S.Ct. 2772, 183 L.Ed.2d 638 (2012).
>
> However, these cases are countered by cases holding that an autopsy report may be admitted into evidence without the testimony of the pathologist who performed the autopsy without violating the defendant's rights under the confrontation clause. See, *e.g., State v. Craig,* 110 Ohio St.3d 306, 2006–Ohio–4571, 853 N.E.2d 621, at ¶¶ 80–88 (concluding that autopsy reports are admissible nontestimonial business records), *review granted by State v. Craig,* 126 Ohio St.3d 1573, 2010–Ohio–4539, 934 N.E.2d 347 (table); *United States v. Feliz,* 467 F.3d 227, 236–37 (2d Cir.2006) (holding that autopsy reports are admissible as business records and are nontestimonial "even where the declarant is aware that [the report] may be available for later use at trial"); *Banmah v. State,* 87 So.3d 101, 103 (Fla.Dist.Ct.App.2012) (autopsy reports are nontestimonial because they are prepared pursuant to statutory duty and not solely for use in prosecution); *Cato v. Prelesnik,* 2012 WL 2952183, *3 (W.D.Mich. July 18, 2012) (rejecting *Crawford* claim in *habeas* petition on basis that *Crawford* did not clearly establish that autopsy results are testimonial in nature and that even under *Melendez–Diaz,* the answer to this question is uncertain). In addition, the cases cited by defendant predate the Supreme Court's decision in *Williams.*

> This split of opinion and the confusion regarding application of the primary purpose test to reports of forensic testing may eventually be resolved by the United States Supreme Court. In the meantime, while we are not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature, we conclude that under the objective test set out by the plurality in *Williams,* under the test adopted in *Davis,* and under Justice Thomas's "formality and solemnity" rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial. Further, an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible.

People v. Leach, 980 N.E.2d 570, 593-594 (2012). Based upon the record before this Court, the Petitioner's motion to reconsider this issue is denied.

2. Remaining claims

The Petitioner seeks reconsideration of the Court's ruling on four other claims: dismissal of the prosecutorial misconduct claim; dismissal of the juror misconduct claim; dismissal of ineffective assistance of counsel claims with respect to prosecutorial and juror misconduct; and dismissal of other ineffective assistance of counsel claims. The Court has reviewed the Petitioner's motion and finds no basis for reconsideration of the Court's previous ruling. Further, no new facts have been presented with respect to these claims, therefore, the Petitioner's motion for reconsideration is denied.

CONCLUSION

Based upon the foregoing analysis, the Petitioner's Motion for Reconsideration is denied.

ORDER

The Petitioner's Motion for Reconsideration is hereby DENIED.

IT IS SO ORDERED.

DATED this 20th day of November 2013.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON PETITIONER'S MOTION FOR RECONSIDERATION was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 21st day of November, 2013, to:

Dennis Benjamin
P O Box 2772
Boise ID 83701

Nance Ceccarelli - messenger
P O Box 1267
Lewiston ID 83501

PATTY O. WEEKS, Clerk

By _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY · STATE OF IDAHO · EX-OFFICIO AUDITOR AND RECORDER

FILED

2013 DEC 19 PM 1 55

PATTY O. WEEKS
CLERK OF THE DIST. COURT IDAHO
DEPUTY

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 ORDER GRANTING MOTION FOR PERMISSION FOR INTERLOCUTORY APPEAL

The Court, having reviewed the Petitioner's Motion for Permission to Take Interlocutory Appeal of its July 11, 2013, order summarily dismissing Mr. Grove's first cause of action (alleging a denial of the right to confront the witnesses against him in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 13 of the Idaho Constitution) and Mr. Grove's fifth cause of action (alleging a denial of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 13 of the Idaho Constitution insofar as counsel failed to assert Mr. Grove's state and federal rights to confrontation) finds good cause to grant the motion. The issues involve a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal would advance the orderly resolution of the litigation.

ACCORDINGLY, THE COURT HEREBY:

1. GRANTS THE MOTION FOR PERMISSION ON APPEAL;

2. DIRECTS THE PETITIONER TO FILE A MOTION WITH THE IDAHO SUPREME COURT REQUESTING ACCEPTANCE OF THE APPEAL UNDER I.A.R. 12(c)(1) WITHIN FOURTEEN DAYS AFTER THE FILING OF THIS ORDER.

SO ORDERED this 19th day of December, 2013.

Carl B. Kerrick
District Judge

In the Supreme Court of the State of Idaho

FILED

2014 JAN 21 AM 10 09

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE MATTER OF THE MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION.	ORDER DENYING MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION
STACEY LEWIS GROVE, Petitioner, v. STATE OF IDAHO, Respondent.	Supreme Court Docket No. 41714-2013 Nez Perce County No. 2012-1798 Ref. No. 14-22

A MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION with attachments and a MEMORANDUM IN SUPPORT OF MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION with attachments were filed by counsel for Petitioner on December 31, 2013, requesting this Court for an Order granting permission to appeal the district court's Opinion and Order on Motions for Summary Disposition, file-stamped July 11, 2013, in Nez Perce County case number CV 2012-1798. Thereafter, an OBJECTION TO "MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION" was filed by counsel for Respondent on January 7, 2014. The Court being fully advised; therefore, after due consideration,

IT HEREBY IS ORDERED that Petitioner's MOTION REQUESTING COURT TO ACCEPT APPEAL BY PERMISSION be, and hereby is, DENIED.

DATED this 21st January, 2014.

By Order of the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Carl B. Kerrick

FILED

2014 MAR 14 PM 2 56

PATTY O. WEEKS
CLERK OF THE DIST. COURT
BY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO

Stacey Grove v. State

ORDER REASSIGNING ALL CIVIL CASES)
PREVIOUSLY ASSIGNED TO DISTRICT)
JUDGE CARL B. KERRICK TO DISTRICT)
JUDGE JAY P. GASKILL)

CV12-1798

Administrative Order
No. 2014-2

All civil cases arising in the Second Judicial District currently assigned to Judge Carl B. Kerrick are REASSIGNED, effective February 28, 2014, to Judge Jay P. Gaskill.

This Administrative Order shall be served on all parties by the Clerk of the Court for each county in those cases currently assigned to Judge Kerrick. Receipt of this Administrative Order shall constitute notice that a new judge has been assigned pursuant to Rule 40(d)(1)(E), I.R.C.P.

DATED this 14th day of March 2014, *nunc pro tunc* to February 28, 2014.

John R. Stegner
Administrative District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of ~~March~~ April, 2014, a true copy of the foregoing was delivered to the following:

Nanci Ceccarelli

_____ U. S. Mail, Postage Prepaid
_____ Valley Messenger Service
_____ Hand Delivery
✓ Facsimile

Dennis Benjamin

_____ U. S. Mail, Postage Prepaid
_____ Valley Messenger Service
_____ ~~Hand~~ Delivery
✓ Facsimile

By: _____
DEPUTY

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • EX-OFFICIO AUDITOR AND RECORDER STATE OF IDAHO

FILED

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PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

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

STACEY L. GROVE,	)	
Plaintiff,	)	CASE NO. CV12-1798
vs.	)	ORDER FOR TELEPHONIC STATUS CONFERENCE
STATE OF IDAHO,	)	
Defendant.	)	

IT IS HEREBY ORDERED that Tuesday, the 29th day of April, 2014, at the hour of 2:15 P.M. Pacific Time in the District Court Chambers of the Nez Perce County Courthouse, Lewiston, Idaho, is the time and place set for a Telephonic Status Conference in the above-entitled matter with THE COURT initiating the call.

DATED this 8th day of April, 2014.

JAY P. GASKILL- District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER FOR TELEPHONIC STATUS CONFERENCE ~~was mailed, postage prepaid,~~ Fax-ed by the undersigned at Lewiston, Idaho, this 21 day of April, 2014 on:

Dennis Benjamin
P O Box 2772
Boise ID 83701
Fax: (208) 345-8274

Nance Ceccarelli
P O Box 1267
Lewiston ID 83501
Fax: (208) 799-3080

PATTY O. WEEKS, Clerk

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

FILED

2014 APR 29 PM 2 11

CLERK OF THE DISTRICT COURT
BY DEPUTY

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2012-1798 **ORDER OF VOLUNTARY DISQUALIFICATION FOR CAUSE**

Pursuant to the Petitioner's Motion for Disqualification under i.r.c.p. 40(d)(4),

IT IS HEREBY ORDERED that the Honorable Jay Gaskill be disqualified a the judge in this case.

DATED this 29th day of April, 2014.

Honorable Jay Gaskill
District Judge

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PATTY O. WE
CLERK OF THE DIST. COURT
DEPUTY

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

STACEY GROVE, Plaintiff, vs. STATE OF IDAHO, Defendant.	Case No. **CV12-01798** **ORDER ASSIGNING JUDGE**

In accordance with the Order entered by the Supreme Court on January 31, 2014, it is ORDERED that Senior Judge Carl B. Kerrick, is assigned to preside over all further proceedings in the above-entitled matter until further order of the Court.

DATED this 30th day of April, 2014.

JAY P. GASKILL
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER ASSIGNING JUDGE was faxed to:

Dennis Benjamin
P O Box 2772
Boise ID 83701
Fax (208) 345-8274

Nance Ceccarelli
P O Box 1267
Lewiston ID 83501
(208) 799-3080

Hon. Carl B. Kerrick—hand delivered

on this 30 day of April, 2014.

Deputy Clerk

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY
EX-OFFICIO
AUDITOR AND RECORDER
STATE OF IDAHO

FILED
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PATTY O. WE...
CLERK OF THE DIST...
DEPUTY

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

STACEY L. GROVE,	)	
Plaintiff,	)	CASE NO. CV12-1798
vs.	)	ORDER FOR TELEPHONIC STATUS CONFERENCE
STATE OF IDAHO,	)	
Defendant.	)	

IT IS HEREBY ORDERED that Thursday, the 15th day of May, 2014, at the hour of 10:45 A.M. Pacific Time in the District Court Chambers of the Nez Perce County Courthouse, Lewiston, Idaho, is the time and place set for a Telephonic Status Conference in the above-entitled matter with THE COURT initiating the call.

DATED this 1st day of May, 2014.

CARL B. KERRICK- District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER FOR TELEPHONIC STATUS CONFERENCE was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 1st day of May, 2014 on:

Dennis Benjamin
P O Box 2772
Boise ID 83701
Fax: (208) 345-8274

Nance Ceccarelli
P O Box 1267
Lewiston ID 83501
Fax: (208) 799-3080

PATTY O. WEEKS, Clerk

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY
EX-OFFICIO
AUDITOR AND RECORDER
STATE OF IDAHO

FILED

2014 MAY 19 AM 10 10

PATTY O. W[illegible]
CLERK OF THE DIST. COURT

[illegible]
DEPUTY

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

STACEY GROVE, Plaintiff, vs. STATE OF IDAHO, Defendant.	Case No. **CV-2012-1798** **ORDER ASSIGNING JUDGE**

In accordance with the order entered by the Supreme Court on January 31, 2014, it is **ORDERED** that Senior Judge Carl B. Kerrick is assigned preside over all further proceedings in the above-entitled matter until further order of the Court.

DATED this 14th day of May 2014.

John R. Stegner
Administrative District Judge

CERTIFICATE OF SERVICE

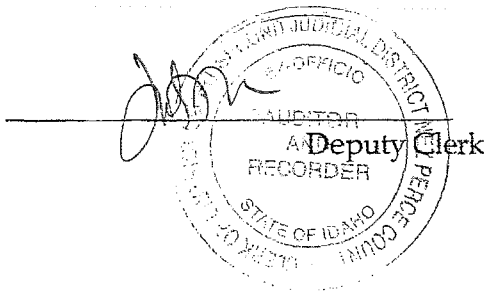
I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER ASSIGNING JUDGE was transmitted by facsimile to:

Dennis Benjamin
PO Box 2772
Boise, ID 83701

Nance Ceccarelli
PO Box 1267
Lewiston, ID 83501
(208) 799-3080

Hon. Carl B. Kerrick – hand delivered

on this 19 day of May 2014.



Deputy Clerk

DANIEL L. SPICKLER
Prosecuting Attorney

Nez Perce County, Idaho
Post Office Box 1267
Lewiston, Idaho 83501
Telephone (208) 799-3073
ISBN: 2923

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

STACEY L. GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV2012-0001798 PETITION FOR APPOINTMENT OF SPECIAL PROSECUTOR

COMES NOW, DANIEL L. SPICKLER, Prosecuting Attorney, and hereby petitions this Court for the appointment of a Special Prosecutor in the case of the Stacey L. Grove vs. State of Idaho, Case No. CV2012-0001798 and upon being duly sworn, hereby deposes and says:

1) That your affiant is the duly elected Prosecuting Attorney of Nez Perce County, and was sworn into office on January 14, 2013;

2) That your affiant has the duty to prosecute all felony criminal and/or civil actions, pursuant to Idaho Code §31-2604 as Prosecuting Attorney;

3) That your affiant petitions this Court to appoint Jessica Lorrello, or his/her delegee, a member of the Idaho Bar Association and an experienced

attorney in criminal prosecution, as the Special Prosecutor in that he/she is a suitable person to perform the duties required of your affiant in prosecuting;

4) That your affiant petitions this Court to appoint Jessica Lorello, or his/her delegee, as Special Prosecutor pursuant to I.C. §31-2603 throughout the duration of all further proceedings in this case.

DATED this 26th day of August, 2014.

Daniel L. Spickler

DANIEL L. SPICKLER
Nez Perce County Prosecuting Attorney

STATE OF IDAHO)
) ss.
County of Nez Perce)

On this 26th day of August, 2014, before me, a Notary Public for Idaho, appeared Daniel L. Spickler, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

MELANIE S. KELLER NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
Residing at: Lewiston,
Idaho
My Commission Expires: 09-08-2016

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a true and correct copy of the foregoing, PETITION FOR APPOINTMENT OF SPECIAL PROSECUTOR, was sent via:

(1) _____ hand delivered, or
(2) _____ hand delivered via court basket, or
(3) _____ sent via facsimile, or
(4) __X__ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Dennis Benjamin
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

Jessica Lorello
Attorney General's Office
Special Projects Unit
PO Box 83720
Boise, ID 83720-0010

DATED this 11th day of August, 2014.

MELANIE S. KELLER
Legal Assistant

FILED
ORIGINAL
2014 AUG 29 AM 10 20
PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
DEPUTY

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

STACEY L. GROVE, Petitioner, vs. STATE OF IDAHO, Respondent,	CASE NO. CV2012-0001798 ORDER FOR APPOINTMENT OF SPECIAL PROSECUTOR

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Jessica Lorello, or her delegee, be appointed as Special Prosecutor in the case of Stacey L. Grove vs. State of Idaho, Case No. CV2012-0001798, in that she is a suitable person to perform the duties required in prosecuting said case and that there is a conflict of interest in the Nez Perce County Prosecuting Attorney's continued prosecution of said case pursuant to I.C. §31-2604.

DATED this 29th day of August, 2014.

District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing, Order for Appointment of Special Prosecutor,

(1)_____ hand delivered, or

(2)_____ hand delivered via court basket, or

(3)_____ sent via facsimile, or

(4)__✓__ mailed, postage prepaid, by depositing the same in the United States mail, addressed to the following:

Prosecutor's Office -hand delivered
P. O. Box 1267
Lewiston, ID 83501

Dennis Benjamin
Nevin, Benjamin, McKay & Barlett LLP
P.O. Box 2772
Boise, ID 83701

Jessica Lorello
Attorney General's Office
Special Projects Unit
PO Box 83720
Boise, ID 83720-0010

DATED this 29th day of August, 2014.

CLERK OF THE COURT

Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **ORDER GRANTING MOTION FOR PERMISSION TO CONDUCT DISCOVERY**

Pursuant to the motion filed by Petitioner Stacey Grove and the State of Idaho for permission to conduct Discovery, IT IS HEREBY ORDERED that Petitioner is granted permission to obtain and examine the brain tissue of [redacted] Martin along with the histology blocks, and histology slides from Dr. Ross Reichard's neuropathological examination, all of which are currently in possession of the Spokane County (Washington) Medical Examiner.

Ordered this 10th day of December, 2014.

Carl B. Kerrick
District Judge

12-11-14 Copies faxed to: Dennis Benjamin (208) 345-8274
Jessica Lorello (208) 854-8083

FILED

2015 MAR 12 PM 4:19

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2012-01798 **ORDER TO TRANSPORT PETITIONER TO HEARING**

It appearing the above-named Petitioner is in the custody of the Idaho Department of Corrections and it is necessary that he be brought before the Court for further proceedings. IT IS HEREBY ORDERED that the Sheriff of Nez Perce County, State of Idaho, bring the Petitioner to the Court at Lewiston, Idaho, County of Nez Perce, State of Idaho, on or before the 23rd day of March, 2015, so that he may attend the evidentiary hearing scheduled in this case on March 24-26, 2015.

IT IS FURTHER ORDERED, that the Department of Corrections release the said Defendant to the Sheriff of Nez Perce County, State of Idaho, for the purpose of the aforementioned appearance and retake him into custody upon return to the Department of Corrections.

IT IS FURTHER ORDERED, that immediately following the conclusion of the evidentiary hearing, the Sheriff return the said Defendant to the custody of the Idaho Department of Corrections.

Dated this 12th day of March, 2015.

Honorable Carl B. Kerrick

FILED

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PATTY O. WEEKS

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	)	CASE NO. CV-12-01798 **ORDER GRANTING REQUEST FOR PETITIONER TO WEAR CIVILIAN CLOTHING AT EVIDENTIARY HEARING**

THE COURT, having considered Petitioner's request that he be allowed to wear civilian clothing at the evidentiary hearing, HEREBY ORDERS THAT STACEY GROVE BE ALLOWED TO WEAR CIVILIAN CLOTHING TO THE EVIDENTIARY HEARING TO BE HELD BEFORE THIS COURT ON MARCH 24, 25 AND 26, 2015.

Dated this 23rd day of March, 2015.

Carl B. Kerrick
District Judge

Faxed to: Dennis Benjamin (208) 345-8274
Jessica Lorello (208) 854-8083

emailed to: NPC Jail

Dennis Benjamin, ISBA# 4199
Deborah Whipple, ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **SECOND MOTION FOR RECONSIDERATION**

Petitioner, Stacey Grove, asks this Court, pursuant to I.C.R. 11(a)(2)(B), to reconsider its order granting in part the Respondent's Motion for Summary Disposition as to the confrontation clause issue and the confrontation clause aspects of the ineffective assistance of counsel claim. This motion is based, in part, upon *State v. Stanfield*, — Idaho —, — P.3d —, 2015 WL 1452930 (April 1, 2015). A memorandum of law in support of this motion is filed contemporaneously herewith.

Dated this 9th day of April, 2015.

Deborah Whipple
Attorneys for Stacey Grove

Dennis Benjamin

CERTIFICATE OF SERVICE

I CERTIFY that on April 9, 2015, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

Dennis Benjamin
ISB #4199
Deborah Whipple
ISB #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
db@nbmlaw.com
dwhipple@nbmlaw.com

Attorneys for Petitioner

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

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **MEMORANDUM IN SUPPORT OF SECOND MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Stacey Grove submits the following in support of his second motion for reconsideration of the Court's order granting in part the Respondent's Motion for Summary Disposition. Reconsideration should be granted because the Court's Confrontation Clause analysis is in error in light of *State v. Stanfield*, — Idaho —, — P.3d —, 2015 WL 1452930 (April 1, 2015). A true and correct copy of *Stanfield* is attached hereto as Exhibit A for the court's convenience.

II. WHY RECONSIDERATION SHOULD BE GRANTED

A. *The Court Should not Have Dismissed the Confrontation Clause Claim.*

1. Introduction

The Court should reconsider its conclusion that the admission into evidence of the testimony of other doctors about the findings contained in Dr. Ross Reichard's neuropathology report did not violate Mr. Grove's Sixth Amendment right to confront witnesses. The Court had two bases for its ruling: 1) that the evidence was not objected to by defense counsel, and 2) the evidence was not "testimonial." See, Opinion and Order on Motions for Summary Disposition ("Opinion") pg. 22. As will be explained, the Court should grant an evidentiary hearing on the Confrontation Clause issue which is pleaded as a stand-alone claim and as an aspect of the Ineffective Assistance of Counsel claim.

First, a constitutional violation may be raised for the first time in a post-conviction petition, even when there was an opportunity to object at trial. The argument why Mr. Grove can raise this issue even though there was no objection at trial was set forth in the Memorandum in Support of the [First] Motion for Reconsideration at pages 4-5, which is incorporated herein by this reference. In short, there is no statutory bar to raising such claims and cases where an unobjected-to trial error has been raised in post-conviction are common and include: *Berg v. State*, 131 Idaho 517, 519, 960 P.2d 738, 740 (1998); *Short v. State*, 135 Idaho 40, 41, 13 P.3d 1253, 1254 (Ct. App. 2000) (both raising breach of plea agreement claims); *Rossignol v. State*, 152 Idaho 700, 706, 274 P.3d 1, 7 (Ct. App.), *review denied* (2012); *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); and *Barcella v. State*, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009) (all raising

deprivation of the right to testify claims); *Murillo v. State*, 144 Idaho 449, 452, 163 P.3d 238, 241 (Ct. App. 2007) (raising a denial of the right to participate in his defense claim); *Noel v. State*, 113 Idaho 92, 94, 741 P.2d 728, 730 (Ct. App. 1987) (raising an adequacy of plea colloquy claim); and *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975) (raising an unfair suggestiveness of lineup claim, among other stand-alone claims).

Second, reconsideration should be granted because the Court's ruling conflicts with *State v. Stanfield, supra.* This will be discussed in detail in the section immediately below.

2. The contents of Dr. Reichard's report were inadmissible under the Confrontation Clause per *State v. Stanfield.*

The contents of Dr. Reichard's report, which were testified to by other doctors in this case, were testimonial and thus inadmissible under the Sixth Amendment's confrontation clause. Recently, the Idaho Supreme Court clarified what "testimonial" means in the context of forensic evidence. The court first reviewed the three leading United States Supreme Court cases, *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, —— U.S. ——, 131 S.Ct. 2705 (2011) and *Williams v. Illinois*, —— U.S. ——, 132 S.Ct. 2221 (2012), noting that those "decisions are difficult to distill into controlling principles of law." *Stanfield*, at *4. In fact, while this Court attempted to follow the confusing and splintered *Williams* opinion, our Supreme Court took a very different interpretative approach. It found that "[b]ecause no position received support from a majority of the justices, *Williams* does not provide us a governing legal principle and this Court views the decision as limited to the unique set of facts presented in that case." *Stanfield*, at *8.

Nevertheless, "[i]t is clear that a statement—forensic or otherwise—is testimonial if it is made primarily with an evidentiary purpose, regardless of its formality or any other particular criteria." *Stanfield*, at *4. The Court went on to note:

> The only consistent requirement that can be distilled from these decisions is that in order for a statement—forensic or otherwise—to be deemed testimonial, it must have been made with a primary objective of creating an evidentiary record to establish or prove a fact at trial. This Court has previously addressed the definition of testimonial statements only in the context of statements made by lay witnesses, where we likewise applied the primary purpose test to determine whether a statement is testimonial. *State v. Hooper*, 145 Idaho 139, 144–146, 176 P.3d 911, 916–184 (2007) (videotape of child victim's interview with police was testimonial because it was admitted as a substitute for her live testimony)[.] . . . . [W]e conclude that our inquiry should focus on whether the . . . statements were made with a primary objective of creating an evidentiary record to establish or prove a fact at trial.

Id (some internal citations omitted).

The *Stanfield* Court's citation to *State v. Hooper* is important in this case because *Hooper* was the most recent Idaho Supreme Court Confrontation Clause case at the time of Mr. Grove's criminal trial. Trial counsel should have been familiar with *Hooper*. Dr. Reichard's report was testimonial evidence under *Hooper* because he prepared the report at the request of Dr. Ross with the primary objective of creating an evidentiary record to establish or prove a fact at trial. The email correspondence between Dr. Ross and Dr. Reichard conclusively demonstrates that the primary purpose of Dr. Reichard's consultation was to develop evidence for use in a criminal case where expert testimony might be required. Dr. Reichard was contacted on August 3, 2006, three weeks after [redacted] Martin's death, by Dr. Ross in regards to conducting neuropathology consultations "in cases that have a significant potential to require his services as an expert witness in court" and Dr. Reichard agreed to perform that role. See Exhibit A to the Second

Affidavit of Dennis Benjamin, filed on April 12, 2013. Attached as Exhibit B to that affidavit is a Spokane County Medical Examiner Chain-of-Evidence Form showing that tissue was sent from the Spokane Medical Examiner to the New Mexico Office of Medical Investigations on August 14, 2006, and was received on August 15, 2006. Dr. Reichard's report was testimonial evidence.

3. Conclusion

The testimony regarding Dr. Reichard's examination and report violated the Confrontation Clause under *State v. Hooper* and *State v. Stanfield*. Reconsideration of this claim should be granted.

B. *The Court Should Not Have Dismissed the Ineffective Assistance of Trial Counsel Claim Based Upon the Failure to make a Confrontation Clause Objection at Trial.*

Even if Mr. Grove could not raise the Confrontation Clause issue as a stand-alone claim, he should be able to raise defense counsel's failure to object to that evidence as alleged in Paragraph 70 of the Amended Petition. This Court dismissed the claim due to its previous finding that "the expert's reliance and testimony regarding Dr. Reichard's report was not in violation of the Confrontation Clause[.]" Opinion, pg. 32. That conclusion should be reconsidered in light of *Stanfield* for the reasons already set forth in the Confrontation Clause section above.

It was deficient performance to fail to make a Confrontation Clause objection because the exclusion of the evidence would have furthered defense counsel's theory of the case. Dr. Reichart's finding of a tear in the corpus callosum tended to show that [redacted] suffered a violent injury. The deficient performance prejudiced Mr. Grove because Dr. Reichart's findings severely

undercut the defense theory of the case. It purported to show that the fatal injuries were inflicted after Ms. Nash left [redacted] alone with Mr. Grove because the immediate and debilitating nature of such an injury would have been plainly apparent to her. There is more than a reasonable probability of an acquittal in this case had Dr. Reichard's findings been excluded.

Reconsideration should be granted and the Court should permit an evidentiary hearing on this aspect of the ineffective assistance of trial counsel claim.

III. CONCLUSION

For all the reasons above, this Court should grant reconsideration of the Confrontation Clause issues.

Respectfully submitted this 9th day of April, 2015.

Deborah Whipple Dennis Benjamin

Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on April 9, 2015, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

2015 WL 1452930
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Idaho,
Boise, August 2014 Term.

STATE of Idaho, Plaintiff–Respondent,
v.
Katherine Lea STANFIELD, Defendant–Appellant.

No. 40301. | April 1, 2015.

Synopsis
Background: Defendant was convicted in the District Court of the Fourth Judicial District, Ada County, Ronald J. Wilper, J., of first-degree murder. Defendant appealed.

Holdings: The Supreme Court, Horton, J., held that:

[1] the trial court's admission of testimony from neuropathologist did not violate defendant's Confrontation Clause rights;

[2] neuropathologist's testimony that her laboratory's routine procedures were followed and that the slides she viewed contained the victim's brain tissue was hearsay; and

[3] the exception to the hearsay rule that allowed an expert to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they were otherwise admissible applied to warrant admission of neuropathologist's opinion testimony.

Affirmed.

West Headnotes (27)

[1] **Criminal Law**
Questions of Fact and Findings
When a violation of a constitutional right is asserted, the Supreme Court will defer to the trial court's factual findings unless those findings are clearly erroneous.
Cases that cite this headnote

[2] **Criminal Law**
Constitutional Issues in General
The Supreme Court exercises free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found.
Cases that cite this headnote

[3] **Criminal Law**
Reception of Evidence
Whether admission of evidence violates a defendant's right to confront adverse witnesses under the Sixth Amendment's Confrontation Clause is a question of law over which the Supreme Court exercises free review. U.S.C.A. Const.Amend. 6.
Cases that cite this headnote

[4] **Criminal Law**
Instructions
The issue of whether a particular jury instruction is necessary and whether the jury has been properly instructed is a matter of law over which the Supreme Court exercises free review.
Cases that cite this headnote

[5] **Criminal Law**
Hearsay in General
Criminal Law
Hearsay
The trial court has broad discretion in deciding whether to admit hearsay evidence under one of the exceptions, and the Supreme Court will not overturn an exercise of that discretion absent a clear showing of abuse.

Cases that cite this headnote

[6] **Criminal Law**
Discretion of Lower Court

Whether the district court has abused its discretion is determined by examining: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason.

Cases that cite this headnote

[7] **Criminal Law**
Right of Accused to Confront Witnesses

The right to confrontation is fundamental and applies equally to state prosecutions. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[8] **Criminal Law**
Right of Accused to Confront Witnesses

The Confrontation Clause only applies to witnesses against the accused, in other words, those who bear testimony. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

The Confrontation Clause only applies to statements that are testimonial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

The Confrontation Clause does not bar statements not offered to prove the truth of the matter asserted. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Availability of Declarant

If the statement is testimonial, then its admission is permitted under the Confrontation Clause only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[12] **Criminal Law**
Hearsay in General

Criminal Law
Acts or Conduct

Any declaration, affirmation, omission, or nonverbal conduct made for the purpose of establishing some fact, qualifies as a statement.

Cases that cite this headnote

[13] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

Whether a statement is testimonial, for Confrontation Clause purposes, is determined by looking at the statement's primary purpose and its similarities to traditional testimony. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[14] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

"Testimony" is defined as a solemn declaration or affirmation made for the purpose of establishing or proving some fact.

Cases that cite this headnote

[15] **Criminal Law**

Out-Of-Court Statements and Hearsay in General

A statement is testimonial, for Confrontation Clause purposes, when the circumstances objectively indicate that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution; when no such primary purpose exists, the statement is nontestimonial and its admissibility is governed by state and federal rules of evidence, not the Confrontation Clause. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[16] **Criminal Law**
Out-Of-Court Statements and Hearsay in General
Criminal Law
Use of Documentary Evidence
Criminal Law
Testimony at Preliminary Examination, Former Trial, or Other Proceeding

While a statement does not have to be written or made under oath to be testimonial, for Confrontation Clause purposes, the formality of the statement itself and the formality of the circumstances in which the statement is made are relevant to determine whether it was intended to establish some fact at trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[17] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

In essence, a statement is testimonial, for Confrontation Clause purposes, when it is intended to be a weaker substitute for live testimony at trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[18] **Criminal Law**
Use of Documentary Evidence

The introduction of reports by non-testifying analysts violates the defendant's right of confrontation when they are for the purpose of establishing or proving some fact at trial, or are affirmations made for the purpose of establishing or proving some fact in a criminal proceeding. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[19] **Criminal Law**
Out-Of-Court Statements and Hearsay in General

In order for a statement, forensic or otherwise, to be deemed testimonial, for Confrontation Clause purposes, it must have been made with a primary objective of creating an evidentiary record to establish or prove a fact at trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**
Right of Accused to Confront Witnesses

A defendant's right to confrontation is violated when an expert acts merely as a well-credentialed conduit, and does not provide any independent expert opinion. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**
Right of Accused to Confront Witnesses

When an expert independently evaluates objective raw data obtained from an analyst, and exercises his or her own judgment in reaching a conclusion, the expert is not a conduit for the analyst's conclusion, for Confrontation Clause purposes, rather, the testifying expert's opinion is an original product that can be readily tested through cross-examination. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[22] **Criminal Law**
Right of Accused to Confront Witnesses

The trial court's admission of testimony from neuropathologist, who opined that child died from non-accidental head trauma after reviewing slides prepared by technician, who did not testify at murder trial, did not violate defendant's Confrontation Clause rights; technician did not make the slides with the primary objective of creating an evidentiary record to establish or prove a fact at trial, neuropathologist had personal knowledge that the slides were stained correctly based on her comparison of the slides with the control slide, and technician's act of labeling the slides did not require him or her to make any conclusions or factual findings as to any issue to be decided at trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[23] **Criminal Law**
Right of Accused to Confront Witnesses

The right to confrontation does not mandate that the prosecution call every person involved in the chain of custody. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
Particular Determinations, Hearsay Inadmissible

Neuropathologist's testimony that her laboratory's routine procedures were followed and that the slides she viewed contained the victim's brain tissue was hearsay, during prosecution for murder; the testimony provided facts that were specific to the case. Rules of Evid., Rules 801(c), 802.

Cases that cite this headnote

[25] **Criminal Law**
Sources of Data

An expert witness is allowed to base an opinion on: (1) facts within her personal knowledge; (2) facts presented to her at trial; or (3) facts presented to her outside of court, but not perceived by her personally, if those facts are the type of facts reasonably relied upon by experts in her field in drawing such conclusions. Rules of Evid., Rule 602, 703.

Cases that cite this headnote

[26] **Criminal Law**
Sources of Data

The exception to the hearsay rule that allowed an expert to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they were otherwise admissible applied to warrant admission of neuropathologist's opinion testimony that child died from non-accidental head trauma, which opinion was formed after reviewing child's brain tissue slides, which were labeled by technician, in prosecution for murder; neuropathologist testified that the slides she examined contained the brain tissue of victim and that those slides were stained properly, the technician did not make any factual findings that neuropathologist relied upon, and neuropathologist examined the tissue, documented her factual findings, and formed her own opinion. Rules of Evid., Rule 703.

Cases that cite this headnote

[27] **Constitutional Law**
Particular Issues and Applications
Homicide
First Degree, Capital, or Aggravated Murder

The trial court's jury instruction on the elements of first degree murder did not violate defendant's due process rights, even though defendant argued that the jury should have been required to find that defendant specifically intended to cause great bodily harm to the victim; the court instructed the jury as to the elements of the offense and stated that defendant would be guilty of first degree murder if she committed a battery upon the child which resulted in great bodily harm, from which the child died. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.
The judgment of conviction is affirmed.

Attorneys and Law Firms

Sara B. Thomas, State Appellate Public Defender, Boise, for appellant.Brian R. Dickson argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.Russell J. Spencer argued.

Opinion

HORTON, Justice.

*1 Katherine Lea Stanfield appeals from her judgment of conviction, entered following a jury trial, for the first-degree murder of two year-old W.F. by aggravated battery on a child under twelve years. Stanfield raises two primary challenges on appeal. First, she alleges that the district court erred in admitting certain expert testimony, claiming that its admission violated her Sixth Amendment right to confrontation and that the evidence was inadmissible hearsay. Second, she contends that the district court deprived her of her Fourteenth Amendment right to due process and right to a jury trial by failing to properly instruct the jury. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2009, at 3:35 p.m., Ada County Sheriff's dispatch received an emergency call from Stanfield requesting medical assistance for W.F., the son of her daughter's boyfriend. At the time, Stanfield operated a daycare primarily for her two grandsons and W.F., and she had been watching W.F. most weekdays during the previous four months. Stanfield told dispatchers that W.F. was unresponsive after falling and hitting his head. A medical unit arrived at the scene at 3:40 p.m. and transported W.F. to St. Luke's Regional Medical Center.

W.F. was treated by several doctors and underwent a number of tests, including two CT scans, which indicated severe head trauma. W.F. did not regain consciousness and died on December 13, 2009. An autopsy was performed on W.F. which revealed axonal injury to his brain. According to Dr. Charles Garrison, the pathologist who performed W.F.'s autopsy, this injury could have been caused by either hypoxia or trauma. Dr. Garrison requested that a neuropathologist become involved in order to ascertain the cause of the axonal injury. Dr. Garrison preserved W.F.'s brain for this examination. Based on Dr. Garrison's evaluation of all of the other evidence, but prior to receiving the neuropathologist's report, he concluded that W.F.'s death was caused by non-accidental trauma.

Police questioned Stanfield and her two grandsons, C.D. (age 8) and J.D. (age 5), about the incident immediately after W.F. was transported to the hospital and several times in the months following W.F.'s death. On September 21, 2010, Stanfield was charged with first-degree murder by aggravated battery on a child under twelve. Stanfield maintained that W.F. was not pushed or shaken, but had fallen down while she was in the kitchen and he was alone in the living room. The interviews of C.D. and J.D. corroborated Stanfield's version of events, but multiple medical experts concluded that W.F.'s injuries were inconsistent with this scenario. After charging Stanfield, in order to help resolve the conflicting theories, the State hired Dr. Lucy Rorke–Adams, a neuropathologist, to examine W.F.'s brain tissue to determine the cause of his death.

The trial began on May 2, 2012, with the jury returning its verdict on June 4, 2012. The primary issue at trial was what —or who—caused the injuries that resulted in W.F.'s death. The State contended that W.F. died from non-accidental head trauma resulting from Stanfield abusing him. Stanfield denied that W.F. was abused and asserted that he hit his head after falling and his injuries were caused by a combination of the fall and other medical conditions, including hypoxia caused by the emergency responders.

*2 At trial, seven medical experts testified for the prosecution and three testified for the defense. In addition to these experts, Dr. Rorke–Adams testified for the State regarding her examination of W.F .'s brain tissue and the conclusions she drew from that examination. Dr. Rorke–Adams testified that, while she personally conducted the examination and wrote the report, she did not participate in preparing the slides that she examined; rather, her technician prepared the slides. [1] After verifying the technician's work by reference to a control slide, Dr. Rorke–Adams evaluated

the slides and wrote a report detailing her findings and conclusions.

Stanfield objected, arguing that because Dr. Rorke–Adams lacked personal knowledge of the technician's actions, Dr. Rorke–Adams' testimony violated her right to confrontation and was impermissible hearsay. The district court overruled Stanfield's objections and permitted Dr. Rorke–Adams to testify that the slides she examined contained W.F.'s brain tissue and that, based on her examination of the slides, she believed that W.F. died from non-accidental head trauma resulting from abuse.

Without objection, the district court instructed the jurors that to find Stanfield guilty of first-degree murder, they must find that she committed aggravated battery on W.F., which resulted in his death, but that they were not required to find that she intended to kill. After deliberating for thirteen hours, the jury found Stanfield guilty of first-degree murder. The district court sentenced Stanfield to life in prison, with ten years fixed.

Stanfield appeals the district court's decision to permit Dr. Rorke–Adams to testify as to the results of her examination and the cause of W.F.'s axonal injuries. Stanfield also challenges the district court's jury instruction, alleging that it constitutes fundamental error in violation of her Fourteenth Amendment right to due process and her right to a jury trial.

II. STANDARD OF REVIEW

[1] [2] [3] [4] When a violation of a constitutional right is asserted, we will defer to the trial court's factual findings unless those findings are clearly erroneous. *State v. Hooper*, 145 Idaho 139, 142, 176 P.3d 911, 914 (2007). This Court exercises "free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found." *Id.* Whether admission of evidence violates a defendant's right to confront adverse witnesses under the Sixth Amendment's Confrontation Clause is a question of law over which this Court exercises free review. *Id.* Likewise, "[t]he issue of whether a particular jury instruction is necessary and whether the jury has been properly instructed is a matter of law over which this Court exercises free review." *State v. Adamcik*, 152 Idaho 445, 472, 272 P.3d 417, 444 (2012).

[5] [6] The trial court has broad discretion in deciding whether to admit hearsay evidence under one of the exceptions, and this Court will not overturn an exercise of that discretion absent a clear showing of abuse. *State Dep't of Health & Welfare, ex rel. Osborn v. Altman*, 122 Idaho 1004, 1007, 842 P.2d 683, 686 (1992). Whether the district court has abused its discretion is determined by examining: "(1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *State v. Shackelford*, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010). Even if evidence was admitted in error, this court will not grant relief if we find the error to be harmless. *Id.*; *see also* I.C.R. 52.

III. ANALYSIS

*3 We first consider whether the district court erred by permitting the introduction of Dr. Rorke–Adams' testimony. This requires a determination whether the introduction of her testimony abridged Stanfield's Sixth Amendment right of confrontation. We then separately consider whether Dr. Rorke–Adams' testimony included inadmissible hearsay. Finally, we address Stanfield's challenge to the jury instruction.

A. The district court did not err by admitting Dr. Rorke–Adams' testimony.

1. *The admission of the testimony did not violate Stanfield's Sixth Amendment right of confrontation.*

As previously noted, the district court overruled Stanfield's objection and permitted Dr. Rorke–Adams to testify that the slides she examined contained W.F.'s brain tissue and as to the findings and conclusions she reached based upon her examination of those slides. Dr. Rorke–Adams did not personally prepare the slides that she examined; rather, a technician in her lab purportedly prepared the slides in accordance with instructions from Dr. Rorke–Adams. Stanfield contends that the technician, by labeling the slides, asserted that they contained W.F.'s tissue, and that, by returning the slides to Dr. Rorke–Adams without any notations, asserted that the proper chemicals had been applied to the tissue samples in accordance with her instructions. Stanfield argues that these assertions are testimonial and that Dr. Rorke–Adams introduced them for their truth. Thus, Stanfield contends that the Confrontation Clause required

that the State produce the testimony of the laboratory technician in addition to that of Dr. Rorke–Adams. Absent this testimony, Stanfield argues, Dr. Rorke–Adams' opinions and conclusions were not relevant or reliable and should not have been presented to the jury.

a. Current Confrontation Clause jurisprudence

[7] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him."U.S. Const. amend. VI; *see also*Idaho Const. Art. I § 13. The right to confrontation is fundamental and applies equally to state prosecutions.*Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Our state constitution does not contain a confrontation clause similar to that found in the United States Constitution; therefore, this issue is analyzed solely under the United States Constitution. *State v. Sharp*, 101 Idaho 498, 502, 616 P.2d 1034, 1038 (1980).

[8] **[9]** **[10]** **[11]** The Confrontation Clause only "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' " *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The United States Supreme Court has determined that this language restricts the Confrontation Clause to testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 823–24, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *Crawford*, 541 U.S. at 51. The Confrontation Clause only applies to statements that are "testimonial." *Davis*, 547 U.S. at 823; *Crawford*, 541 U.S. at 51. The Clause does not bar statements not offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). If the statement is testimonial, then its admission is permitted only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59; *Hooper*, 145 Idaho at 143, 176 P.3d at 915.

*4 **[12]** Any declaration, affirmation, omission, or nonverbal conduct made for the purpose of establishing some fact, qualifies as a statement. The Supreme Court has recognized that affirmations made by way of omissions may constitute statements. *Bullcoming v. New Mexico*, —— U.S. ——, ——, 131 S.Ct. 2705, 2714, 180 L.Ed.2d 610 (2011) ("He further represented, by leaving the '[r]emarks' section of the report blank, that no 'circumstance or condition ... affect[ed] the integrity of the sample or ... the validity of the analysis.' "). In this case, the technician's labeling and the omission of any indication that Dr. Rorke–Adams' instructions had not been followed constitute statements for Confrontation Clause purposes. However, these statements must be testimonial for the Confrontation Clause to apply.

[13] **[14]** **[15]** The Supreme Court has not provided a comprehensive definition of "testimonial," but some guiding principles may be gleaned from that Court's recent decisions. Whether a statement is testimonial is determined by looking at the statement's primary purpose and its similarities to traditional testimony. *Davis*, 547 U.S. at 822. Testimony is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."*Crawford*, 541 U.S. at 51 (alteration in original; citation omitted). Therefore, a statement is testimonial when "the circumstances objectively indicate that ... the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution."*Davis*, 547 U.S. at 822. When no such primary purpose exists, the statement is nontestimonial and its admissibility is governed by state and federal rules of evidence, not the Confrontation Clause.[2] *Michigan v. Bryant*, 562 U.S. 344, ——, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011).

[16] **[17]** Further, while a statement does not have to be written or made under oath to be testimonial, the formality of the statement itself and the formality of the circumstances in which the statement is made are relevant to determine whether it was intended to establish some fact at trial. *Davis*, 547 U.S. at 826, 827–28; *see, e.g., Shackelford*, 150 Idaho at 373, 247 P.3d at 600 (the totality of the circumstances analysis considers "the formality of questioning and the extent to which the interview was similar to live testimony"). In essence, a statement is testimonial when it is intended to be "a weaker substitute for live testimony at trial."*Davis*, 547 U.S. at 828 (internal quotation, citation omitted). While this definition has been easily applied to traditional testimony presented by lay witnesses, its application to forensic evidence and expert testimony has proved to be problematic.

Three Supreme Court cases have addressed the subject presented in this case—whether the statements contained in, or relied on in creating, forensic reports are "testimonial"—but these decisions are difficult to distill into controlling principles of law. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *Bullcoming*, —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610; *Williams v. Illinois*, —— U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). It is clear that a statement—forensic or otherwise—is testimonial if it is made primarily with an evidentiary

purpose, regardless of its formality or any other particular criteria. *Bryant,* 131 S.Ct. at 1155; *see also Melendez–Diaz,* 557 U.S. at 324. Justices Scalia, Ginsburg, Stevens, and Souter, (and eventually Justices Sotomayor and Kagan) have consistently voted together, opining that this is the only requirement for a statement to be testimonial. *See e.g. Melendez–Diaz,* 557 U.S. at 310. Justices Kennedy, Breyer, Alito, and Chief Justice Roberts, also consistently voting together, have considered whether the statement has an accusatory aspect. Justice Thomas has focused on the formality of the statement. *See, e.g., id.* at 343–44 (Kennedy, J., dissenting); *Id.* at 329–30 (Thomas, J., concurring). Given the present evolution of the Supreme Court's Confrontation Clause jurisprudence, it is appropriate to more carefully examine these decisions.

*5 The United States Supreme Court first took up the issue of whether analysts' statements contained in forensic reports are testimonial for Confrontation Clause purposes in *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314. There, the trial court admitted three "certificates of analysis" that cocaine was present in bags of powder seized from the defendant. *Id.* at 308. The certificates were sworn to before a notary by the analysts who conducted the testing. *Id.* The plurality held that the certificates were testimonial because they were "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" and were "quite plainly affidavits." *Id.* at 310 (quoting *Crawford,* 541 U.S. at 51). The Court noted that the governing statute provided that "the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance,"*id.* at 311 (emphasis in original, internal quotation and citation omitted), and that the certificates provided "the precise testimony the analysts would be expected to provide if at trial."*Id.* [3]

Despite this holding, the plurality explained that:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case ... but, what testimony *is* introduced must (if the defendant objects) be introduced live.

Id. at 311 n. 1 (emphasis in original). Justice Thomas concurred, resulting in a 5–4 holding that the Confrontation Clause was violated by admission of the certificates. Justice Thomas reasoned that, because the certificates were "formalized testimonial materials" and "quite plainly affidavits," they were governed by the Confrontation Clause. *Id.* at 329–30 (Thomas, J., concurring). Justice Kennedy, joined by Justices Roberts, Breyer, and Alito, dissented, arguing that the Sixth Amendment's use of the phrase "witnesses against" requires that the witness perceive "an event that gives him personal knowledge of some aspect of the defendant's guilt."*Id.* at 343–44 (Kennedy, J., dissenting). The dissent reasoned that "[t]he analyst's distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense."*Id.* at 345.

Two years later, the Court again addressed the issue in *Bullcoming v. New Mexico.* — U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610. In *Bullcoming,* the State introduced the results of a blood alcohol test as the principal evidence in the defendant's prosecution for driving while intoxicated. *Id.* at 2709–10. The "certificate of analyst" was signed by the testing analyst and reported that the defendant's blood alcohol concentration was .21. *Id.* at 2710. Additionally, the analyst affirmed that he had "received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number 'corresponded,' and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol."*Id.* at 2714. The trial court allowed the certificate to be admitted as a business record during the testimony of another analyst who was employed by the same laboratory. *Id.* at 2712. Although the testifying analyst was familiar with the lab's routine procedures, he had neither observed nor reviewed the certifying analyst's findings. *Id.*

*6 On appeal, the majority concluded that the report was indistinguishable from the report admitted in *Melendez–Diaz,* despite not being sworn to under oath, and was thus testimonial. *Id.* at 2717. They explained that "[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial."*Id.* (citing *Melendez–Diaz,* 129 S.Ct at 2532). In addition to affirming *Melendez–Diaz,* the *Bullcoming* majority further explained that the Confrontation Clause required that the statements not only had to be admitted through live testimony, but that the testimony had to be that of the specific analyst who conducted the scientific test at issue. *Id.* at 2715. The Court

rejected the notion that "surrogate testimony" could satisfy the requirements of the Confrontation Clause because only the analyst responsible for the testing could "convey what [he] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed."*Id.* The Court held that the Confrontation Clause does not permit a person to testify to the observations made by another, regardless of whether they were recorded, simply because the person testifying is familiar with the technology the observing witness used.*Id.* at 2714–15.

Of particular significance to our decision today, Justice Sotomayor's concurrence discussed the limited scope of the holding, emphasizing that the decision did not extend to situations, such as the one presently before this Court, in which the "expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."*Id.* at 2722 (Sotomayor, J., concurring).

[18] The overriding principle that we glean from *Melendez–Diaz* and *Bullcoming* is that introduction of reports by non-testifying analysts violates the defendant's right of confrontation when they are "for the purpose of establishing or proving some fact at trial,"*Melendez–Diaz*, 557 U.S. at 324, or are "affirmation[s] made for the purpose of establishing or proving some fact in a criminal proceeding."*Bullcoming*, —— U.S. at ——, 131 S.Ct. at 2716 (alteration in original; internal quotation omitted). In the present case, the challenged evidence served as foundation for the introduction of Dr. Rorke–Adams' testimony rather than direct evidence of a fact pointing toward Stanfield's guilt. Thus, we do not view these decisions as dictating the result of this appeal.

Most recently, in *Williams v. Illinois*, the Court examined application of the Confrontation Clause to forensic reports which are relied on by a testifying expert, but which are not admitted into evidence. —— U.S. at —— – ——, 132 S.Ct. at 2227–28. *Williams* addressed " 'the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.' " *Id.* at 2233 (quoting *Bullcoming*, —— U.S. at ——, 131 S.Ct. at 2722 (Sotomayor, J., concurring in part)).

*7 In *Williams*, two DNA profiles were produced. One profile was obtained from a vaginal swab from a rape victim and the other from a sample of the defendant's blood. *Id.* at 2227. The testifying expert was not involved in obtaining or testing the DNA obtained from the victim; rather, her opinion was based on notations within documents admitted as business records. *Id.* The expert did not testify to how the testing laboratory (Cellmark) handled or tested the sample or to the accuracy of the profile created from the sample, and the report itself was not admitted into evidence or shown to the jury.*Id.* at 2227, 2230. However, the expert testified that the DNA profile recovered from the defendant's blood matched "the male DNA *profile found in semen from the vaginal swabs*.... "*Id.* at 2236 (emphasis in original). The defense asserted that the Confrontation Clause prohibited the expert from testifying regarding testing performed by Cellmark. *Id.* at 2231.[4]

The case was again determined by Justice Thomas' fifth vote, however, this time Justice Thomas concurred with the previously dissenting Justices—Chief Justice Roberts, and Justices Kennedy, Breyer, and Alito—finding no Confrontation Clause violation. *Id.* at 2255 (Thomas, J., concurring). The plurality held that even if the Cellmark report had been admitted into evidence, there would have been no violation of the Confrontation Clause for several reasons: (1) "The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach"; (2) "[t]he report was produced before any suspect was identified"; (3) the report was not sought "for the purpose of obtaining evidence to be used against [the defendant], who was not even under suspicion at the time"; and, (4) the DNA profile produced "was not inherently inculpatory." *Id.* at 2228.

The plurality determined that, unlike the forensic reports in *Melendez–Diaz* and *Bullcoming*, the DNA profile generated in *Williams* was not created in order to be used as evidence against a particular defendant. *Id.* at 2243. At the time the report was produced, the defendant was neither in custody nor under suspicion, and the technicians who prepared the profile didn't know whether the results would be incriminating. *Id.* at 2243–44. Therefore, the plurality reasoned that the primary purpose of the technician's report was not to create evidence against the defendant, but was "to perform his or her task in accordance with accepted procedures."*Id.* at 2244.

Justice Thomas, in his concurrence, agreed that the profile was not testimonial but solely because it lacked the requisite formality and solemnity. *Id.* at 2255 (Thomas, J., concurring).

He rejected the plurality's new requirement that a statement must target a particular individual to be testimonial because "[t]here is no textual justification ... for limiting the confrontation right to statements made after the accused's identity became known." *Id.* at 2262 (Thomas, J., concurring). Likewise, Justice Kagan, writing for the four dissenting justices, rejected the plurality's accusatory requirement, as well as Justice Thomas' formality requirement, adhering to the view that forensic reports are testimonial based entirely on the primary purpose test. *Id.* at 2273–74 (Kagan, J., dissenting). Justice Breyer concurred with the plurality but wrote separately to address what he believed was the true question raised: "How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?" *Id.* at 2244 (Breyer, J., concurring). It is this precise question that this Court faces.

***8** In his concurrence, Justice Breyer discussed the practical problems resulting from a requirement that every analyst involved in forensic testing must testify at trial. He concluded that an analyst's statements "lie outside the perimeter of the Clause" for both historical and practical reasons. *Id.* at 2251. Justice Breyer reasoned that, based on the historic purpose of the Clause, these types of statements would not be subject to confrontation because they do not implicate the core concerns at issue—the use of *ex parte* examinations as evidence. *Id.* at 2249–51. He expressed concern that costs resulting from a rule requiring the live testimony of every analyst involved in the testing process would cause prosecutors to forego DNA testimony and return to a reliance on eyewitness testimony. In Justice Breyer's view, an "interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound." *Id.* at 2251. For these reasons, Justice Breyer concluded that reports of this nature fall outside application of the Confrontation Clause. *Id.*

When considering an opinion like *Williams*, in which no single rationale commands the support of a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Because no position received support from a majority of the justices, *Williams* does not provide us a governing legal principle and this Court views the decision as limited to the unique set of facts presented in that case. [5] *See e.g., United States v. James*, 712 F.3d 79, 95 (2nd Cir.2013); *Jenkins v. United States*, 75 A.3d 174, 176 (D.C.2013) ("*Williams*... creates no new rule of law that we can apply in this case.").

The facts presented by this appeal differ from both *Melendez–Diaz*, which involved a certified report that was admitted without live testimony, and *Bullcoming*, which involved a signed report that was admitted through surrogate testimony of another analyst who had no connection to the report and offered no independent expertise. *Melendez–Diaz*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314; *Bullcoming*, —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610. Indeed, the facts appear to fall within one of the scenarios identified by Justice Sotomayor as being outside the "limited reach" of the majority opinion in *Bullcoming*. —— U.S. at ——, ——, 131 S.Ct. at 2719, 2722 (Sotomayor, J., concurring in part).

Circuit courts and state courts have disagreed as to the proper application of current Supreme Court Confrontation Clause jurisprudence. *See, e.g., James*, 712 F.3d at 96 (interpreting pre-*Williams* precedent as establishing that a statement is testimonial if its primary purpose is to create a record for later use at trial); *United States v. Duron–Caldera*, 737 F.3d 988, 994–96 (5th Cir.2013) (declining to adopt requirement that statement be accusatory), *United States v. Turner*, 709 F.3d 1187, 1192–93 (7th Cir.2013) (considering whether jury may have considered statement as offered for its truth and whether it was accusatory); *Derr v. State*, 434 Md. 88, 73 A.3d 254, 270–71 (Md.2013) (requiring a statement to be sufficiently formalized to be testimonial).

***9** **[19]** The only consistent requirement that can be distilled from these decisions is that in order for a statement—forensic or otherwise—to be deemed testimonial, it must have been made with a primary objective of creating an evidentiary record to establish or prove a fact at trial. *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011); *see also Melendez–Diaz*, 557 U.S. at 324. This Court has previously addressed the definition of testimonial statements only in the context of statements made by lay witnesses, where we likewise applied the primary purpose test to determine whether a statement is testimonial. *State v. Hooper*, 145 Idaho 139, 144–146, 176 P.3d 911, 916–184 (2007) (videotape of child victim's interview with police was testimonial because it was admitted as a substitute for her live testimony); *State v. Shackelford*, 150 Idaho 355, 372–73, 247 P.3d 582, 599–600 (2010) (statements of ex-wife were not testimonial because they were offered to evaluate defendant's demeanor and not offered for their truth).

Although this Court has not previously addressed the recent developments in Confrontation Clause jurisprudence in the context of forensic evidence, our Court of Appeals has attempted to navigate these scarcely-charted waters in *State v. Kramer*. 153 Idaho 29, 278 P.3d 431 (Ct.App.2012). During Kramer's trial for driving under the influence of alcohol, the prosecution introduced calibration certificates for the Intoxilyzer 5000 instrument used to determine the alcohol concentration in Kramer's breath. *Id.* at 30, 32, 278 P.3d at 432, 434. Kramer argued that the Confrontation Clause required the State to produce not just the certificates but the live testimony of the people involved in certifying the machine. *Id.* at 32, 278 P.3d at 434. In a thoughtful and well-researched opinion, the Court of Appeals concluded that the certificates were not testimonial as they were not admitted as direct evidence of an element of the crime. *Id.* at 35–36, 278 P.3d at 437–38 ("The certificates here 'support one fact (the accuracy of the machine) that, in turn, supports another fact that can establish guilt (the blood alcohol level).' ") (quoting *Commonwealth v. Zeininger*, 459 Mass. 775, 947 N.E.2d 1060, 1069 (Mass.2011)). As did the Court of Appeals, we conclude that our inquiry should focus on whether the technician's statements were made with a primary objective of creating an evidentiary record to establish or prove a fact at trial.

A number of courts, presented with facts similar to those in *Kramer*, have likewise held that the testimony of an expert witness who arrives at an independent conclusion is permissible under the Confrontation Clause even where other non-testifying analysts have provided underlying data or conducted portions of the testing.[6] In *Washington v. Lui*, the Washington Supreme Court held that the Confrontation Clause was not violated even though the testifying expert "did not personally observe the lab tests that underlaid her analysis" because the output of the testing, an electropherogram, would have no meaning for the jury without the testifying expert's evaluation of its significance. 179 Wash.2d 457, 315 P.3d 493, 507–09 (Wash.2014). Rather, the preliminary steps in an analysis are essentially part of the chain of custody, and evidence of these steps merely goes to the weight and not the admissibility of the result. *Id.* Similarly, the Indiana Supreme Court held that the technician who transferred the blood from pieces of glass to swabs for later testing and analysis was just one person in the chain of custody, and as such, the defendant's right to confrontation was not violated because the expert who conducted the analysis and prepared the report testified at trial. *Speers v. State*, 999 N.E.2d 850, 854–55 (Ind.2013). In these cases, the underlying statements did not have an evidentiary purpose, and were thus not testimonial, because only the expert's independent conclusion served as evidence. *Lui*, 315 P.3d at 510; *Speers*, 999 N.E.2d at 855.

*10 [20] [21] A defendant's right to confrontation is violated when "an expert acts merely as a well-credentialed conduit," and does not provide any independent expert opinion. *United States v. Ramos–Gonzalez*, 664 F.3d 1, 5–6 (1st Cir.2011) (testimony violated Confrontation Clause because expert simply recounted results of another expert's testing). These courts finding statements to be testimonial have done so when the expert has relayed another analyst's conclusion that was not reached independently by the testifying expert. *See, e.g., State v. Navarette*, 294 P.3d 435 (N.M.2013). In *Navarette*, the testifying expert relied on the findings of another analyst—who concluded that there was gunpowder residue on the victim—to determine how close the shooter was to the victim. *Id.* at 436–37. The court held that the analyst's findings were testimonial because there were no "objective markers that any third party can examine in order to express an independent opinion." *Id.* at 438–439. However, when an expert independently evaluates objective raw data obtained from an analyst, and exercises his or her own judgment in reaching a conclusion, the expert is not a conduit for the analyst's conclusion. *United States v. Summers*, 666 F.3d 192, 201–202 (4th Cir.2011). Rather, the testifying expert's opinion is an "original product" that can be readily "tested through cross-examination." *Id.* at 202 (internal quotations and citation omitted). We join the majority of jurisdictions considering this subject and focus our attention on the question whether the primary purpose of the lab technician's act of labeling the slides and the implicit assertion that the proper stain was applied was intended to establish some fact at trial and whether Dr. Rorke–Adams served as a mere conduit.

b. Application of the Confrontation Clause analysis to Dr. Rorke–Adams' testimony

[22] Dr. Rorke–Adams testified that the slides she examined contained the brain tissue of W.F., and that this tissue had been stained with the amyloid antigen. Stanfield contends that Dr. Rorke–Adams' testimony relied on two assertions made by the technician: (1) that the slides were labeled with the correct case number, and thus contained W.F.'s brain tissue; and (2) that the technician applied the proper stain to the samples in accordance with the laboratory protocol, thereby permitting an accurate interpretation of the samples.

Dr. Rorke–Adams testified that she received W.F.'s brain from Dr. Garrison after he had conducted the autopsy, that the brain tissue was labeled when she received it, and that the tissue slices were sent to the technician with the same label. The slides that Dr. Rorke–Adams received back from the technician were also labeled. At trial, the following exchange occurred:

> [The prosecutor]. When the tissues arrived in your office, are they marked with who the tissues belong to?
>
> Dr. Rorke–Adams. Yes, of course. They're labeled.
>
> *11 [The prosecutor]. And when you go to do your examination of these tissues, are they still labeled?
>
> Dr. Rorke–Adams. Yes.
>
> [The prosecutor]. And the technician that put the stain on the tissues, does she write any reports?
>
> Dr. Rorke–Adams. No. She—we write the report. She has documentation to the fact that she received the tissue, the stain that we requested her to do, and she notes when she did it, and then when she handed it back to us. Those are the only pieces of documentation. This is the standard procedure in the laboratory for every case.
>
> And so the label of the material is attached to the material. It remains with the material. Then the slides are prepared by the technician and the slides are labeled with the same number that was attached to that specimen so we know that Specimen 500 came from John Smith. And so we evaluate —we evaluate it, write a report, and that report goes into the permanent record.

Dr. Rorke–Adams testified that she did not observe the technician prepare the slides, however, she explained that she was able to determine if the correct stain had been applied:

> [The prosecutor]. Are you able to tell when your technician places the stain on these tissues whether the stain has been properly applied or not?
>
> Dr. Rorke–Adams. Yes. Because there's always a control slide that goes with it. Control slide means that—in this particular case, I asked for a specific antibody to be applied to this tissue.
>
> ....
>
> We fill out a request sheet. We ask specifically for that antibody to be applied to the tissue. It's given to the technician along with the specimen. The technician then knows which antibody to use. Those technical procedures are done in that special laboratory.
>
> And then that prepared slide is given to the pathologist along with the sheet, the request sheet that we made out asking for that antibody, plus a control slide, which means that another piece of tissue that was known to contain this particular antigen that we're interested in has been used to corroborate the validity of the stain from the unknown slide.
>
> So we look at the control slide first to make certain that the technique was working so that we can rely then upon what we're looking at in the unknown slide.
>
> So these are all standard procedures in the laboratory, and this is the way it is done every day for all of the cases that come through.

Dr. Rorke–Adams testified this procedure was followed in this case.

Thus, Dr. Rorke–Adams had personal knowledge that the slides were stained correctly based on her comparison of the slides with the control slide. Based upon this testimony, Dr. Rorke–Adams did not rely upon an implied assertion by the technician that the slide had been properly prepared. Therefore, the only remaining implied assertion is that the labeling of the slides represented that slides contained W.F.'s tissue.

[23] As in *Lui* and *Speers*, the labeling occurred during preliminary steps for Dr. Rorke–Adams' forensic examination. The technician did not make any conclusions or factual findings as to any issue to be decided at trial when she labeled the slides and the technician's assertion had no probative value as to Stanfield's guilt or innocence. Rather, the act of labeling was manifestly for a laboratory —rather than trial—purpose: to identify the samples while they awaited Dr. Rorke–Adams' examination. Further, while assertions need not be contained in formalized affidavits or admitted at trial to be testimonial, the fact that the technician did not prepare a report suggests that her purpose in labeling the slides was not to establish any fact at trial. The only testimony the technician could have supplied would be to attest that she did not alter the integrity or identity of the tissue samples. This is akin to the type of assertion made

by any person whose name appears in a chain of custody. As the Supreme Court held in *Melendez–Diaz,* the right to confrontation does not mandate that the prosecution call every person involved in the chain of custody. *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 311 n. 1, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

***12** Further, like the calibration certificates in *Kramer,* the technician's assertions were not admitted as direct proof of an element of the crime; rather, they were admitted as foundation for the introduction of the results of Dr. Rorke–Adams' testimony regarding her examination of the samples and the conclusions she drew therefrom, i.e., that W.F. died from non-accidental trauma. These findings and conclusions were derived from Dr. Rorke–Adams' personal examination and observations of the slides. Unlike the analyst in *Navarette,* the technician in this case made no independent conclusions and the labeling did not prove any fact relevant to Stanfield's guilt or innocence.

For these reasons, we hold that there was no Confrontation Clause violation because the technician's assertions were not made for an evidentiary purpose and thus were not testimonial.

2. Dr. Rorke–Adams' testimony was not inadmissible hearsay.

[24] Much like her Confrontation Clause objection, Stanfield argues that Dr. Rorke–Adams' testimony regarding the contents of the slides and her testimony regarding the staining and accuracy of the slides constitute inadmissible hearsay. Stanfield contends that Dr. Rorke–Adams did not have an "independent basis of knowledge so as to testify that the assertions of the laboratory technician were accurate." The State responds that Dr. Rorke–Adams did not relay impermissible hearsay evidence but rather testified to the routine practices of her laboratory and to matters that were within her personal knowledge, as permitted by I.R.E. 406.[7] Initially, we note that while Dr. Rorke–Adams testified regarding her laboratory's routine procedures, she also testified that those procedures were followed in this case and that the slides contained W.F.'s brain tissue.[8] This testimony provided facts that were specific to this case and as such, exceeded that allowed under Idaho Rule of Evidence 406.

Hearsay is defined as an out-of-court statement that is offered "to prove the truth of the matter asserted." I.R.E. 801(c). Therefore, Dr. Rorke–Adams' testimony that procedures were followed and that the slides contained W.F.'s brain tissue was hearsay.[9]

[25] **[26]** Generally, hearsay evidence is not admissible at trial unless it falls under one of the recognized hearsay exceptions. I.R.E. 802; *State v. Watkins,* 148 Idaho 418, 423, 224 P.3d 485, 490 (2009). However, an expert witness is allowed to base an opinion on: "(1) facts within [her] personal knowledge; (2) facts presented to [her] at trial; or (3) facts presented to [her] outside of court, but not perceived by [her] personally, if those facts are the type of facts reasonably relied upon by experts in [her] field in drawing such conclusions." F.R.E. 703, Comment 1[10]; F.R.E. 602; I.R.E. 703; I.R.E. 602; *see also Watkins,* 148 Idaho at 426, 224 P.3d at 493. Idaho Rule of Evidence 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

***13** I.R.E. 703. This rule permits an expert witness "to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they are otherwise admissible, or the court makes the required balancing determination." *Watkins,* 148 Idaho at 426–27, 224 P.3d at 493–94. "The intent of the rule is just that the opinion does not have to be excluded because part of the basis was evidence that would not be admissible itself." *Id.* at 426, 224 P.3d at 493 (quoting Evidence Rules Advisory Committee Minutes of Meeting of November 2, 2001 at 3.).

In 2002, the rule was amended to clarify that I.R.E. 703 should not be used as "a back door for getting this evidence in the record ." *Id.* The amendment "serves to prevent an expert witness from serving as a conduit for the introduction of otherwise inadmissible evidence." *Id.* at 427, 224 P.3d 485, 224 P.3d at 494. The amendment was not intended to change the meaning of I.R.E. 703; rather, it was intended to clarify its limitations. Thus, expert testimony that does nothing more than relay otherwise inadmissible hearsay to the jury is barred by I.R.E. 703. *Id.* However, no error occurs if the hearsay evidence the expert relies upon is referenced but not actually introduced as evidence at trial. *See, e.g., Doty v. Bishara,* 123 Idaho 329, 336, 848 P.2d 387, 394 (1992).

In *Doty,* this Court upheld the admission of an expert's opinion testimony as the cause of tire damage even though his opinion was based, in part, on photographs and notes prepared by another expert who had also examined the tire. *Id.* The expert was allowed to testify "concerning observations made by" the other expert. *Id.* at 335–36, 848 P.2d 387, 848 P.2d at 393–94. Likewise, in *Lawton v. City of Pocatello,* a case concerning a motorcycle accident, this Court upheld the admission of the testimony of an expert who opined that the accident site was dangerous and did not meet existing design standards. 126 Idaho 454, 464, 886 P.2d 330, 340 (1994). The expert's testimony referred to reports of other accidents that had occurred in the same area, although the reports were not admitted into evidence. *Id.* This Court found no error in the introduction of this testimony. *Id.* Although these cases were decided prior to the 2002 amendment, they reflect the meaning of the current rule. *See Watkins,* 148 Idaho at 426, 224 P.3d at 493.

Idaho Rule of Evidence 703 was most recently interpreted in *State v. Watkins.Id.* In that case, this Court held that I.R.E. 703 did not allow an expert witness to reveal the contents of another expert's notes, even though the testifying expert relied on those notes and the notes were not themselves admitted into evidence. *Id.* at 427, 224 P.3d 485, 224 P.3d at 494. In that case, the State's expert, Dr. Finis, testified that:

> *14 according to tests performed at her private laboratory, Identigenetix, Watkins' DNA was in the semen on the girl's underwear and inside the condom and the girl's DNA was on the outside of the condom. Dr. Finis, however, was not at Identigenetix to receive the evidence in person and did not perform the DNA testing herself. Instead, Dr. Finis relied on communications with her colleague, Kermit Channell, as well as his notes, in forming her conclusions about the tested evidence.

Id. at 420, 224 P.3d at 487. Specifically, Dr. Finis testified that she did not do the testing and was not present for Channell's testing but, according the Channell's notes:

> Channell used an oral swab taken from the six-year-old girl to establish a reference DNA sample for her; that Channell used both penile and oral swabs taken from Watkins to establish a reference DNA sample for him; and that Channell extracted DNA from both the inside and outside of the used condom and tested it to see whether it matched either Watkins' or the six-year-old girl's DNA. Dr. Finis testified that the DNA Channell tested on the inside of the condom matched Watkins' DNA and that the DNA Channell tested on the outside of the condom was a mixture of both Watkin's [sic] DNA and the six-year-old girl's DNA.

Id. at 423–24, 224 P.3d at 490–91. This Court explained that the testimony was not admissible under I.R.E. 703 because it was evident that Channell's statements were not admitted for the limited purpose of evaluating Dr. Finis' testimony. *Id.* at 427, 224 P.3d 485, 224 P.3d at 494. Rather, they were relayed "for the purpose of demonstrating the chain of custody, Channell's testing methodology, and to identify the locations on the condom and panties on which Watkins' and the victim's DNA were found." *Id.* We further observed that no evidence, aside that contained in Channell's notes, was introduce to establish these facts. *Id.*

In this case, Dr. Rorke–Adams testified that the slides she examined contained the brain tissue of W.F. and that those slides were stained properly. As was the case with the expert in *Doty,* who relied on pictures and notes created by another expert, Dr. Rorke–Adams' conclusions were based in small part on the labeling created by the technician. However, Dr. Rorke–Adams relied far less on the technician's actions than did the expert whose testimony we upheld in *Doty.*Dr. Rorke–Adams did not testify "concerning observations made by"

another expert but rather explained why she could conclude that the slides belonged to W.F. and why she could observe the amyloid antigens in W.F.'s tissue.

Unlike *Watkins,* the technician's assertions were not the only evidence that established the chain of custody or the testing methodology employed. In this case, Dr. Rorke–Adams received the tissue, partially prepared the tissue by slicing it, sent the tissue to the laboratory and received the tissue back from that laboratory.

Further, unlike the situation in *Watkins,* where the testifying expert relayed factual findings and conclusions reached by another, the technician here did not make any factual findings. Dr. Rorke–Adams did not relay any conclusions that were drawn by the technician. Rather, it was Dr. Rorke–Adams who conducted the examination of the tissue, documented her factual findings, and formed her own opinion. Thus, we find that Dr. Rorke–Adams did not act as a conduit for inadmissible hearsay, but rather indicated the "general nature of the sources" she relied on in forming her opinion as permitted by I.R.E. 703. *Watkins,* 148 Idaho at 426–27, 224 P.3d at 493–94. Even though the district court did not explicitly apply the balancing test required by I.R.E. 703, we conclude that the district court did not err by permitting Dr. Rorke–Adams' testimony.

B. The district court properly instructed the jury as to the elements of first degree murder.

*15 [27] Stanfield contends that first degree murder by aggravated battery on a child under twelve is a specific intent crime. Thus, Stanfield contends that the jury was required to find that she specifically intended to cause great bodily harm to W.F., as opposed to finding that she committed battery, and in doing so, unintentionally caused great bodily harm. She therefore argues that the district court violated her right to due process when it instructed the jury that they did not have to find that she intended to commit murder or to inflict great bodily harm in order to find her guilty of first degree murder.

Stanfield advanced this argument prior to this Court's decision in *State v. Carver,* 155 Idaho 489, 314 P.3d 171 (2013). In *Carver,* this Court addressed an identical claim and held that "the district court correctly instructed the jury that Defendant would be guilty of first degree murder if he committed a battery upon the child which resulted in great bodily harm, from which the child died." *Id.* at 494, 314 P.3d at 176. In this case, the district court gave the same instruction as we upheld in *Carver.* [11] The district court did not err in instructing the jury as to the elements of the offense. Thus, Stanfield has not shown that the district court violated her due process rights.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Chief Justice BURDICK, Justice EISMANN and Justice Pro Tem WALTERS concur.

Footnotes

1 As part of her examination, Dr. Rorke–Adams testified that she cut "slices" of W.F.'s brain. She gave those slices to a technician, who transferred the tissue to slides, labeled the slides, applied the stain that Dr. Rorke–Adams specified, and returned the slides to Dr. Rorke–Adams for her examination.

2 The rules of evidence may assist in determining the purpose of a statement. For example, "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 324, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

3 The plurality also looked to the rules of evidence to determine if the statements served an evidentiary purpose. *Melendez–Diaz,* 557 U.S. at 321–22. Although the certificates of analysis were records created in the ordinary course of the laboratory's business, their purpose was not for the administration of the laboratory's affairs but rather to establish or prove some fact at trial. *Id.* at 324. Therefore, although falling within the well-established business records exception, because their primary purpose was evidentiary, the analysts were subject to confrontation. *Id.*

4 The expert did not have personal knowledge of the testing conducted on the defendant's blood, however, the analyst who developed the profile from the blood sample extracted from the defendant testified at trial, as did the analyst who confirmed that semen was found on the vaginal swabs taken from the victim. *Williams,* —— U.S. at ——, 132 S.Ct. at 2229.

5 "The five Justices who control the outcome of today's case agree on very little ... they have left significant confusion in their wake. What comes out of four Justices' desire to limit *Melendez–Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority."*Williams*, — U.S. at —, 132 S.Ct. at 2277 (Kagan, J., dissenting).

6 *See, e.g., Commonwealth v. Yohe*, 621 Pa. 527, 79 A.3d 520, 541 (Pa.2013) (The right to confrontation satisfied when testifying expert was involved in a sufficient degree in the analysis and is not simply parroting another analyst but rather reviewed raw testing data, evaluated the results, verified the test, and wrote the report); *State v. Joseph*, 230 Ariz. 296, 283 P.3d 27, 29–30 (Ariz.2012) (the testifying expert relying on autopsy report prepared by non-testifying doctor did not act as an impermissible conduit because he testified to his own conclusions regarding the victim's injuries); *State v. Medicine Eagle*, 835 N.W.2d 886, 898–902 (S.D.2013) (right to confrontation was not violated despite the fact that analysts that performed some steps of the testing did not testify at trial because the testifying expert "performed various steps of the [testing]; independently reviewed, analyzed, and compared the data obtained from the testing; and reached her own conclusions regarding the results of the testing"); *State v. Ortiz–Zape*, 367 N.C. 1, 743 S.E.2d 156, 163 (N.C.2013) ("when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront"); *Marshall v. People*, 309 P.3d 943, 947 (Colo.2013) ("We join these courts in concluding that when a lab supervisor ... independently reviews scientific data, draws the conclusion that the data indicates the positive presence of methamphetamine, and signs a report to that effect that is admitted at trial, the Confrontation Clause is satisfied if she testifies and is available for cross-examination."); *Smith v. Florida*, 28 So.3d 838, 854–55 (Fla.2009) (no Confrontation Clause violation in admission of DNA tests because supervisor evaluated raw test results, compared samples, made conclusions, and testified at trial); *Grim v. Mississippi*, 102 So.3d 1073, 1081 (Miss.2012) (holding that "a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand.") (alternation in original; internal quotation and citation omitted).

We acknowledge that the decisions of our sister states have not been in uniform agreement.*See, e.g., State v. Navarette*, 294 P.3d 435, 438–39 (N.M.2013) (autopsy findings are testimonial because when there are no "objective markers that any third party can examine in order to express an independent opinion"); *Martin v. State*, 60 A.3d 1100, 1107 (Del.2013) (the testing analyst's representations and test results were testimonial because the statements were conclusions that the testifying expert relayed and did not make independently).

7 "Evidence of a habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."I.R.E. 406.

8 As explained previously, we find that Dr. Rorke–Adams had independent knowledge regarding the administration of the proper stain to the slides based upon her comparison of the slides to a control slide.

9 The claim that the slides contained W.F.'s tissue is of particular importance; if this assertion were not true, then Dr. Rorke–Adams' testimony would have been irrelevant.

10 The Idaho Rules of Evidence were modeled on the Federal Rules of Evidence "in order to obtain uniformity in the trial practice in both the state and federal courts."*Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 723 P.2d 814, 819 (1986). Thus, we seek to interpret identical rules "in conformance with the interpretation placed upon the same rules by the federal courts."*Id.*

11 The instruction at issue in *Carver* said that, "In order for the defendant to be guilty of First Degree Murder in the perpetration of an aggravated battery upon a child under twelve (12) years of age ... the state does not have to prove that the defendant intended to kill [the child], but the state must prove that during the perpetration of an aggravated battery on a child under twelve (12) years of age, the defendant killed [the child]."155 Idaho at 492, 314 P.3d at 174. At Stanfield's trial, the district court instructed the jury: "In order for the defendant to be guilty of first degree murder ... the state does not have to prove that the defendant intended to kill [W.F.], but the state must prove that during the perpetration or attempt to perpetrate an aggravated battery on a child under 12 years of age, the defendant killed [W.F.]."

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV 2012-01798 MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION

ARGUMENT

Grove Has Failed To Show Any Basis For Reconsideration Of This Court's Summary Dismissal Of His Claims Related To An Alleged Violation Of His Confrontation Rights

A. Introduction

Grove requests reconsideration of this Court's dismissal of his claims regarding an alleged violation of his confrontation rights. Specifically, he asserts

this Court erred by holding: (1) That the defense in the criminal trial waived a confrontation objection, and therefore petitioner may not assert that objection in post-conviction; (2) That there was no "testimonial" evidence presented at trial subject to a confrontation objection; and (3) Counsel was not ineffective for electing to not object on confrontation grounds. (Memorandum in Support of Second Motion for Reconsideration). He has presented no new argument or information in support of his claims regarding issues (1) and (3), above. He asks for reconsideration of issue (2), above, in light of the recent decision in State v. Stanfield, ___ Idaho ___, ___ P.3d ___, 2015 WL 1452930 (2015). Review of all three issues shows no grounds for reconsideration.

B. The Confrontation Objection Was Waived In The Criminal Proceedings

Contrary to Grove's contentions, there are specific statutes that bar his ability to raise his confrontation clause claim in post-conviction. Post-conviction "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence of conviction." I.C. § 19-4901(b). Likewise, any ground "knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction ... may not be the basis for a subsequent application." I.C. § 19-4908. Grove had an available remedy for any alleged violation of his confrontation rights in the original criminal case but counsel tactically waived that objection. The "right to confrontation may, of course, be waived, *including by failure to object to the offending evidence.*" Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009) (emphasis added). Because Grove, through counsel, waived any confrontation objection in

the criminal case, he may not directly assert that objection in post-conviction.[1] He is barred from trying to use these proceedings for the prohibited purpose of asserting an objection he could have made, but instead waived, in the criminal case.

Under sections 19-4901(b) and 19-4908 Grove's waiver of his claim or right in the criminal proceedings bars his post-conviction claim. Were this not so, every post conviction petitioner who entered a guilty plea could challenge the lack of a jury trial; could claim that every choice by counsel to not call a witness violated his right to present evidence; and, closer to this case, could claim every waiver of cross examination or failure to object to arguably testimonial evidence violated his confrontation rights. Grove's claim that the waiver of confrontation in the criminal proceedings does not bar his claim in post-conviction is meritless. This Court properly dismissed the claim of a Confrontation Clause violation on the basis that this objection should have been raised in the criminal case and the choice to not make the objection constituted a waiver.

C. Grove Has Failed To Show That The Portion Of The Doctors' Testimony Based On The Neuropathology Report Offends The Confrontation Clause

This Court also ruled, in the alternative, that there was no Confrontation Clause violation because the neuropathology report was not "testimonial." (Opinion and Order on Motions for Summary Disposition, pp. 22-24.) This Court

[1] These statutes do not prevent Grove from asserting ineffective assistance of counsel for his choice to not object—only a direct assertion of the waived objection. That counsel's waiver was not the result of ineffective assistance of counsel is addressed below.

noted that there is a split in authority regarding whether an autopsy report is "testimonial," the touchstone for application of the Confrontation Clause. (Id.) This Court found more persuasive and applicable to the facts of this case opinions holding that an autopsy process conducted independent of a police investigation does not serve the primary function of creating evidence for a criminal prosecution. (Id.; see also pp. 8-20.) Grove contends that this holding is contrary to the recent decision in State v. Stanfield, 2015 WL 1452930 (Idaho, 2015). Grove's claim that Stanfield shows any error in this Court's alternative ruling is without merit.

First, the opinion in Stanfield is of marginal utility in this case. In that case the witness in question was an expert hired specifically by the prosecution to prepare trial evidence. 2015 WL at *1. The confrontation challenge was to evidence of actions by others in the expert's lab who processed evidence intended for trial. Id. at *2. Thus, Stanfield does not address the testimonial nature of evidence prepared outside the scope of a police investigation or prosecution. Many jurisdictions have held that autopsy reports were not testimonial, and therefore not subject to confrontation, precisely because they were prepared for purposes other than police investigation or prosecution. See, e.g., State v. Snelling, 236 P.3d 409, 413-14 (Ariz. 2010) (expert offering opinion based facts and data set forth in autopsy report did not violate confrontation rights); People v. Dungo, 286 P.3d 442, 449-50 (Cal. 2012) (testimony of expert regarding description of injuries in autopsy report as one basis for medical conclusions did not grant right to confrontation of doctor who prepared report);

People v. Hensley, 22 N.E.3d 1175, 1193-94 (Ill. App., 1st dist., 2014) (autopsy report prepared in normal course of business of medical examiner's office not testimonial); People v. Portes, 125 A.D.3d 794, 2015 WL 542337, *1 (App., 2nd Dept., 2015) (admission of autopsy report did not violate confrontation rights). Because Stanfield does not address the basis for this Court's determination that the neuropathology report was not testimonial, it does not provide grounds for reconsideration of the ruling that reliance on the report by other experts did not violate the Confrontation Clause.

Second, even though the Stanfield opinion does not address the question of whether autopsy reports prepared outside the course of any criminal investigation are testimonial, it does cite with approval State v. Joseph, 283 P.3d 27 (Ariz. 2012), for the proposition that "the testimony of an expert witness who arrives at an independent conclusion is permissible under the Confrontation Clause even where other non-testifying analysts have provided underlying data or conducted portions of the testing." Stanfield, 2015 WL at *9 & n.6.

In Joseph the trial court allowed the prosecution's medical expert to testify based on an autopsy report prepared by another doctor. 283 P.3d at 29. He did not testify about the other doctor's "conclusions" but did testify about the "opinions he formed after reviewing the facts and photographs contained in the report." Id. The Court stated that "a testifying medical examiner may offer an opinion based on an autopsy performed by a non-testifying expert without violating the Confrontation Clause." Id.

As did the expert in Joseph, the doctors in this case offered opinions based, in part, on an autopsy report. Grove had the opportunity to cross-examine these doctors. He also had the opportunity to present evidence attempting to undermine the experts' opinions by challenging the facts they relied on in reaching those opinions. Because the experts arrived at their own independent conclusions about the cause of death and the timing of the infliction of the injuries, such was "permissible under the Confrontation Clause even where other non-testifying analysts have provided underlying data or conducted some portions of the testing." Stanfield, 2015 WL at *9. Grove has failed to show a basis for reconsideration of this Court's dismissal of the counts related to his confrontation claim.

D. Counsel's Choice To Not Assert The Confrontation Issue Was Not Ineffective Assistance Of Counsel

This Court held that because an objection on confrontation grounds would not have succeeded, counsel's performance by not objecting was not deficient and Grove suffered no prejudice. (Opinion, p. 32.) As set forth above, the Stanfield decision does not alter that analysis.

Even if the Stanfield opinion had resolved the question of whether autopsy reports done in the regular course of business (as opposed to being part of the police investigation) were subject to a confrontation objection, that case was not available to counsel at any relevant time. As the Idaho Supreme Court stated in Stanfield, binding precedent on this general topic did not exist. 2015 WL at *6. In the absence of settled law, counsel's performance can hardly be labelled as

deficient. Schoger v. State, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010) ("this Court will generally not find deficient performance where counsel fails to argue a novel legal theory in an undeveloped area of law"); Piro v. State, 146 Idaho 86, 91, 190 P.3d 905, 910 (Ct. App. 2008) ("failure to advance a novel theory" is not ineffective assistance of counsel).

Finally, even if a confrontation objection may have had merit, such is not alone enough to show deficient performance or prejudice. It is well established that "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 (Ct. App. 1994). The right to confrontation may be waived by counsel. See Melendez-Diaz, 557 U.S. at 314 n.3. "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 v. Washington, 466 U.S. 668, 689 (1984)). "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).

In State v. Dunlap, 155 Idaho 345, 384, 313 P.3d 1, 40 (2013), the post-conviction petitioner alleged counsel was ineffective for failing to object to reports by doctors admitted at a capital sentencing because admission of those reports

allegedly violated the petitioner's Fifth Amendment and confrontation rights. The Idaho Supreme Court did not address the merits of such an objection at all; rather, it held that "[i]n the absence of evidence suggesting that the introduction [of the allegedly excludable evidence] was the product of inadequate preparation or ignorance of the relevant law, we hold that the district court did not err by summarily dismissing this claim of ineffective assistance of counsel." Id.

Just as in Dunlap, there is in this case an absence of evidence that counsel was ignorant of the relevant law or unprepared. Grove has presented no evidence rebutting the strong presumption that counsel's conduct fell within the range of reasonable representation. The same result as in Dunlap, summary dismissal, is thus appropriate.

CONCLUSION

Grove is barred from asserting a violation of his confrontation rights in this post-conviction case because counsel waived that right by not objecting in the criminal proceedings. The Stanfield opinion provides no basis for finding a confrontation violation or ineffective assistance of counsel because it did not address the preparation of autopsy reports in the regular course of business, but instead addressed only testing done at the specific request of the prosecution for trial. Finally, Grove has presented no evidence of any objective shortcoming of counsel, such as ignorance of the law or inadequate preparation, to rebut the

presumption of effective assistance. Because it lacks merit, the motion for reconsideration should be denied.

DATED this 16th day of April, 2015.

KENNETH K. JORGENSEN
Deputy Attorney General
Special Prosecutor for Nez Perce County

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of April, 2015, I caused a true and correct copy of the foregoing document to be emailed and placed in the United States mail, postage prepaid, addressed to:

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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE,	)	
	)	
Petitioner,	)	CV-12-01798
	)	
vs.	)	**PETITIONER'S**
	)	**CLOSING ARGUMENT**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

I. INTRODUCTION

COMES NOW, Petitioner Stacey Grove, through counsel Dennis Benjamin and Deborah Whipple, and offers this Closing Argument following the evidentiary hearing held March 24-25, 2015.

Per this Court's Order of July 11, 2013, four claims were addressed at the evidentiary hearing: A) whether trial counsel was ineffective in the direct and cross-examination of Mr. Grove; B) whether trial counsel was ineffective during the direct and cross-examination of Dr. Arden; C) whether trial counsel was ineffective in addressing the matter of sleeping jurors; and D) whether trial counsel was ineffective in failing to object to multiple instances of prosecutorial

misconduct during closing arguments. To prevail on these claims, Mr. Grove is required to prove his allegations by a preponderance of the evidence. ICR 57(c); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). Mr. Grove carried this burden through the exhibits and testimony of multiple witnesses to jurors sleeping during trial, trial counsel Scott Chapman, Dr. Jonathan Arden, and Andrew Parnes, Ph.D., J.D.

II. WHY RELIEF SHOULD BE GRANTED

A. *Ineffective Assistance in the Direct and Cross-Examination of Mr. Grove*

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852. In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.*

1. Evidence regarding Mr. Grove's relationship with his son and child support

Mr. Grove alleged in his Amended Verified Petition that defense counsel's performance was deficient because he introduced evidence in the direct examination of Mr. Grove regarding

the bad relationship between Mr. Grove and his son Alex. The trial transcripts establish that defense did elicit such evidence. Exhibit B, p. 1074, ln. 1-24. Specifically, Mr. Grove testified that he had a troubled relationship with his biological son.

> It was a complicated situation with Alex. He's ten years old. He's a great boy. It started off rough with the very first. Me and his mother, she basically was gone. When she was pregnant with [redacted] (sic), she started seeing some other guy. And come to find out, she moved in with him. And, you know, it was a real rocky relationship the whole way through.
>
> And at the latter -- the latter time when I was seeing him, there was a pull with him. I could tell that they were telling him things, and he would ask me questions that I didn't think -- and it was a hard situation. And at the time, it was my decision that I didn't want to stress him out with it, so I felt it would be best if I removed myself from the situation until he was old enough to be able to -- I could talk with him about what was going on. And he wouldn't -- he wouldn't have these feelings, because I could tell he was being torn, and I didn't want to see him go through that. And I thought the best would be for what I did, and that was the choice that I made.

Id.

At the evidentiary hearing, defense counsel testified that he could not recall why he elicited the evidence from Mr. Grove on direct examination. Defense counsel also admitted that the evidence was unfavorable to Mr. Grove. Evidentiary Hearing Transcript ("EH Tr.") p. 187, ln. 14-24. That is plainly true as it portrays him as an uninvolved dad in a case where he is being accused of harming a child. The Tenth Circuit has held that where an attorney accidentally brings out damaging testimony due to a failure to prepare, his conduct cannot be called a strategic choice. *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002). The prosecutor took advantage of the opening in his cross-examination by asking Mr. Grove if he currently maintained a relationship with Alex. Mr. Grove had to admit that he did not. Exhibit B, p. 1115, ln. 6-10.

Mr. Grove also alleged that defense counsel's performance was deficient because he

failed to object to the prosecutor questioning him about the fact he was not currently paying child support. The trial transcript proves the prosecutor asked that question and that trial counsel failed to object. Exhibit B, p. 1115, ln. 21-24.[1] Plainly, this question was not relevant to any issue at the trial and an objection to it would have been sustained. I.R.E. 402; 403.

Regarding the child support question, defense counsel testified that "the decision, I guess, that I made at the time, best as I can recollect is, don't make it – don't make it any bigger than it is by objection." Evidentiary Hearing ("EH") Tr. p. 189, ln. 3-5. This is not evidence of a strategic decision on defense counsel's part since he qualifies his answer with "I guess" and "best as I can recollect." At the same time, defense counsel admitted that he could have moved pretrial to exclude such evidence as he was aware that Mr. Grove was behind on child support payment prior to trial. EH Tr. p. 189, ln. 9-15.

In fact, defense counsel filed a Supplemental Motion in Limine on July 14, 2008, shortly before trial, to prohibit "any mention of the relationship that Stacey Grove has with his son, Alex Light, and/or child support obligations." Exhibit A, Vol. 1B, p. 174. (The criminal trial record does not show that defense counsel ever sought or obtained a ruling on this motion.) Thus, defense counsel actually elicited from Mr. Grove evidence which he sought to exclude pretrial. In addition, defense counsel knew the state was aware there was a problem with the child support payment as the Supplemental Motion in Limine put the state on notice.

Andrew Parnes testified that there was no valid strategic purpose for defense counsel to elicit from Mr. Grove the evidence of his relationship with his son. The evidence undermined

---

[1] Q. Do you pay child support? A. At the time?
Q. No. As of now. A. No, sir.

the defense case which "was based on Mr. Grove's credibility" and "the scientific evidence." In his view, defense counsel's actions fell below reasonable professional norms for a criminal defense lawyer especially "because there was a motion in limine . . . that was filed to keep that information out." EH T. p. 250, ln. 6-18. Mr. Parnes noted that the record did not show that defense counsel had sought a ruling on his Supplemental Motion in Limine. EH Tr. p. 250, ln. 22. The failure to obtain a ruling was itself below reasonable professional standards. EH Tr. p. 251, ln. 5-13.

Mr. Parnes was a highly credible witness. He was awarded a doctorate from Stanford and a law degree from UC-Berkeley, both world class universities. He been an attorney for 37 years practicing criminal defense and has practicing in Idaho since 1990. EH Tr. p. 245, ln. 20 - p. 246, ln. 25. He served as the President of the Palo Alto Bar Association and of the Idaho Association of Criminal Defense Lawyers. EH Tr. p. 247, ln. 3-19. Mr. Parnes had only testified as an expert on one prior occasion "[a]nd that was actually for the prosecution in a case where [he] believed that trial counsel did not provide ineffective assistance [of] counsel." EH Tr. p. 278, ln. 22-25.

Mr. Parnes also testified that the prosecutor's question regarding child support was objectionable because it was not relevant, it was the subject of the motion in limine and that "it would certainly be more prejudicial than probative if there was any relevance to it at all." Further, there was no valid reason to let that evidence in. EH T. p. 251, ln. 22 - p. 252, ln. 5. 85. Defense counsel's failure to object to inadmissible evidence has been found to be deficient performance under *Strickland. See, e.g., Smith v. State*, 689 S.E.2d 629, 633 (S.C. 2010) ("The presumption of adequate representation based on a valid trial strategy disappears when trial

counsel acknowledged there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony.") (emphasis in original).

In addition, the prosecutor committed misconduct when he raised the child support issue. "An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury should not be admitted." *State v. Wilson*, 93 Idaho 194, 196-98, 457 P.2d 433, 435-37 (1969), *quoting State v. Fleming,* 154 N.W.2d 65, 66 (Neb. 1967). This is so because "[a] fundamental principle of criminal law is that where the offense charged 'is of itself sufficient to inflame the minds of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence'." *Id., quoting People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954). "However, reception at trial of irrelevant and immaterial evidence, which serves no probative function, but serves only to inflame the minds and passions of the jury to the prejudice of the defendant is reversible error." *Id.*

The Idaho Supreme Court in *Wilson* held that evidence of "[t]he degree on pain suffered by a young virgin upon being raped, as opposed to the feelings of a bride when first experiencing intercourse with her husband," was patently inadmissible and reminded the prosecutor that he was only "entitled to hit as hard as he can above, but not below, the belt." *Id., quoting State v. Rollo*, 351 P.2d 422, 426-427 (Or. 1960). It went on to list several other "examples of irrelevant, immaterial and inflammatory material, the admission of which into evidence was held to be reversible error," including:

Evidence that defendant, accused of Mann Act Violation, failed to file income tax

> returns; evidence that defendant, accused of murder, was a deserter from the army; evidence that defendant, accused of arson, had been treated for venereal disease; evidence that defendant, accused of murder, while in the army offered a friend $500.00 to shoot him in the foot in order to avoid frontline duty; evidence, in prosecution for 'Malicious shooting at and wounding another with intent to kill,' of victim's prognosis for recovery and future ability to perform manual labor; evidence, in rape prosecution, that victim was pregnant as a result of the rape; evidence, in murder prosecution, that victim was married and a parent; evidence that married defendant, accused of murdering wife's friend, had been seen with other women[.]

93 Idaho at 198, 457 P.2d at 437.

The evidence about Mr. Grove's child support arrears fits squarely into the Idaho Supreme Court's list of examples of "irrelevant, immaterial and inflammatory material,"and it was misconduct for the prosecutor to elicit such testimony because it had no such tendency to prove the charge and "could only serve to excite the minds and inflame the passions of the jury[.]" *Id.* Consequently, it was deficient performance for defense counsel to let the prosecutor's misconduct go unchallenged.

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

Mr. Grove alleged that defense counsel's performance was deficient because he failed to move to strike the prosecutor's comments after his objection to prosecutorial misconduct during cross-examination was sustained. Verified Amended Petition, p. 32. The trial record shows that the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, p. 1113, ln. 8-13. While defense counsel's objection was sustained, he did not ask that the comments be stricken or that the jury be instructed to disregard the comments. *Id.*

At the evidentiary hearing, defense counsel said that he did not recall why he did not ask the court to strike that comment. He also could not think of a reason why he did not ask the court to reprimand the prosecutor for that statement. EH Tr. p. 192, ln. 5 - 15. Mr. Parnes, however, testified that defense counsel should have asked the Court to strike the comment, "as was done in other parts of trial." He continued: "I would also add that, in this particular situation, that kind of a statement is so, I think, beyond the bounds that I would have probably have asked for a mistrial." EH Tr. p. 252, ln. 18 - p. 253, ln. 5.

There is no doubt that the prosecutor committed misconduct in his characterization of Mr. Grove's sworn testimony. Counsel should not interject his personal opinion and beliefs about the credibility of a witness or the guilt or innocence of the accused. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007); *citing State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *State v. Garcia*, 100 Idaho 108, 110–11, 594 P.2d 146, 148–49 (1979); *State v. Lovelass*, 133 Idaho 160, 169, 983 P.2d 233, 242 (Ct. App. 1999); *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). The prosecutor's characterization of Mr. Grove's testimony as a "story you need the jury to believe" and that "some things . . . just don't really make sense" are mere assertions of his personal opinions and belief in Mr. Grove's guilt and to the lack of credibility of Mr. Grove's testimony, and thus was misconduct. The failure to object to improper statements by the prosecutor have been found to be deficient performance under *Strickland*. *People v. Bodden*, 82 A.D.3d 781, 784, 918 N.Y.S.2d 141, 143 (2011) (Counsel failed to object to prosecutor's comments which implied that the defendant's character increased the likelihood that he was guilty.). That was also

the case here. The failure to object was deficient performance.

3. Prosecutor's question about Mr. Grove's emotional state

Mr. Grove also alleged in his Amended Verified Petition that defense counsel's performance was deficient when he failed to object to the prosecutor asking Mr. Grove when he had been prescribed Ativan and whether the prescription "was a result of [his] emotional state Friday[.]" Amended Verified Petition, pg. 32. The criminal trial record proves the questions were asked and that defense counsel failed to object.

> 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 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 T. p. 197, ln. 25 - p. 198, ln. 1.

At the evidentiary hearing, defense counsel testified that "at the time, or even looking at it now, I'm not sure, under the circumstances of the way all this came down, whether it was objectionable." EH T. p. 193, ln. 5-10. Mr. Parnes disagreed stating that the evidence was irrelevant. Further it was highly prejudicial when understood in its proper context. When the

trial was continued on that Friday, "the jury was told that there had been a medical issue, but they were not told what the details of that were." EH T. p. 253, ln. 14-21. See also, Exhibit B, p. 1067, ln. 3-5. (Wherein the Court informs the jury that "an unforeseen medical situation has arisen which affects our ability to proceed with trial today" and does not mention Mr. Grove or the nature of the medical situation.) Defense counsel's failure to object to improper cross-examination has been held to be deficient performance under *Strickland. See, e.g., United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986) (Deficient performance found where prosecutor used cross-examination to bring in extraneous and at times unfounded charges in order to blacken the defendant's character.)

In addition, the prosecutor used the "emotional state" testimony to great effect during his rebuttal argument. First, defense counsel brings up in his closing argument the questioning about "Stace having a breakdown last Friday" and argues that the evidence is simply 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 springs 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 [redacted]

Exhibit B, p. 1458, ln. 13-19. Defense counsel did not object to this line of argument nor did he have the chance to respond because the prosecutor held it back until rebuttal. But had defense counsel properly objected, the evidence never would have come in at all.

The introduction of all this evidence was prejudicial under *Strickland* because Mr. Grove's credibility was of paramount importance to the defense case. His testimony about what

happened after Lisa Nash left for work and he was alone with [redacted] was one half of the defense case, the other half being Dr. Arden's medical testimony. Thus, the evidence showing Mr. Grove had a bad relationship with his biological son and that he was not even paying child support painted him as a bad person and bad care giver, *i.e.*, the kind of person who would beat an infant. The prosecutor's comments that Mr. Grove needed the jury to believe his story but that parts of it just don't really make sense, implied to the jury that Mr. Grove would lie to them because he *had to*, irrespective of the logical soundness of his testimony. And the prosecutor's argument that Mr. Grove had an emotional breakdown with [redacted] similar to the one he had in court, established what the state's evidence could not – an explanation for why Mr. Grove would brutally beat an infant. None of this would have been brought to the attention of the jury had defense counsel's performance not been deficient. Without it, there is a reasonable probability that state would not have obtained a conviction.

B. *Ineffective Assistance in the Direct and Cross-Examination of Dr. Arden*

Mr. Grove alleged in his Amended Verified Petition that trial counsel was ineffective in failing to object to the prosecutor impeaching Dr. Arden with alleged "gross mismanagement" when he was the Medical Examiner in the District of Columbia; in failing to attempt to rehabilitate Dr. Arden on redirect; and in failing to provide iron stain slides to Dr. Arden prior to his trial testimony. Amended Verified Petition, pp. 32-33; 35-37.

The state's theory of this case was that Mr. Grove "brutally beat" [redacted] Martin to death, Ex. B, p. 691, ln. 14-22, between 7:54 a.m. and approximately 8:30 a.m., on July 10, 2006. Ex. B, p. 745, ln. 7-p. 747, ln. 7.

The defense theory was that the injuries happened prior to the 35 minutes when Mr.

Grove was alone with [redacted] Ex. B, p. 696, ln. 18-p. 708, ln. 24. As stated in defense counsel's opening at trial, the defense case for acquittal rested on two things: Mr. Grove's credibility when he testified under oath that he did not beat [redacted] and Dr. Arden's testimony that the injuries resulting in Kyler's death happened prior to 7:45 a.m. on July 10, 2006. Ex. B, p. 708, ln. 9-24. To make that case, the defense was relying on the jury to "take your intelligence and common sense and listen to Dr. Arden, listen to the testimony of the causation and the timing of these things." Ex. B, p. 708, ln. 13-15. As trial counsel testified at the evidentiary hearing, "the nudge" of the case was the timing of the injuries and Dr. Arden was the sole medical witness to support the theory. EH Tr. p. 212, ln. 10-22.

When Dr. Arden testified at trial, he placed the time of the injuries at three or more days before a point between brain death and the cross-clamp done for organ harvest. Ex. B, p. 1267, ln. 11-15; p. 1302, ln. 1-p. 1303, ln. 8. He further testified that injuries to the pancreas were at least a week old. Ex. B, p. 1302, ln. 1- 1303, ln. 8. Given that brain death occurred on July 11, 2006, Ex. B, p. 934, ln. 11-13, and the cross-clamping occurred on July 12, 2006, Ex. B, p. 935, ln. 8-10, the injuries were, according to Dr. Arden's testimony, inflicted prior to the morning of July 10. By contrast, Dr. Ross testified for the state, based in part upon his review of Dr. Reichard's report, that the injuries occurred one to two days prior to the cross-clamping; in other words sometime between July 10 and July 11. Ex. B, p. 933, ln. 14-17; p. 934, ln. 24-p. 935, ln. 16.[2]

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[2] In addition, Dr. Arden testified that there was no tear in the corpus callosum. Rather, the appearance of a tear was an artifact created during the preparation of the microscopic slides. Ex. B, p. 1291, ln. 11-15. Dr. Ross testified that there was a tear, but that it could have been caused either by trauma or by brain swelling instead of blunt force. Ex. B, p. 940, ln. 23-p. 942, ln. 23.

Dr. Hunter, a state's medical witness, testified that he believed that [redacted] would have been somewhere between headachy and unconscious immediately following the injury that led to death. Ex B, p. 875, ln. 8-22. Dr. Harper, another medical witness for the state, testified that upon receiving the injuries, [redacted] would have been obviously critically ill, unconscious or semi-conscious. Ex. B, p. 1033, ln. 16-21. She also testified that she did not need to consider microscopic evidence to conclude the time of injury - that sort of evidence was "all well and good" but "it doesn't make any difference." Ex. B, p. 1041, ln. 18-24. She believed that [redacted] was injured the morning of July 10. Ex. B, p. 1059, ln. 8-17. Dr. Arden testified to the contrary, specifically that [redacted] could have been alert and active after being injured. Ex. B, p. 1306, ln. 15-p. 1310, ln. 25. His testimony was supported both by testimony about the nature of head injuries and by the fact that injuries to the pancreas were over a week old showing that [redacted] was clearly active after being seriously injured.

Dr. Arden came before the jury with very strong credentials. He testified to, among other qualifications, an impressive education, board certifications in both anatomic pathology and forensic pathology, licenses to practice medicine in five states and the District of Columbia, membership and a director's position in the National Association of Medical Examiners, and multiple academic appointments at several medical schools, including N.Y.U. and George Washington University Medical School. He had given lectures and published multiple articles in medical journals. He had been a medical examiner for 20 years, including positions as the first deputy chief medical examiner for New York City and for Washington, D.C. And, at the time of Mr. Grove's trial, he had both a private consulting practice and served as a forensic pathologist for the state of West Virginia. Ex. B, p. 1235, ln. 19-p. 1245, ln. 14.

In contrast, the jury was given no real information about the state's expert pathologist, Dr. Reichard. In fact, Dr. Reichard himself never came and testified so that the jury could hear a non-hearsay account of his determination about the timing of the injuries to [redacted] Ex. B. Dr. Marco Ross, who did testify at trial, presented a much shorter and less extensive educational, academic, and professional resumé to the jury. He testified to coming to pathology later in his career and provided no evidence of board certifications or publications or academic appointments. Further, he had worked as a medical examiner for just over eight years. And, the fact that he did not examine the brain himself indicated his own judgment of his lack of expertise as to pediatric brain injury diagnosis. Ex B, p. 892, ln. 22-p. 893, ln. 13.

While Dr. Hunter and Dr. Harper offered their opinions regarding the age of Kyler's injuries, neither had any expertise in the dating of injuries. Each testified based upon their anecdotal experience as physicians treating injuries, not as pathologist/physicians diagnosing time of injury. Yet, as Dr. Hunter himself testified, "'In my experience' are the three most dangerous words in medicine, because each – any one of us has a limited experience compared with, say, large studies . . ." Ex. B, p. 888, ln. 9-14.

In a strict balancing of known expertise, Dr. Arden was by far the best qualified expert at trial to date the injuries and had the jury accepted his expert opinion, Mr. Grove would have been acquitted.

However, the state seriously undermined Dr. Arden's testimony with a three-pronged attack. First, the prosecutor improperly put before the jury the theory that Dr. Arden was on a special mission to help Mr. Grove instead of the state. Exhibit B, p. 1321, ln. 18-p. 1323, ln. 4. Then the prosecutor extensively questioned Dr. Arden about the iron stain slides Dr. Reichard

had reviewed which Dr. Arden had not reviewed. Ex. B, p. 1353, ln. 8-p. 1364, ln. 2. And finally, the prosecutor closed his cross examination by extensively questioning Dr. Arden about his departure from the Washington, D.C. medical examiner's office under pressure. Ex B, p. 1382, ln. 6-p. 1388, ln. 12. That questioning is attached as an appendix to this argument for the court's convenience. In summary, the questioning brought out that Dr. Arden had been accused of gross mismanagement, had failed to attend meetings of the DC Child Fatality Review Board, had presided over the office with a backlog of 1300 autopsy reports and an accumulation of 189 bodies, and had been accused of sexual harassment, sexual discrimination, unlawful retaliation, and racial discrimination. Following these allegations, Dr. Arden resigned.

Dr. Arden's admission to having been accused of all of these things and then resigning under pressure was the last thing the jury heard in the trial except for this redirect:

> Q. We've been out here a long time, and I'm going to be very, very brief, okay? Is there anything that the Prosecutor asked you or answers that you've given that in any way changes the opinions you provided to this jury under direct examination?
>
> A. No, sir.

Ex. B, p. 1388, ln. 20-25.

Mr. Grove produced evidence that proves by a preponderance that counsel was constitutionally ineffective in failing to get Dr. Arden the iron stain slides prior to trial and in failing to prevent the prosecutor's impeachment of Dr. Arden both with the notion that he was on a special mission to help the defense but not the state and with the irrelevant and unfairly and highly prejudicial information about his employment with and resignation from the D.C. Medical Examiner.

At the evidentiary hearing, Dr. Arden testified that he had asked Mr. Chapman to send him all the microscopic slides that had been made by the medical examiner who performed the autopsy. EH Tr. p. 134, ln. 8-11. These slides included the iron stain slides. EH Tr. p. 136, ln. 8-10; p. 138, ln. 6-10. Mr. Chapman, for his part, testified that he was aware prior to trial of the existence of the iron stain slides but that in the letter he sent to the prosecutor requesting recuts for Dr. Arden's review prior to trial he did not ask for the iron stain slides. EH Tr. p. 201, ln. 13-p. 204, ln. 1. Mr. Parnes, testifying as a *Strickland* expert, stated that the failure of trial counsel to obtain the iron stain slides for Dr. Arden prior to trial violated reasonable professional norms because provision of all relevant information to an expert is critical to the expert's ability to review the matter fully and to have credibility before the jury. EH Tr. p. 254, ln. 20-p. 255, ln. 15.[3]

The state presented nothing whatsoever to rebut any of this evidence. The state did not dispute that Dr. Arden asked for Mr. Chapman for all slides or that Mr. Chapman did not ask for or send the iron stain slides to Dr. Arden. Nor did the state present its own expert testimony to contravert Mr. Parnes' testimony that failure to provide a defense expert with all relevant information is contrary to reasonable professional norms of practice. In fact, the state did not even ask Mr. Parnes anything in cross examination about the failure of trial counsel to provide

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[3] Mr. Parnes' testimony is consistent with *State v. Shackelford,* 150 Idaho 355, 385, 247 P.3d 582, 612 (2010), which recognized that failure to properly prepare an expert may be deficient performance, but found that Shackelford had failed to demonstrate prejudice. *See also, Murphy v. State,* 143 Idaho 139, 146-47, 139 P.3d 741, 748-49 (Ct. App. 2006), holding that failure to ask for a continuance to consult with an expert medical witness was deficient performance. *Also see, Rompilla v. Beard,* 545 U.S. 374, 387, 125 S.Ct. 2456, 2466 (2005), holding that defense counsel must obtain information that the State has and will use against the defendant.

the iron stain slides to Dr. Arden other than to ask him whether he had made averments about the iron stain slides in his affidavit earlier filed in this case. EH Tr. p. 282, ln. 23-p. 283, ln. 9. The evidence before this Court is clear that trial counsel acted contrary to reasonable professional norms in failing to provide Dr. Arden the iron stain slides prior to trial.

With regard to the impeachment of Dr. Arden as being on a special mission, Mr. Chapman testified that he did not believe it was proper for the prosecutor to impugn the motives of Dr. Arden without evidentiary support and that he could not now recall why he did not object to the line of questioning, but that he was certain that Dr. Arden was not going to tell the jury that he was on a special mission for the defense. EH Tr. p. 21, ln. 11-p. 215, ln. 18. Mr. Parnes testified that the special mission questioning was improper and should have been objected to. EH Tr. 260, ln. 10-22. The state did not present any evidence that such questioning by the prosecution was appropriate or that counsel acted in conformity with reasonable professional norms in not objecting to the questioning.

With regard to the other impeachment, Dr. Arden testified that he had alerted Mr. Chapman prior to trial to the circumstances of his departure from the Washington, D.C. office. EH Tr. p. 128, ln. 3-p. 130, ln. 12. Dr. Arden further testified that the allegations did not in any way relate to his medical expertise or his honesty. EH Tr. p. 131, ln. 6-14. Mr. Chapman testified that he was aware pretrial of the allegations both from discussions with Dr. Arden and from his own internet research. EH Tr. p. 205, ln. 14-p. 206, ln. 4. Mr. Chapman further testified that he assumes the prosecutor was also aware of the allegations against Dr. Arden; that he (Mr. Chapman) did not believe that evidence about the accusations against Dr. Arden and his departure from the D.C. office was relevant; that he viewed the evidence as prejudicial; that he

could have made a pretrial motion in limine to exclude the evidence or made a contemporaneous objection to it at trial; but that he did not attempt to keep the evidence out. EH Tr. p. 204, ln. 2-p. 207, ln. 1.

The state did not dispute any of this evidence. The state's only question to Mr. Chapman on this topic was whether he could have taken advantage of the prosecutor's questioning of Dr. Arden regarding the circumstances in Washington, D.C. by arguing to the jury that the state had nothing to do at trial but attack Dr. Arden because it could not attack his opinions. EH Tr. p. 237, ln. 8-17.

Mr. Parnes testified that Mr. Chapman should have objected to the impeachment of Dr. Arden because the impeachment was irrelevant. Mr. Parnes testified that Mr. Chapman should have filed a motion in limine to exclude the evidence or, in the alternative, to preserve error in admitting the evidence.[4] Mr. Parnes also testified that the timing of the impeachment, coming at the very end of Dr. Arden's testimony and the very end of the trial made it particularly prejudicial. ER Tr. p. 259, ln. 4-15. This prejudicial effect was compounded by the failure of counsel to do anything to rehabilitate Dr. Arden. EH Tr. p. 256, ln. 19-p. 260, ln. 2. The state presented no expert testimony to contradict Mr. Parnes' conclusion that counsel was deficient in failing to keep this evidence out of trial or at least preserving a record for appeal if the evidence was erroneously admitted over objection. Mr. Parnes ultimately testified that trial counsel's performance as a whole during the preparation for Dr. Arden's testimony and in the direct and

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[4] Mr. Parnes' testimony is consistent with IRE 401 and 402 because the evidence did not impeach Dr. Arden's medical testimony. Moreover, the evidence's unfair prejudice outweighed any probative value and was inadmissible under IRE 403. Lastly, the evidence was not admissible under IRE 404, nor did the state give any notice of its intent to use the evidence as required by IRE 404(b).

cross-examination of Dr. Arden did not meet reasonable professional standards for criminal defense attorneys. EH Tr. p. 260, ln. 23-p. 261, ln. 3. The state presented no expert or other evidence to the contrary. Thus, Mr. Grove has proven deficient performance as required by *Strickland.*

The second question is whether the deficient performance was prejudicial. Mr. Grove has also proven this.

Dr. Arden testified at the evidentiary hearing that the slides he had pretrial and Dr. Reichard's report of the iron staining were sufficient, as he testified at trial, for him to conclude that [redacted]s injuries occurred at least 48-72 hours prior to death. But, upon seeing the iron stain slides himself, he could now further conclude that there were injuries in the mesentery and eyes that were significantly older, some as old as a week or more prior to death. EH Tr. p. 167, ln. 8-p. 169, ln. 10. Had Dr. Arden been able to give this testimony at trial, it would have effectively countered Dr. Hunter's and Dr. Harper's "in my experience" claims that [redacted] could not have been active after receiving the injuries that resulted in death. If the jury had known that [redacted] had been active for over a week with both retinal injuries and mesentery injuries, there is a reasonable probably that at least one juror would have had a reasonable doubt that death resulted from injuries inflicted in the 35 minutes prior to the arrival of the ambulance.

In addition, had counsel objected to the improper impeachment of Dr. Arden, one of two things would have happened: the improper evidence would have been excluded or if it was admitted, there was a reasonable probability that the appellate court would have found reversible error.

If the evidence was not admitted, there is a reasonable probability that at least one juror

would have found that the testimony of the most qualified medical pathologist at the trial created a reasonable doubt as to Mr. Grove's guilt. This is especially evident given the timing of the impeachment and the failure of trial counsel to rehabilitate Dr. Arden. The last thing that the jury heard was that Dr. Arden was accused of all sorts of mismanagement and bad acts. Given that the jury was never instructed to disregard this evidence, the jurors likely used it to determine what sort of credibility to give to Dr. Arden's expert testimony. Indeed, the prosecutor recognized the power of this impeachment to discredit Dr. Arden's medical opinions. He devoted part of his closing argument to discrediting Dr. Arden because Dr. Arden was a paid expert. He argued:

> Dr. Arden, as we presented to you, was a well-paid public servant for many years. And as he described to you, he resigned his position under pressure. And for the next five years, 2003 until today – well, until, excuse me, a month ago or so, he was not employed as a forensic pathologist, but he was employed as, quote, a paid consultant.
>
> And that's – and he said in criminal cases, what he does is he comes and testifies for the defense. Now, in fairness to Dr. Arden, he said, if it's clearcut that the person is just flat wrong, he won't take the case. But on the borderlines on clearcut, don't you think that it's reasonable, and in your life experience probably, that his financial situation leads him to decide what cases he can take? Doesn't it extend out? Doesn't it make sense that it extends out, that realm of reasonable medical probability? That's for you to decide. When you're deciding on his credibility, think about that.

Ex. B, p. 1428, ln. 20-p. 1429, ln. 13.

The prosecutor continued this line of attack in his rebuttal:

> He [Mr. Chapman] mentioned putting on evidence just to attack the guy [Dr. Arden]. Well, when somebody's opinion is so important to you making a decision, it is necessary to put on evidence about the kind of person that's making the opinion, why he's doing it, to enable you to decide how much weight to give that opinion, if any. It's not an attack on the person. It's information for you.

Ex. B, p. 1458, ln. 5-12. (It is telling to note that Mr. Spickler acknowledges that Dr. Arden's testimony was "so important" to the jury's decision and central to the defense case.)

Later, the prosecutor continued:

> Dr. Arden certainly has credentials, but he also has a purpose here. When I commented to you earlier that he was stretching things and I talked about the brain death and stuff, look at your notes and see if when he admitted that certain of these things, according to the literature, can appear one to three days after death, if he didn't always pick three days, you know, the outside limit, not the early part of it. But look at your notes and see if that isn't true.

Ex. B, Trial Tr. p. 1461, ln. 9-17.

These arguments demonstrate that the prosecutor believed that the improper impeachment evidence was integral to the case against Mr. Grove. Otherwise, he would not have introduced the evidence nor argued it repeatedly in closing and rebuttal. Reviewing this argument and the remainder of the evidence presented at trial, there is a reasonable probability that had trial counsel not been deficient in his handling of Dr. Arden's preparation and the improper impeachment of Dr. Arden that the outcome of the trial would have been different - there would have been an acquittal or a hung jury.

Moreover, had the court allowed the improper evidence even over objection, the error would have been raised on appeal. And, there is a reasonable probability that relief would have been granted.

The question of relevancy is subject to free review on appeal, a standard favorable to the appellant. *State v. Carson,* 151 Idaho 713, 717, 264 P.3d 54, 58 (2011). The evidence regarding the Washington, D.C. office and Dr. Arden's resignation had nothing to do with his medical expertise or the validity of the opinions offered at Mr. Grove's trial. Indeed, it did not even have

any relevance to the doctor's general credibility as the evidence had nothing to do with Dr. Arden's general reputation for truthfulness or untruthfulness. Therefore, the evidence was inadmissible under IRE 401 and 402. *See, 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. *See also,* IRE 403, IRE 404 and IRE 608. Moreover, on appeal, a very favorable standard of review would have applied. Specifically, the state would have to prove beyond a reasonable doubt that the error in the admission of the impeachment evidence did not contribute to the verdict. *See State v. Perry,* 150 Idaho 209, 221-22, 245 P.3d 961, 973-74 (2010), citing *State v. Thompson,* 132 Idaho 628, 636, 977 P.2d 890, 898 (1999); *State v. Zichko,* 129 Idaho 259, 265, 923 P.2d 966, 972 (1996); *State v. Pizzuto,* 119 Idaho 74, 778, 810 P.2d 680, 716 (1991); and *State v. Stoddard,* 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). Given the evidence presented at trial, there is a reasonable probability that had this Court allowed the evidence over objection, Mr. Grove would have prevailed upon appeal and received a new trial.

Thus, Mr. Grove has proved both deficient performance and prejudice as required by *Strickland* as to counsel's handling of Dr. Arden's preparation and testimony. Post-conviction relief should therefore be granted.

C. *Ineffective Assistance With Regard to Sleeping Jurors*

Mr. Grove alleged in his amended verified petition for post-conviction relief that trial counsel was ineffective in failing to move for a mistrial after jurors fell asleep during testimony at trial. Amended Verified Petition p. 33. He has now proven this ineffectiveness by a preponderance of the evidence and post-conviction relief should be granted.

At the evidentiary hearing, Mr. Grove presented testimony from witnesses Debbie Grove, Carol Grove, Lori Stamper, Karen Stamper, Craig Stamper, and Justina Hyder that they had observed one or more jurors sleeping during the trial. EH p. 13-123. The witnesses testified to sleeping by Jurors Neiman, Lind, Yates, Barrett, and Loetscher. EH p. 18, ln. 15-p. 21, ln. 19; p. 77, ln. 4-25; p. 86, ln. 7-13; p. 106, ln. 6-7; p. 112, ln. 4-5. He also presented the testimony of Mr. Chapman that he recalled a side bar during trial about jurors having been sleeping. EH p. 216, ln. 7-10. Mr. Chapman testified that he was aware that some jurors may have been sleeping during Dr. Ross' testimony but that he did not attempt to make a record with regard to this nor did he consult with Mr. Grove about whether action should be taken as to the sleeping jurors. EH p. 218, ln. 3-p. 219, ln. 12. Mr. Chapman's testimony was consistent with the trial record. During the prosecutor's direct examination of Dr. Ross, the Court interrupted the prosecutor *sua sponte* and called for a side bar. Immediately after the side bar, the Court noted that the proceedings had been going on for some time and that the Court and counsel had determined that it would be best to take a break. Ex. B, p. 921, ln. 20-p. 922, ln. 6. During Mr. Chapman's cross-examination of Dr. Ross, the prosecutor asked for a break in the proceedings. He stated that it was warm in the courtroom and "I've recently noticed that the jurors might be in need of a break. They're having a hard time staying awake." Ex B, p. 983, ln. 10-12.[5]

The state attempted to rebut this evidence through the testimony of seven of the jurors to

[5] Insofar as the state intends to now argue that no jurors were sleeping, the argument is contrary to the spirit, if not the letter of, the doctrine of judicial estoppel. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Heinze v. Bauer,* 145 Idaho 232, 235, 178 P.3d 597, 600 (2008), quoting *McKay v. Owens,* 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997). The underlying policy is the orderly administration of justice and regard for the dignity of judicial proceedings. It is intended to prevent a litigant from playing fast and loose with the courts. *Id.*

the effect that they personally did not sleep and that they did not observe others sleeping. EH pp. 305-341. Yet, the state could not present any juror who testified that he or she had watched all the other jurors throughout the proceedings and no one fell asleep. *Id.* Moreover, the state did not present testimony from Mr. Yates or Ms. Barrett that they had not been sleeping during the trial. *Id.* Mr. Grove's evidence as to those two jurors was not impeached by the state.

Mr. Parnes testified that when an attorney becomes aware of a sleeping juror he or she has a duty to discuss the matter with the client and create a record. Failure to consult potentially impeded the client's right to a unanimous jury. The right to a unanimous jury is a right that counsel cannot waive for the client without the client's consent. In this case, Mr. Chapman did not meet reasonable professional standards in failing to consult with Mr. Grove regarding the sleeping jurors. EH p. 262, ln. 4-p. 264, ln. 6. The state did not present any evidence from an expert or otherwise that Mr. Chapman's failure to consult with Mr. Grove to controvert Mr. Parnes' testimony.

Mr. Parnes' testimony is consistent with *State v. Umphenour,* S.Ct. No. 41497, — Idaho —, — P.3d —, 2015 WL 1423789 (Ct. App. March 30, 2015). *Umphenour,* relying on *State v. Swan,* 108 Idaho 963, 966, 703 P.2d 727, 730 (Ct. App. 1985), holds that Article I, § 7 of the Idaho Constitution requires that waiver of the right to a jury trial requires the defendant's personal waiver. *Id.*, at *3. *See also,* ICR 23 (a) which states that issues of fact must be tried by a jury in felony cases unless a trial by jury is waived by a written waiver executed by the defendant in open court with the consent of the prosecutor expressed in open court and entered in

the minutes. [6]

Umphenour further holds that a constitutionally invalid waiver of a jury trial is a structural defect which requires reversal without a showing of an actual effect on the outcome of the trial. The Court of Appeals relied upon *Arizona v. Fulminate,* 499 U.S. 279 (1991); *Duncan v. State of Louisiana,* 391 U.S. 145 (1968); *Sullivan v. Louisiana,* 508 U.S. 275 (1993); *State v. Perry,* 150 Idaho 209, 222-23, 245 P.3d 961, 974-75 (2010); and *Swan, supra,* to conclude that the error in not obtaining a personal wavier by the defendant of the right to have his/her case determined by the jury affects the framework within which the trial proceeds and thus is not subject to a harmless error review. *Umphenour,* at *6-9.

In Mr. Grove's case, the fact that one or more jurors slept though part or parts of the trial denied Mr. Grove the right to a trial before a jury of 12 as required by Article I, § 7. Counsel did not meet reasonable professional norms in waiving that right without consulting Mr. Grove. *Umphenour, supra*; *Swan, supra.*

Moreover, as counsel's deficiency created a structural error in the trial, the deficiency should be evaluated under the standards of *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984). Under *Cronic,* there is a presumption of prejudice when a deficiency results in an actual breakdown of the adversarial process. A deficiency which results in structural error is a deficiency which is entitled to the presumption of prejudice under *Cronic.*

But, even if *Strickland's* prejudice prong must be proven, Mr. Grove has proven by a preponderance of the evidence that post-conviction relief must be granted. This case turned on

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[6] As *Umphenour* was resolved on state constitutional grounds, the Court of Appeals did not address whether the Sixth Amendment likewise requires a personal waiver. Mr. Grove asserts that it does. *See State v. Wheeler*, 114 Idaho 97, 102, 753 P.2d 833, 838 (Ct. App. 1988).

expert medical testimony which, absent prosecutorial misconduct, would have weighed in favor of Mr. Grove. There is a reasonable probability that the outcome of the trial would have been different, whether through a hung jury or an acquittal, had all twelve jurors heard all the expert testimony.

D. ***Ineffective Assistance With Regard to Prosecutorial Misconduct in Closing***

Mr. Grove alleged in his petition that "[d]efense counsel's performance during the state's closing and rebuttal arguments was deficient because he failed to object to multiple instances of misconduct by the prosecutor" and that "[d]efense counsel's performance was deficient because he failed to move for a mistrial after the prosecutor's closing and rebuttal arguments." Amended Verified Petition, p. 34-35. He also alleged multiple instances of such misconduct. *Id.*, p. 15-17. Each of these allegations and the evidence presented at the hearing are discussed below:

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

Defense counsel testified that the defense theory of the case was not that there was a long-term brain injury. "It was a defense theory that there was some injury prior to the time that the child was with Stace. . . I wouldn't define it as long term, no." He also agreed that it is improper for the prosecutor to misrepresent the defense's theory of the case, but could not say why he failed to object to that misrepresentation. EH Tr. p. 224, ln. 5 - pg. 225, ln. 4.

Mr. Parnes testified that defense counsel should object when the state misstates the defense theory of the case. EH Tr. p. 269, ln. 23. Indeed, the case law is clear 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. Griffiths*, 101 Idaho 163, 166, 610 P.2d 522,

525 (1980); *State v. Tupis*, 112 Idaho 767, 771-72, 735 P.2d 1078, 1082-83 (Ct. App. 1987); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Further, the prosecutor's statement about a long term injury implied a period of time longer than a few days or a week "[a]nd that was clearly not the defense in this particular case." EH Tr. p. 270, ln. 1-8. The prosecutor's mischaracterization of the defense theory was intended to make the theory appear improbable because it would be unlikely that the brain injuries could go unnoticed by care givers for a long period of time, while the true theory was much more plausible and supported by Dr. Arden's testimony.

2. The prosecutor told the jury without supporting evidence that "[c]are takers kill little babies all the time." Exhibit B, p. 1460, ln. 5-6.

3. The prosecutor told the jury without supporting evidence that "[p]arents kill babies all the time." Exhibit B, p. 1460, ln. 6-7.

4. The prosecutor told the jury without supporting evidence that "there are literally thousands of [similar] incidents in any given span of time[.]" Exhibit B, p. 1460, ln. 8-10.

5. The prosecutor told the jury without supporting evidence that he believed that "our local paper has probably shown . . . probably six more of these cases since – since this one started." Exhibit B, p. 1460, ln. 11-14.

Defense counsel agreed that it is improper for a prosecutor to state facts which are not supported by the evidence. EH Tr. p. 225, ln. 17-19. Our appellate courts agrees: "It is plainly improper for a party to present closing argument that misrepresents or mischaracterizes the evidence." *State v. Troutman*, 148 Idaho 904, 911, 231 P.3d 549, 556 (Ct. App. 2010); *see also Griffiths*, 101 Idaho at 166, 610 P.2d at 525; *State v. Martinez*, 136 Idaho 521, 525, 37 P.3d 18, 22 (Ct. App. 2001); *State v. Phillips,* 144 Idaho at 86, 156 P.3d at 587. Defense counsel could not recall any evidence to support the above statements, but could not say why he failed to object

to them. EH Tr. p. 226, ln. 5 - p. 227, ln. 1.

Mr. Parnes testified that these comments were not supported by evidence and were highly inflammatory because the state alleged that Mr. Grove was the caretaker at the time of Kyler's injuries. Consequently, there should have been an objection. EH Tr. p. 271, ln. 4-7.

The case law supports Mr. Parnes' opinion. While both sides in a trial have traditionally been afforded considerable latitude in closing argument to the jury, "[t]his latitude is not boundless, however, and it is impermissible to appeal to the emotion, passion, or prejudice of the jury through the use of inflammatory tactics." *State v. Johnson*, 149 Idaho 259, 266-67, 233 P.3d 190, 197-98 (Ct. App. 2010), *citing State v. Gross*, 146 Idaho 15, 20–21, 189 P.3d 477, 482–83 (Ct. App. 2008); *State v. Phillips*, 144 Idaho at 86, 156 P.3d at 587 ("Considerable latitude, however, has its limits, both in matters expressly stated and those implied."). A prosecutor exceeds the scope of this considerable latitude if he or she "attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence." *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). Thus, "[u]rging the jury to render a verdict based on factors other than the evidence and jury instructions, such as sympathy for the victim, has no place in closing arguments." *State v. Felder*, 150 Idaho 269, 275, 245 P.3d 1021, 1027 (Ct. App. 2010); *State v. Beebe*, 145 Idaho 570, 576, 181 P.3d 496, 502 (Ct. App. 2007). Finally, the ABA instructs that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice: Prosecution and Defense Functions § 3-5.8 (3d. ed.1993).

In fact, our Supreme Court has long held that the limits on permissible closing argument

apply most stringently to a prosecuting attorney:

> A prosecuting attorney is a public officer, "acting in a quasi judicial capacity." It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same[.]
>
> It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.

State v. Irwin, 9 Idaho 35, 43-44, 71 P. 608, 609-11 (1903). *See also, State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994); *State v. Givens*, 28 Idaho 253, 268, 152 P. 1054, 1058 (1915).

Mr. Spickler's multiple references to matters outside the record were so far afield from acceptable practice that defense counsel's failure to object to any one of those statements was deficient performance. In this regard, Mr. Parnes noted that the fact that defense counsel could not state a reason for failing to object was "important in terms of making a decision about deficient performance, that it implies that there's no . . . tactical or strategic reason thought out

and planned for." EH Tr. p. 271, ln. 11-17.

Further, the failure to object was prejudicial. The prosecutor used the argument as an emotional appeal to the jury to take a stand against (his asserted epidemic of) child abuse. As Mr. Parnes stated:

> It just absolutely is an instance of prosecutorial misconduct. It's inflammatory. It's not supported by the record. It[] . . . has the – the incredible impact of telling jurors this happens all the time. This is something that you've got to do something about. And the way that you're going to do something about it is to convict Mr. Grove who's in front of you. You can't do anything else other than to convict Mr. Grove in order to stop this problem that – you know, the problem in the community.

EH Tr. p. 271, ln. 23 - p. 272, ln. 8.

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

Defense counsel testified that he agreed that is is improper for a prosecutor to appeal to the sympathies of the jury, but could not say why he failed to object to the above comment. EH Tr. p. 225, ln. 5-15. Mr. Parnes testified that the statement was inflammatory and defense counsel should have been objected. EH Tr. p. 272, ln. 13-18. Of course, appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Raudebaugh*, 124 Idaho at 769, 864 P.2d at 607; *State v. Smith*, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982); *Griffiths*, 101 Idaho at 168, 610 P.2d at 527. And that is the only possible purpose behind Mr. Spickler's comment about "taking Kyler's body apart piece by piece[.]" *Id*, pg. 1464, ln. 24-25

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

Defense counsel stated that he did not know whether the prosecutor's argument was

objectionable, but agreed that it could be interpreted as diminishing the state's burden of proof and could not say why he did not object. EH Tr. p. 223, ln. 1-19.

Mr. Parnes testified that the prosecutor's statement was objectionable. First, it was highly inflammatory because it informed the jury that the prosecutor would not let a murderer go free, even if the evidence did not support a guilty verdict. "[T]hat's not the prosecutor's responsibility. It's to do justice under the law." EH Tr. p. 268, ln. 10-15. Moreover, the burden of proof beyond a reasonable doubt is, in fact, designed to let some guilty people go free in order to protect the innocent. Proof beyond reasonable doubt reflects "fundamental value determination of our society that it is *far worse* to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (emphasis added). That fundamental value applies in all criminal cases, even – perhaps even more so – in murder cases where the consequences are so high. Beyond a reasonable doubt requires the jury to deliberate from the starting position of innocence and test the state's case to determine whether it overcame the presumption. "[W]e don't want to let a murderer go free," flips the presumption on its head and asks the jury to begin its deliberations with the presumption that the defendant is a murderer and then determine whether the evidence disproves that. In Mr. Parnes' opinion, the comment was so improper that an objection and motion for mistrial outside the presence of the jury would have been appropriate. EH Tr. p. 268, ln. 16 - p. 269, ln. 1.

8. The prosecutor argued without supporting evidence that the emotional breakdown of Mr. Grove at trial showed that Mr. Grove 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.

Defense counsel agreed that the only evidence of an "emotional breakdown" by Mr.

Grove was elicited, without objection, by the prosecutor during the cross-examination of Mr. Grove. EH Tr. p. 228, ln. 7-14. He was not asked by either party whether he had a strategic reason for failing to object to this comment. However, defense counsel agreed that a defense attorney's job is to protect his client's right to a fair trial. He also agreed that objecting to prosecutorial misconduct could have a deterrent effect preventing future misconduct and that defense attorneys sometime make such objections for that purpose. Finally, he agreed that making an appellate record is a part of the defense attorney's duties and that making objections to prosecutorial misconduct is a method to create an appellate record. EH Tr. p. 228, ln. 15- p. 229, ln. 9.

Mr. Parnes agreed with defense counsel that it is part of defense counsel's duty to create an adequate record for appellate review because "if there's no record made, then the objections [on appeal] are reviewed under a very strict standard, in Idaho fundamental error standard, and in most courts and they are, in essence, deemed to be waived." EH Tr. p. 267, ln. 5-7. In addition, an early objection to misconduct can rein in an overzealous prosecutor. *Id.*, ln. 12-17.

As to the emotional breakdown comment, Mr. Parnes stated 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 Tr. p. 269, 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 Tr. p. 267, ln. 15.

Here, the prosecutor committed multiple instances of misconduct during closing and rebuttal argument. Yet, with one notable exception, defense counsel did not object to any of it.

Mr. Parnes' opinion was that counsel's performance during closing and rebuttal arguments when considered in totality did not meet reasonable professional standards. EH Tr. p. 273, ln. 1-3. That is clearly the case. Indeed, the state did not present any evidence to contradict Mr. Parnes' opinion on that prong of the *Strickland* test.

Defense counsel's deficient performance was prejudicial because, had proper objections been made, the jury would not have been misled by the prosecutor about the defense position regarding when the brain injury occurred. It would not have heard "evidence" from the prosecutor about an alleged widespread problem of care givers killing infants or heard argument about how horrible it was to take Kyler's body apart during the autopsy, arguments which aimed to appeal to the jury's passions rather than focusing it on the evidence and jury instructions. With a proper objection, it would not have heard the prosecutor undermine the state's burden of proof and the requirement of proof beyond a reasonable doubt; nor would it have heard the state's insinuation that it acceptable to convict Mr. Grove even if the evidence did not support such a verdict because "we don't want to let a murderer go free." Finally, had an objection been made, the jury would not have heard Mr. Grove's testimony about his "emotional breakdown" during trial and the prosecutor would not have been able to use that testimony to establish an reason why Mr. Grove would have committed the offense when it had no other explanation. Had the jury not been exposed to such improper argument, there was a reasonable probability of a different result.

Consequently, relief should be granted on this basis alone.

E. ***Cumulative Prejudicial Effect of the Totality of the Deficient Performance***

In analyzing a claim of ineffective assistance of counsel, the Court need not look to each

example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *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). As the Ninth Circuit has explained, "Separate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003).

As set forth above, there is a reasonable probability of a different result had defense counsel's performance not been deficient. Highly prejudicial evidence would have been excluded, additional exculpatory defense evidence would have been presented by Dr. Arden and Dr. Arden would not have been impeached with irrelevant matters, Mr. Grove would have had a jury trial with 12 jurors who had heard all the evidence presented (or a mistrial), and egregious prosecutorial misconduct would have been prevented or resulted in a mistrial. This is more than a sufficient showing of prejudice under *Strickland.*

III. CONCLUSION

For all the reasons above, this Court should grant the petition, vacate the judgment and sentence in the criminal case, release Mr. Grove on his own recognizance pending further proceedings, and order that a new trial be held within a reasonable amount of time.

Respectfully submitted this 23rd day of April, 2015.

Deborah Whipple
Dennis Benjamin
Attorneys for Stacey Grove

CERTIFICATE OF SERVICE

I CERTIFY that on April 25, 2015, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
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Dennis Benjamin

somebody who stayed that way for a week. I don't know in the literature if there's an example of somebody who stayed in that condition for a long, long time. But, you know, depending upon what you mean by long time, several days at a time, yes, I've seen that many times.

Q. Doctor, why did you resign your position in Washington DC?

A. I was under pressure because I came to Washington DC, you said yourself, from the fat into the -- or the frying pan into the fire, which was true. I came to a place that was horribly dysfunctional. It was very well known not only in the forensic community, but actually more broadly, that that agency was pretty much in chaos, had been for close to 20 years. And I came in to try to revitalize it.

I was very tough in enforcing standards, enforcing rules, trying to create an agency that worked much better. Along the way, I made a bunch of people unhappy, and they got together and decided to make all kinds of allegations about me and said that I did all kinds of terrible things and harassed them and so on and so forth.

In the course of that, my position to leave that agency became untenable. There was publicity. The mayor's office really wasn't going to back me at that

point, and so it was clear I couldn't possibly lead this agency with people making all kinds of wild allegations. At that point, and under pressure from the government, I resigned my position.

Q. Now, you're familiar, obviously, with the report -- the Final Report of Inspection of the Office of the Chief Medical Examiner conducted by the District of Columbia Office of the Inspector General?

A. Yes, sir.

Q. And without going into a ton of detail on that, that report accused you of gross mismanagement. Now, I'm going to as fair as I can to you, because being a government employee myself, I know that there's never enough money to do what needs to be done, and it's very easy to sit on the outside and take potshots without looking at the fiscal realities or the political realities. And I'm going to grant you that.

But I'm just going to ask you, this report had approximately 84 recommendations for changes, and you agreed with about 80 of them -- or 80 percent of them in your -- when you were given an opportunity to respond. One of the things -- and the reason I bring this up is in your discussion with the jury this morning about your involvement in various child abuse things, you mentioned the DC Child Fatality Review Board. That was one of the

things that they were critical of you about, was it not, not attending those meetings?

A. At some point late in my tenure, I could not possibly attend as many of those meetings as I wanted to. I had at that point -- most of the hand-picked team that I brought in had moved on to other jobs in other places. They had withstood a lot of tough service and a lot of bad times with me, and they chose to move on to other opportunities. So, I was short probably the two most important positions in my administrative team, my executive team.

Other than all the other generalities you were talking about, what's fiscal reality, what's political reality, it had become more and more difficult to manage the agency. And I wasn't able to backfill some of those very important critical positions of the people who were closest to me on the executive team. And as a result of more things happening and more demands, yes, as a matter of fact, I missed a number of those meetings. I didn't stop supporting that Fatality Review Committee. We didn't stop supplying them with records and information and data.

As a matter of fact, I think one of the other recommendations or accusations in that report has to do with not providing them with adequate facilities, which

is really nonsense. We took them into the Medical Examiner's Office. We tried to make statutory change or regulatory change to make them a part of the office because they had no home; they had no agency that actually sponsored them for a period of time. We gave them space. We gave them computers. We provided them with, you know, the place to work and the materials with which to work. And they didn't get everything they wanted and not everything worked perfectly, which is true in general of what happened in government when I was there. Not everything worked perfectly.

And so, under the -- under the strains of not being able to be in three places at once, I missed a number of meetings, and they correctly identified that in the report. No denying that. And I think they also said things about not providing them with support, which I really don't agree with.

Q. Certainly. I understand there's always two sides to every story. There were some statistical problems, though, a backlog of over 1300 autopsy reports, an accumulation of 189 bodies, some of which went back to 2000. There was just not a good situation; is that correct?

A. Well, it depends upon how you want to define not a good situation. There were clearly some serious

problems that were still ongoing at the time that I left. And I said -- when I responded to that report, I said, I'm the agency director. I take ultimate responsibility.

Now, in reality, there are other forces at work, both within the agency and within the government in general, so that I mean, I couldn't possibly do every single thing myself. But I take responsible as the former chief of the agency for the problems. Some of those were problems that were very serious, and I wish I could say that I fixed them. I had about a five-year run trying to fix an agency that had been in the toilet for 20 years. They hadn't had a real chief medical examiner who did the job and understood the job for about 20 years.

In fact, somebody else in my organization, in the National Association of Medical Examiners, publicly posted after they -- after I went that the average tenure of a chief medical examiner in the District of Columbia for the past 20 some odd years had been 3.75 years. And I made five-and-a-half, so I'm 149 percent over average.

But yes, there are some serious problems, and those are things that I can't deny and that I wouldn't try to deny. But we were in the midst of -- we had made

and were in the midst of making substantial improvements in the agency, and I'm proud of the improvements that I did make.

Q. Now, you made mention, Doctor, of some wild accusations and so forth. And, again, without getting into a huge amount of detail, unless you wish to, those included allegations of sexual harassment, sexual discrimination, and unlawful retaliation by five medical examiners, all women, and allegations of racial discrimination in the training of black students and residents. Now, those are allegations. Were they investigated?

A. Yes, sir.

Q. And were they investigated by the Office of Corporation Counsel --

A. Yes, sir.

Q. -- for Washington DC --

A. Yes, sir.

Q. -- for the District of DC? And were they sustained?

A. Well, there was some talk in the investigation that the investigator may have believed that some of these things happened. They were never actually sustained in the sense that the deciding official never made a decision. This was not a process that played

out. There was no due process hearing. I never had a chance to present a defense. None of these was ever adjudicated by any body, deciding official or otherwise. I was never sanctioned. I was never disciplined.

I did resign under pressure. I wasn't fired. I resigned under pressure. And they probably would have moved to remove me had I not resigned. By the way, they also were motivated enough to pay me about a $70,000 settlement after I left to avoid me suing them over this whole issue. So, I don't think it's fair to say that any of them were sustained.

Q. Fair enough.

MR. SPICKLER: That's all I have, Your Honor.

THE COURT: Thank you, Mr. Spickler.

Mr. Chapman, redirect?

MR. CHAPMAN: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. CHAPMAN:

Q. We've been out here a long time, and I'm going to be very, very brief, okay? Is there anything that the Prosecutor asked you or answers that you've given that in any way changes the opinions you provided to this jury under direct examination?

A. No, sir.

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV 2012-01798 RESPONDENT'S POST-EVIDENTIARY HEARING CLOSING ARGUMENT

The State of Idaho, by and through Jessica M. Lorello and Kenneth K. Jorgensen, Deputy Attorneys General and Special Prosecuting Attorneys for Nez Perce County, hereby submit the state's post-evidentiary hearing closing argument.

BACKGROUND

In January 2007, a grand jury indicted Petitioner Stacey Grove on one count of first-degree murder for the death of K.M. (Exhibit A (#36211 R., p.13).) Following a seven-day trial, a jury convicted Grove of that offense. (Exhibit A (#36211 R., p.210).) Grove was represented at trial by Scott Chapman. (E.H. Tr., p.186, Ls.22-24.) Grove unsuccessfully challenged his conviction on appeal. Grove v. State, 151 Idaho 483, 259 P.3d 629 (Ct. App. 2011).

On September 7, 2012, Grove, with the assistance of counsel, filed a post-conviction petition raising several claims. (Verified Petition for Post-Conviction Relief.) Grove filed an amended petition on January 2, 2013. (Amended Verified Petition for Post-Conviction Relief ("Amended Petition").) Both Grove and the state filed motions for summary dismissal[1]; the Court denied Grove's motion and granted the state's motion, in part, and denied it in part. (Opinion and Order on Motions for Summary Disposition ("Summary Dismissal Order"), filed July 11, 2013.) Grove filed a motion for reconsideration, which the Court denied, and sought an interlocutory appeal, which this Court granted, but which the Idaho Supreme Court denied. The Court thereafter scheduled Grove's non-dismissed claims for an evidentiary hearing. In its Summary Dismissal Order, the Court identified the following claims that would be considered at the evidentiary hearing, which was held March 24-25, 2015: (1) "Whether counsel's performance was deficient during direct and cross-examination of [Grove]"; (2) "Whether counsel was deficient during the direct and cross-examination of Dr. Arden" with respect to the microscopic slides of tissue taken from K.M. and with respect to the prosecutor's impeachment of Dr. Arden; (3) "Whether counsel was deficient for failing to move for a mistrial because jurors may have been sleeping during the presentation of testimony"; and (4) "Whether defense

[1] Undersigned counsel were not appointed until after summary dismissal proceedings.

counsel's performance during closing argument was deficient." (Summary Dismissal Order, pp.38-39.) Following the evidentiary hearing, the Court set a briefing schedule for closing arguments.

ARGUMENT

I.
Grove Has Failed To Prove Either Deficient Performance Or Prejudice In Relation To Trial Counsel's Performance Regarding Grove's Testimony

A. Introduction

In his Amended Petition, Grove raised three claims relating to counsel's performance during Grove's direct examination and cross examination. First, Grove alleged "[d]efense counsel's performance was deficient when he failed to object to the prosecutor asking Mr. Grove when he had been prescribed Ativan and whether the prescription 'was a result of [his] emotional state Friday.'" (Amended Petition, p.32 ¶ 86.)

Second, Grove alleged "counsel was deficient because he introduced evidence in the direct examination of Mr. Grove regarding the bad relationship between Mr. Grove and his son Alex" and claimed "[t]his evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence." (Amended Petition, p.33 ¶¶ 91-91.1.)

Third, Grove alleged "counsel's performance was deficient because he failed to object to the prosecutor questioning Mr. Grove about the fact that he was behind on child support" and claimed "[t]his evidence could have been kept out by filing a motion in limine as it is both irrelevant and inadmissible other acts evidence." (Amended Petition, pp.33-34, ¶¶ 92, 92.1.)

Grove failed to meet his burden of proof in relation to any of these allegations.

B. Grove Failed To Meet His Burden Of Proving Counsel Was Ineffective During The Direct Or Cross-Examination Of Grove

Grove's first claim relating to counsel's performance during Grove's cross-examination is based on a situation that arose at trial where Grove was unable to testify on the date counsel originally planned to have him testify. Following an in-chambers discussion, the Court invited defense counsel to explain the situation on the record, which he did, stating:

> . . . [A]s we discussed in chambers, based upon my observations and interactions with my client this morning, it became apparent to me that, for whatever reason, he was going to be unable to proceed today.
>
> We had originally anticipated his testimony this morning. And based upon what I would -- for lack of a better term, and I'm not a physician or anything of that nature, but an unraveling due to a culmination of stress and the pressures involved with this, he would be -- was to such a state that he would have been unable to testify. And, in my opinion, was unable -- or at least borderline unable, or would have been in that state, to assist me in the defense.
>
> We had a full schedule for today, and we had fully anticipated proceeding on that basis. But based upon lengthy discussions with him, and without waving [sic] any attorney/client privilege, I'll give the Court one example. In an effort to see where we were going to go with this, I started asking him fairly simple straightforward questions, as we would on the stand, like his name and date of birth. And when I asked him his address, he could not tell me his address.
>
> I've been at this for 23-plus years. I've never run into this before. It's with reluctance that I do this, but I've asked the Court for -- to continue the trial until Monday morning to enable us to seek medical help and get things put back together so that we could proceed.
>
> . . . And on that basis, would ask the Court to continue this matter until Monday morning.

(Trial Tr.[2], Vol. II, p.1061, L.18 – p.1062, L.25.)

The state objected to the request for a continuance, explaining:

[2] The trial transcripts from the underlying criminal case were admitted as Exhibit B at the post-conviction evidentiary hearing. (E.H. Tr., p.6, Ls.23-24.) For ease of reference, the state will refer to those transcripts as "Trial Tr." and by volume number.

> Number one, despite Counsel's fears of the defendant being borderline unable to assist in his defense, there's been no adjudication of such a condition. However, having said that, I accept Mr. Chapman's explanation to the Court in its entirety as being true.
>
> Secondly, a trial is an organic process. It flows from the beginning to the end in a predictable manner. And it is predictable that after a defendant hears day after day of incriminating evidence, that the defendant would feel some stress and some emotional reaction.
>
> But in this case, it's particularly important because it's the State's position, as it has been all along, that this defendant had an emotional meltdown on the morning that the injuries were inflicted on this child. And I believe the jury should be entitled to observe his demeanor as an additional factor to be weighed in deciding the facts of this case.
>
> While I understand that Defense Counsel, as well as the Prosecution, designs their case in such a way as to have witnesses come in in a certain order, it -- it appears to me if your lead witness is unavailable, he could at least sit here and observe the other testimony.
>
> And lastly, as a final alternative to granting this condition, the defendant could be called to the stand; and if the fears that Mr. Chapman had expressed, in fact, turn out to become reality, the Court could then grant the continuance.

(Trial Tr., Vol. II, p.1063, L.7 – p.1064, L.10.)

The Court granted defense counsel's request for a continuance and informed the parties that it was "simply going to tell the jurors that an unforeseen medical situation has arisen affecting our ability to proceed today" and that the trial would "resume Monday morning" (Trial Tr., Vol. II, p.1064, L.18 – p.1066, L.6.) The Court so advised the jury. (Trial Tr., Vol. II, p.1066, L.20 – p.1067, L.7.)

When the trial resumed on Monday, defense counsel's first witness was Grove. (Trial Tr., Vol. II, p.1069, Ls.22-25.) During direct examination, Grove discussed his background and how he met K.M.'s mother, Lisa, and his relationship with Lisa, K.M., and Lisa's daughter. (Trial Tr., Vol. II, p.1070, L.18 – p.1073, L.22.) Grove also explained his relationship with his biological son, Alex. (Trial Tr., Vol. II, p.1073, L.23 – p.1074, L.24.) Grove then testified about

the days and events leading up to K.M.'s death, and events after K.M.'s death. (Trial Tr., Vol. II, pp.1074-1112.)

Near the end of the prosecutor's cross-examination of Grove, the prosecutor inquired whether Grove was "currently on any medications." (Trial Tr., Vol. II, p.1120, Ls.6-7.) Grove answered that he was taking Ativan, and then the following exchange occurred:

> Q. And when was that prescribed for you?
>
> A. Friday.
>
> Q. And that was the 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 . . .
>
> Q. Now, is this -- what effect does this Ativan have on your ability to testify?
>
> A. I don't believe anything. It just helped me get some sleep. Like I said, I was exhausted.
>
> Q. So, you're okay -- you're okay today, and your --
>
> A. I feel perfectly fine.
>
> Q. -- your memory is not affected by any --
>
> A. No, sir.
>
> Q. -- medications?
>
> A. No, sir.

(Trial Tr., Vol. II, p.1120, Ls.9-25.)

"To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency." Heilman v. State, 158 Idaho 139, ___, 344 P.3d 919, 925 (Ct. App. 2015). It is well-established that 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). The prejudice prong of an ineffective assistance of counsel claim "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). "Unless a defendant makes both showings, [deficient performance and prejudice], it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id. Other bedrock principles governing ineffective assistance of counsel claims, as articulated by the United States Supreme Court in Strickland, are worth repeating:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.
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> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

> professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client the same way.
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland, 466 U.S. at 688 (citations and quotations omitted).

Application of the correct legal standards shows Grove has failed to establish deficient performance, much less prejudice, in relation to defense counsel's failure to object to the prosecutor's inquiry into Grove's medication use at the time Grove testified. In support of his claim that counsel's lack of an objection was deficient, Grove relies on Andrew Parnes'[3] opinion that "the evidence was irrelevant." (Petitioner's Closing Argument, p.9.) Mr. Parnes' opinion on the subject falls far short of establishing the testimony was irrelevant as a matter of law. Indeed, it is unclear why a witness's ability to perceive and recall events would not be relevant. The testimony could also be relevant in relation to Grove's demeanor at the time he testified, and

[3] Grove attempts to bolster Mr. Parnes' testimony by describing him as a "highly credible witness" and noting Mr. Parnes has "been an attorney for 37 years practicing criminal defense" and "was awarded a doctorate from Stanford and a law degree from UC-Berkeley, both world class universities." (Petitioner's Closing Argument, p.5.) While Mr. Parnes may be a fine attorney with degrees from well-known educational institutions, this does not mean that the decisions Mr. Parnes thinks he would have made based on his limited review of the record are the only constitutionally permissible decisions. Indeed, such a conclusion would be contrary to the Strickland standard. Mr. Chapman, having been an attorney for 30 years, during which time he handled an estimated 500 plus criminal cases, with approximately 20 jury trials, is certainly well-qualified, knowledgeable regarding the law, capable of making strategic and tactical decisions, and a highly credible witness as well. (E.H. Tr., p.229, L.19 – p.230, L.17.)

his emotional state, as compared to what his demeanor may have been in relation to K.M. when Grove was alone with him before he became unresponsive, was hospitalized, and died. As the prosecutor noted in objecting to the continuance that was required due to Grove's condition when trial counsel requested the continuance, the state's theory was that Grove "had an emotional meltdown on the morning that the injuries were inflicted on this child," and the jury was "entitled to observe his demeanor as an additional factor to be weighed in deciding the facts of this case."

Even if the relevance of the testimony was debatable, Grove did not prove that trial counsel's decision not to object was constitutionally deficient. As the Idaho Supreme Court recently explained, "In our view, counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions ...." State v. Abdullah, ___ Idaho ___, ___ P.3d ___, 2015 WL 856787, *112 (2015). Such tactical or strategic decisions "will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or some other shortcomings capable of objective review." Id. That Mr. Parnes believes he would have objected does not mean Mr. Chapman was deficient for making a different decision. See Strickland, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Grove has also failed to prove that Mr. Chapman's failure to object to the prosecutor's inquiry about Grove's use of Ativan was an error "so serious as to deprive [Grove] of a fair trial." Strickland, 668 U.S. at 687. This case did not turn on whether Grove started taking

Ativan three days before he testified in order to help him sleep. The jury's knowledge of that fact does not render its guilty verdict unreliable.

C. Grove Failed To Meet His Burden Of Proving Counsel Was Ineffective In Relation To The Testimony About Grove's Relationship With His Biological Son, Including That Grove Had Not Been Paying Child Support

On direct examination, Grove testified that he had a "great" relationship with K.M. and K.M.'s sister. (Trial Tr., Vol. II, p.1073, Ls.1-2.) Following that, trial counsel inquired about Grove's relationship with his biological son. (Trial Tr., Vol. II, p.1073, L.23 – p.1074, L.4.) Grove explained that it was a "complicated situation," but described his son as a "great boy." (Trial Tr., Vol. II, p.1074, Ls.5-6.) Grove, however, had a "rocky relationship" with his son's mother. (Trial Tr., Vol. II, p.1074, Ls.7-11.) Grove believed the strained relationship with his son's mother made the situation with his son "hard" and he thought it caused his son "stress" when Grove was seeing him. (Trial Tr., Vol. II, p.1074, Ls.12-17.) As a result, Grove thought it "would be best if [he] removed [himself] from the situation until [his son] was old enough to be able to . . . talk with him about what was going on." (Trial Tr., Vol. II, p.1074, Ls.16-24.)

Grove characterizes this testimony as the presentation of a "bad relationship" between Grove and his son. (Petitioner's Closing Argument, p.3.) To the contrary, the testimony was simply that Grove did not have an active relationship with his biological son, not that he had a "bad" one. It was not deficient for counsel to inquire into this area given that the defense clearly wanted to portray Grove as a caring father-figure to K.M. and his sister – a reasonable strategy under the circumstances of this case. The state's obvious response to that would have been to ask about Grove's relationship with his biological son. It is not an unreasonable tactical decision for the defense to ask the question first. Grove has failed to articulate any basis for this Court to conclude that the line of questioning was based on a lack of preparation, ignorance of the law, or

some other objective shortcoming. Rather, Grove implies that the line of questioning was an "accident," but offers no evidence to support such a claim. (Petitioner's Closing Argument, p.3.)

Because Mr. Chapman was not deficient for inquiring into Grove's relationship with his biological son, there was no basis for counsel to object to the prosecutor's inquiry on the same subject. As for counsel's failure to object to the prosecutor's specific question on cross-examination regarding Grove not paying child support, a topic not directly addressed on direct, Grove claims "this question was not relevant to any issue at trial and an objection to it would have been sustained." (Petitioner's Closing Argument, p.4.) Whether an objection would have been sustained does not, however, resolve whether Grove has met his burden of proving constitutional deficiency. Grove has not. Just because Mr. Chapman did not object does not mean the decision was not strategic or tactical, based on ignorance of the law, or lack of preparation. As noted, "counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions." Abdullah, 2015 WL 856787, *112. Mr. Chapman's testimony regarding the child support question illustrates this point. Mr. Chapman indicated that, to the best of his recollection, he would not object in order to avoid "mak[ing] it any bigger than it is." (Petitioner's Closing Argument, p.4 (quoting E.H. Tr., p.189, Ls.3-5).) Nevertheless, Grove contends "[t]his is not evidence of a strategic decision on defense counsel's part" because he "qualifie[d] his answer with 'I guess' and 'best as I can recollect.'" (Petitioner's Closing Argument, p.4.) Grove's contention reveals a misunderstanding of the applicable presumption and his burden. The presumption is that the decision was strategic or tactical and it is Grove's burden to overcome that presumption. That Mr. Chapman had to speculate about his thought process behind not objecting to a question asked during a trial that took place nearly seven years ago does not overcome the presumption

and neither the state nor Mr. Chapman were required to prove the underlying reasons for every single choice trial counsel made during trial.

In addition to his failure to meet his burden of proving deficient performance with respect to the testimony elicited about Grove's relationship with his son and his failure to pay child support, Grove has failed to prove resulting prejudice. In fact, Grove's prejudice argument on this issue is unclear. It appears Grove may be contending that it was prejudicial because it "undermine[d] the defense case which 'was based on Mr. Grove's credibility' and the 'scientific evidence.'"[4] (Petitioner's Closing Argument, pp.4-5.) Grove, however, does not explain how this is so. The fact that Grove made the decision not to have an active relationship with his biological son because he thought that decision was in his son's best interest has no bearing on his credibility and has absolutely nothing to do with the "scientific evidence." The same is true regarding his lack of child support payments. There is no reasonable probability that the jury would have reached a different result in this case if it had never heard evidence that Grove was not actively paying child support and did not maintain a relationship with his biological son. Grove failed to meet his burden of proving otherwise.

II.
Grove Has Failed To Prove Either Deficient Performance Or Prejudice For Not Supplying The Iron-Stained Slides To Dr. Arden

A. Introduction

Grove claims that trial counsel was ineffective for failing to supply iron-stained slides to Dr. Arden prior to trial. (Amended Petition, pp.35-37, ¶ 97.) Specifically, he alleged Dr. Arden "requested ... all existing microscopic slides for examination prior to trial" (Amended Petition,

[4] Grove also complains that the prosecutor committed misconduct "when he raised the child support issue." (Petitioner's Closing Argument, p.6.) Any independent prosecutorial misconduct claim is not properly before the Court. (See Summary Dismissal Order, pp.38-39.)

p.35, ¶ 97.1), but Mr. Chapman "did not comply with that request" (id. at p.35, ¶ 97.1(a)), and had the slides been supplied, Dr. Arden "could have testified that [redacted] had been injured at some much earlier time or times" (id at p.37, ¶ 97.1(l)).

Counsel must conduct a "reasonable investigation" for potential exculpatory evidence, but failure to discover additional exculpatory evidence is not unreasonable unless "the known evidence would lead a reasonable attorney to investigate further." Stevens v. State, 156 Idaho 396, 412-13, 327 P.3d 372, 388-89 (Ct. App. 2013).

Grove's claim fails because Dr. Arden testified at trial that he had been supplied with all the information he needed to form opinions about the case and that Mr. Chapman and the prosecution had provided everything he had requested. The evidence establishes that Mr. Chapman in fact conducted an adequate factual investigation by providing his expert with all the information his expert requested, and thus did not render deficient performance. Furthermore, there was no prejudice because the post-conviction examination of the iron slides produced evidence with no actual exculpatory value.

B. Grove Has Failed To Prove Deficient Performance Because The Evidence Shows That Mr. Chapman In Fact Provided Dr. Arden With All The Materials Dr. Arden Needed Or Requested For Review Of This Case

At the trial Dr. Arden testified as follows:

> Q. Did you feel like there was *any information that you needed in order 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 you and the state arranged for them to be provided. *So, what I requested I was given.*

(Trial Tr., Vol. II, p.1252, L.25 – p.1253, L.9 (emphasis added).) Dr. Arden's trial testimony conclusively establishes that he was provided all of the materials he "needed to form opinions" about the case and that "what [he] requested [he] was given."

At the evidentiary hearing Dr. Arden stated that he requested "all of the microscopic slides that were done pursuant to this autopsy." (E.H. Tr., p.133, L.24 – p.134, L.11.) When asked about "when he testified at the criminal trial" that he had "received all the information [he] needed to form opinions about that case," Dr. Arden answered that his trial testimony was only "correct insofar as I had received everything I needed to support the opinions that I was prepared to render, that I was prepared to give under oath." (E.H. Tr., p.138, Ls.14-23.)

Dr. Arden's attempt to qualify the testimony he gave at trial is unpersuasive. When asked if "there was any information that [he] needed in order to form opinions about this [case] that was not provided to [him]" he unqualifiedly answered, "No." (Trial Tr., Vol. II, p.1252, L.25 – p.1253, L.3.) Dr. Arden further testified that, "what [he] requested, [he] was given." (Trial Tr., Vol. II, p.1253, Ls.8-9.) He did not testify at trial that he "received everything [he] needed to support the opinions that [he] was prepared to render" but did not receive enough information to make a thorough review of the case and that he had requested additional materials that had not been supplied. Any finding that Dr. Arden requested additional information he felt was necessary to thoroughly review the case and it was not provided to him would require a conclusion that Dr. Arden was deliberately deceptive in his trial testimony.

The evidence in this case shows that Mr. Chapman arranged for Dr. Arden to be supplied with all of the materials Dr. Arden requested and felt he needed. He was not required to conduct further investigation into whether supplying additional, unrequested materials might help the defense. Grove has therefore failed to prove deficient performance.

C. Grove Has Failed To Prove Prejudice Because Dr. Arden's Testimony About Prior, Healed Injuries Has Little, If Any, Probative Value

Grove has also failed to prove prejudice. Dr. Arden's discovery of prior, healed injuries through his examination of the iron-stained slides is not exculpatory evidence.

Dr. Arden testified that when he examined the iron-stained slides for the post-conviction action he discovered evidence of healed injuries in one of K.M.'s eyes, his back, and the mesentery in his abdomen that were "substantially older" than the injuries that killed K.M. (E.g. E.H. Tr., p.162, L.19 – p.164, L.7; p.166, Ls.12-19; p.166, L.21 – p.169, L.10; p.173, L.20 – p.177, L.13.) He also testified that he could detect those injuries in the standard "H and E" stained slides, which he had examined prior to trial. (E.H. Tr., p.135, Ls.14-21; p.165, Ls.5-11; p.174, L.14 – p.175, L.2.) Dr. Arden testified in post-conviction that seeing the iron-stained slides did not "change[] any of the opinions [Dr. Arden] expressed" at trial, but did cause him to "expand[] [his] opinion to include some injuries of greater age." (E.H. Tr., p.172, Ls.5-12; see also p.177, Ls.4-13.)

The trial transcript, however, reveals that Dr. Arden testified that he had observed injuries of more than a week old and used those observations to form his opinions. (Trial Tr., Vol. II, p.1302, L.15 – p.1304, L.1 (discussing older, healed injuries); p.1308, L.16 – p.1309, L.11 (discussing older injuries in context of whether [redacted] would have shown severe symptoms); p.1340, Ls.16-24 (acknowledging that his findings of prior injuries were disclosed in pre-trial discovery); p.1363, Ls.2-20 (discussing older injuries with scarring).) The record does not establish that Dr. Arden made any truly new findings based on his review of the iron-stained slides.

Moreover, the existence of older injuries does not call the verdict into question. Grove contends this testimony "would have effectively countered Dr. Hunter's and Dr. Harper's 'in my

experience' claims that [K.M.] could not have been active after receiving the injuries that resulted in his death." (Petitioner's Closing Argument, p. 19 (internal quote original).) The evidence does not support this argument.

Dr. Hunter testified that K.M.'s abdominal injuries (exclusive of brain injuries) would have produced "absolute agony ... an incredible amount of pain." (Trial Tr., Vol. II, p.872, Ls.1-15.) He further testified that, to his knowledge and in his experience, the severe brain injuries suffered by K.M. would have "produc[ed] immediate symptoms" from "severe headache and confusion to unconsciousness," with unconsciousness being more likely. (Trial Tr., Vol. II, p.875, Ls.2-22.) Dr. Hunter testified that it was "virtually impossible" that K.M. engaged in activities such as playing, laughing, climbing, and getting himself pudding after being injured. (Trial Tr., Vol. II, p.876, Ls.7-20.) Dr. Harper testified that K.M.'s abdominal and brain injuries would have caused K.M. to be "immediately" and "obviously critically ill," including being "unconscious or semi-conscious," and were inconsistent with K.M.'s described activities prior to being left with Grove. (Trial Tr., Vol. II, p.1033, L.12 – p.1037, L.24.)

Grove does not explain *how* Dr. Arden's testimony about previously undetected older injuries would have countered these medical opinions. Grove has presented no evidence that the prior, healed injuries were significant in scope or severity. By definition they were less severe than the fatal injuries Dr. Hunter and Dr. Harper testified were inconsistent with K.M.'s described activities before being left in Grove's care. Moreover, there is no evidence that K.M. was not symptomatic of having suffered some form of injury in the weeks or months prior to his death. Finally, because Dr. Arden detected no additional brain injuries the testimony related to the physical effects of that ultimately fatal injury are completely unimpeached, even under Grove's theory.

Evidence that K.M. suffered previous injuries of unknown severity in his back, eye, and mesentery in no way impeaches the testimony about the pain and other physical manifestations that would have been caused by infliction of the ultimately fatal injuries to his abdomen and brain. Grove has failed to establish that this testimony is even relevant, much less that its presentation at trial would probably have produced a different result. He has therefore failed to prove prejudice.

III.
Grove Has Failed To Show Ineffective Assistance Of Counsel Regarding The Impeachment Of Dr. Arden

A. Introduction

Grove alleged that trial counsel provided ineffective assistance of counsel for "failing to object to the prosecutor attempting to impeach Dr. Arden with alleged 'gross mismanagement' when he was the Medical Examiner in the District court Columbia" and "failing to attempt to rehabilitate Dr. Arden on re-direct examination." (Amended Petition, pp.32-33, ¶¶ 87-88.[5]) Grove has failed to prove his claims under the applicable legal standards.

B. Grove Has Failed To Prove Deficient Performance

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., Vol. II, p.1242, Ls.14-22.) He "first worked in the Office

[5] In his closing argument Grove also claims counsel provided ineffective assistance for failing to object "to the impeachment of Dr. Arden as being on a special mission." (Petitioner's Closing Argument, p. 17.) Grove did not allege this claim of ineffective assistance of counsel in his Amended Petition. (See generally Amended Petition; see also Petitioner's Closing Argument, p. 11 (listing claims made in Amended Petition and not including claim of ineffective assistance of counsel for not objecting to "special mission" impeachment). Because it was not pled, this claim is not properly before this Court. Hull v. Giesler, 156 Idaho 765, 777, 331 P.3d 507, 519 (2014) ("An unpleaded issue not tried by either express or implied consent cannot be the basis for a court's decision.").

of the Medical Examiner for Suffolk County," New York. (Trial Tr., Vol. II, 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 [sic] period." (Trial Tr., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, p.1244, Ls.11-17.)

In cross-examination the prosecutor explored Dr. Arden's transition from government employ to private consulting work. (Trial Tr., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, p.1428, Ls.20-23.) This resignation led to him making his living for the previous five years as a "paid consultant." (Trial Tr., Vol. II, 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., Vol. II, p.1429, Ls.2-13.)

In closing arguments Mr. Chapman 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., Vol. II, 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., Vol. II, 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., Vol. II, 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., Vol. II, 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[6] 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." (E.H. Tr., p.204, L.8 – p.207, L.6.) He did testify in retrospect that presenting the evidence himself to "pull the thorn" might have been a better tactical choice (E.H. Tr., p.207, L.7 – p.208, L.13), but such "second guessing" does not show deficient performance, Abdullah, 2015 WL 856787 at *112.

[6] 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. (E.H. 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.

While the trial transcript and Mr. Chapman's testimony support the presumption of effective performance, the only evidence that actually supports a claim that trial counsel's tactical decisions were objectively unreasonable is the testimony of Mr. Parnes. (Petitioner's Closing Argument, pp.18-19.) Review of that testimony, however, shows that it falls far short of carrying Grove's burden of proof. Mr. Parnes opined that counsel should have objected because he might have gotten a favorable ruling[7] and would have preserved the issue for appeal. (E.H. Tr., p.256, L.19 – p.258, L.14.) While Mr. Parnes is entitled to make tactical choices in cases where he is counsel, what tactical choices he would have made in this case is of little, if any, relevance to whether Mr. Chapman's choices were based on an objective shortcoming such as ignorance of the law or inadequate preparation.

The decisions of whether to object to admission of evidence of the circumstances Dr. Arden left the DC examiner's job; whether to present it in direct examination; whether to rehabilitate in re-direct examination; or address it in closing argument (which is what counsel ultimately elected to do), are all tactical decisions. Such decisions are second-guessed only if based on an objective shortcoming such as ignorance of the law or inadequate preparation. Because Grove presented no evidence of any objective shortcoming, he has failed to prove deficient performance.

C. Grove Has Failed To Prove Prejudice

To prove prejudice the petitioner must "establish by a preponderance of the evidence that there is a reasonable probability that the result would have been different." Abdullah, 2015 WL 856787, *89. Grove has failed to prove prejudice because the evidence in question was

[7] The state does not believe Mr. Parnes' motion would have succeeded. The admissibility of the cross-examination is addressed in the prejudice argument, below.

admissible and, even if inadmissible would not have created a reasonable probability that the result would have been different.

"Relevant evidence is generally admissible." State v. Harvey, 142 Idaho 527, 532, 129 P.3d 1276, 1281 (Ct. App. 2006) (citing I.R.E. 402). "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Harvey, 142 Idaho at 532, 129 P.3d at 1281 (citing I.R.E. 401). Evidence impeaching or corroborating a witness's testimony is always relevant. See State v. Thumm, 153 Idaho 533, 540, 285 P.3d 348, 355 (Ct. App. 2012) (quoting United States v. Abel, 469 U.S. 45, 52 (1984)) ("Generally, 'Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.'").

Dr. Arden's career path changed rather dramatically a few years before trial, when he went from an upwardly mobile career track working for government medical examiner offices to running his own consulting business. The prosecutor explored that change from several angles, including the change in practice of writing reports in every case as a medical examiner to writing reports only if requested by a defense attorney (Trial Tr., Vol. II, p.1318, L.11 – p.1320, L.19); whether Dr. Arden had effectively switched from testifying for one side to testifying for the other (Trial Tr., Vol. II, p.1376, L.2 – p.1377, L.8); and whether he had given different opinions in similar cases when he was a medical examiner (Trial Tr., Vol. II, p.1323, L.19 – p.1328, L.3). The prosecutor explored evidence of a gap between the medical examiner job and establishing the consulting business and the speed at which the consulting business grew. (Trial Tr., Vol. II, p.1375, L.14 – p.1376, L.1; p.1377, L.9 – p.1378, L.8.) Only part of the exploration of this

subject of the change in career path and why—that Dr. Arden was forced out of his career path upon accusations of mismanagement, including sexual harassment (Trial Tr., Vol. II, p.1382, L.6 – p.1388, L.11)—does Grove believe his counsel should have objected to. All of it, however, was relevant to explore potential bias. That Dr. Arden was forced from his chosen career path because of allegations of mismanagement and therefore had a gap in employment and had to build a business was all relevant to show bias in taking this case and reaching conclusions helpful to the defense. Grove has not shown the evidence to be irrelevant.

Nor has he shown it to be inadmissible because it was unfairly prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010) (quoting I.R.E. 403). "To exclude evidence under Rule 403, the trial court must address whether the probative value is substantially outweighed by one of the considerations listed in the Rule." Ruiz, 150 Idaho at 471, 248 P.3d at 722. This balancing test is committed to the discretion of the trial judge. Id. Although there is arguably some potential for unfair prejudice from the evidence in question, the prosecutor focused on the effect those accusations had on Dr. Arden's career path and his ultimate choice to abandon (or mostly abandon) working as a government medical examiner and instead become a consultant hired by criminal defendants. (Trial Tr., Vol. II, p.1428, L.20 – p.1429, L.13.) Grove has failed to establish that this evidence was inadmissible.

More importantly, even if inadmissible it is unlikely that this evidence played any significant role in the verdict. As noted above, Mr. Chapman vigorously argued that this

evidence did not ultimately undercut Dr. Arden's medical opinion. This argument likely reduced, if not eliminated, any unfair prejudice.

Moreover, it is exceedingly unlikely that the jury resolved differences in the medical testimony based on evidence of a forced resignation over allegations of office mismanagement. Dr. Ross and Dr. Arden agreed the fatal injuries were inflicted about three days before death, but Dr. Ross marked death at cross-clamping (stopping the heart and therefore the flow of blood carrying the cells involved in healing), which meant the injuries were inflicted on the day K.M. was admitted to the hospital (Trial Tr., Vol. II, p.933, L.3 – p.936, L.1; p.968, Ls.6-23), while Dr. Arden measured the time of death as some amorphous time between brain death and cross-clamping, meaning the injuries were inflicted before K.M. was in Grove's exclusive physical custody (Trial Tr., Vol. II, p.1263, L.22 – p.1267, L.15). Far more likely than differences in the medical evidence being resolved on whether Dr. Arden was guilty of mismanagement is the probability that the medical evidence was resolved because Dr. Arden failed to articulate why he thought brain death would have stopped the biological healing processes by which the doctors aged the injuries, as opposed to cross-clamping, which stopped the heart.

Even more likely, the jury concluded that K.M. would have immediately shown symptoms of his fatal injuries. As set forth above, the doctors who testified for the state were of the opinion that the infliction of the fatal injuries would have resulted in immediate severe symptoms that would have excluded the activities K.M. was seen engaged in between returning home and being left in Grove's custody. Dr. Arden's opinion that the symptoms would not have coincided with the injury (Trial Tr., Vol. II, p.1306, L.15 – p.1310, L.25) was ultimately unpersuasive.

Grove has failed to prove prejudice. First, the evidence that Dr. Arden was forced to change career paths because of accusations of mismanagement was admissible to show bias and was not excludable as unfairly prejudicial. More importantly, however, there is little reason to believe that the evidence of mismanagement played any significant role as compared to evidence that the biological healing process did not stop upon brain death (but instead stopped upon heart death) and that K.M. would have been immediately and obviously symptomatic upon being so severely injured.

III.
Grove Has Failed To Prove Either Deficient Performance Or Prejudice For Not Moving For A Mistrial Because Jurors Were Allegedly Sleeping

A. Introduction

Grove alleged that his trial counsel's performance was "deficient because he failed to move for a mistrial after many jurors fell asleep during the testimony." (Amended Petition, p.33, ¶ 90.) Grove has failed to prove this claim. First, Grove has failed to show that a mistrial motion by counsel based on a claim of sleeping jurors would have been granted. Second, even if a juror or two were having trouble staying awake for part of the trial, Grove has failed to show that Mr. Chapman's tactical choice to not move for a mistrial was based on any objective shortcoming. Finally, he has established no prejudice.

B. Grove Has Failed To Show That A Mistrial Motion Would Have Been Granted

"To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency." Keserovic v. State, 158 Idaho 234, 345 P.3d 1024 (Ct. App. 2015) (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). Where a claim of ineffective assistance

of counsel is based on a failure to file a motion, a conclusion that the motion "would not have been granted by the trial court, is generally determinative of the *Strickland* test." Abdullah, 2015 WL 856787, *96 (brackets omitted); see also Zepeda v. State, 152 Idaho 710, 715, 274 P.3d 11, 16 (Ct. App. 2012). Grove failed to show that a mistrial motion, if made by counsel, would have been granted. Thus, he has failed to prove either prong of his ineffective assistance of counsel claim.

A mistrial is appropriate where there has been conduct, inside or outside of the courtroom, that is "prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). A mistrial should be granted where "the event which precipitated the motion for a mistrial represented reversible error when viewed in the context of the record." State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993). To show entitlement to a new trial because of a juror's inattentiveness, the defendant must demonstrate the misconduct by clear and convincing evidence and also prove "the identity and duration of the specific testimony, argument or instructions the juror missed." State v. Strange, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2008); see also Campbell v. State, 130 Idaho 546, 549, 944 P.2d 143, 146 (Ct. App. 1997).

Where a juror has been inattentive, remedies include "admonishment of any inattentive juror, replacement of a juror with an alternate or, in appropriate circumstances, declaration of a mistrial." State v. Bolen, 143 Idaho 437, 441, 146 P.3d 703, 707 (Ct. App. 2006).

Grove has failed to prove by clear and convincing evidence that juror misconduct due to inattentiveness occurred at trial. He has also failed to show prejudice because the evidence does not establish the identity and duration of any testimony allegedly missed. Finally, he has failed to show that remedies short of mistrial were inadequate.

Grove's claim of juror misconduct relies almost entirely upon the testimony of friends and family who assert they saw one or more jurors apparently sleeping. This testimony is not credible. Furthermore, it is rebutted by credible evidence.

Grove presented the testimony of five witnesses asserting juror misconduct during the testimony of Dr. Ross. Debbie Grove, Grove's mother, testified that five jurors—Neiman, Lind, Yates, Barrett, and Loetscher—were "sleeping and nodding off." (E.H. Tr., p.13, L.22 – p.14, L.5; p.15, Ls.21-25; p.17, L.20 – p.19, L.3.) Carol Grove, Grove's grandmother, testified she saw three jurors, Loetscher, Barrett, and "the gentleman … that had a mustache," "sleeping" during Dr. Ross's testimony. (E.H. Tr., p.75, L.11 – p.78, L.4.) Karen Stamper, a friend of the Grove family, saw two male jurors "sleeping." (E.H. Tr., p.93, L.15 – p.95, L.25.) Craig Stamper, a personal friend of Grove, testified that one juror, Loetscher, "appeared to be sleeping." (E.H. Tr., p.104, L.13 – p.106, L.17.) Justina Hyder, a close friend of Grove, testified that jurors Loetscher and Yates were "obviously sleeping" and other, unidentified, jurors were "kind of nodding off." (E.H. Tr., p.110, L.10 – p.113, L.20.)

All of the witnesses testified that these observations were made shortly before the prosecutor asked for a recess because the jurors were having a hard time staying awake. (E.H. Tr., p.23, L.8 – p.24, L.17; p.78, Ls.19-22; p.96, Ls.1-8; p.107, Ls.12-15; p.113, L.14 – p.114, L.3; see Trial Tr., Vol. II, p.983, Ls.9-16.)

The evidence is insufficient to show that had Mr. Chapman made a motion for a mistrial at this time the motion would have succeeded. First, the evidence in support of the motion is unconvincing. Groves' friends and family gave wildly different accounts of who appeared to be sleeping. One said it was five jurors, one said three, two said two, and one said it was only one. Second, the jurors available to testify in post-conviction denied sleeping or seeing any of the

other jurors sleeping. (See generally E.H. Tr., pp.305-342.) Grove has not proved by clear and convincing evidence that any juror actually fell asleep. At best he has demonstrated that at least one juror appeared to be asleep.[8] Moreover, the alleged sleeping happened shortly before a recess requested by the prosecutor. Given all these circumstances, it is likely that had Mr. Chapman made a motion for a mistrial it would have been denied because the recess was sufficient cure for any issue of staying awake. Even if Mr. Chapman could have demonstrated that a juror had fallen asleep the best remedy he could have hoped for would have been excusing that juror in favor of one of the two alternates. For these reasons Grove has failed to prove that a motion for mistrial made at this time would have been granted.

The second episode of alleged juror sleeping occurred during Dr. Harper's testimony. Grove's mother, Debbie, claims she saw two jurors, Neiman and Lind, "nodding off" during Dr. Harper's testimony. (E.H. Tr., p.26, Ls.1-10.) No other person saw this. (See generally E.H. Tr.) Nor did anyone call this alleged episode to Mr. Chapman's (or anyone else's) attention. Finally, no evidence indicating what testimony was covered or how long the jurors were allegedly inattentive was presented. This evidence fails to establish any basis for moving for or declaring a mistrial.

Finally, Grove's mother also testified that three jurors, Yates, Loetscher and Barrett, "dozed off" during Dr. Arden's testimony. (E.H. Tr., p.26, L.11 – p.27, L.2.) Lori Stamper, a friend of Grove's, claimed to have seen either juror Keller or Loetscher apparently asleep at some point during Dr. Arden's testimony as well. (E.H. Tr., p.86, L.3 – p.87, L.11.) Grove's other friends and family in attendance did not report seeing any issue with the jury at this time.

[8] It is noteworthy that the only juror identified as appearing to sleep by all of Grove's friends and family was Kendall Loetscher. Mr. Loetscher testified that he did not fall asleep. (E.H. Tr., p.315, L.9 – p.316, L.12.) In addition, juror Loetscher was not identified as having been asleep in documents prepared by Grove's witnesses prior to trial.

(See generally E.H. Tr.) Again, this evidence is insufficient because it is contradicted by the jurors' testimony and fails to identify what evidence would have been compromised.

The evidence presented by Grove does not show that a mistrial would have been granted. The testimony did not establish clearly and convincingly that jurors were actually sleeping because of the bias of the witnesses, the remarkable inconsistency in what they claim they saw, and the contrary evidence. Moreover, even if there were an issue with jurors becoming inattentive, Grove failed to establish that the issue was not properly addressed through taking a recess, much less that other remedies short of declaring a mistrial, including juror admonishment and using alternates, were inadequate. Having failed to show that a motion for mistrial would have been granted, Grove fails on both prongs of his claim of ineffective assistance of counsel for not moving for a mistrial.

C. Grove Has Failed To Show That The Tactical Decision To Not Seek A Mistrial Was The Result Of An Objective Shortcoming By Counsel

To establish deficient performance, Grove had the burden of showing that Mr. Chapman's representation fell below an objective standard of reasonableness. "In order to prevail in a post-conviction proceeding, the petitioner must prove the allegations by a preponderance of the evidence." Popoca-Garcia v. State, 157 Idaho 150, ___, 334 P.3d 824, 825 (Ct. App. 2014). That proof must overcome 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).

"[T]he decision to request or consent to a mistrial involves tactical choices appropriately made by the defendant's counsel." State v. Nab, 113 Idaho 168, 172-73, 742 P.2d 423, 427-28

(Ct. App. 1987). "[T]actical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of the law, or some other shortcomings capable of objective evaluation." Heilman v. State, 158 Idaho 139, ___, 344 P.3d 919, 925 (Ct. App. 2015). Grove's claim of deficient performance fails because he has not presented any evidence tending to show any shortcoming of counsel capable of objective evaluation, such as deficient observation of the level of attentiveness of the jury or ignorance of the law.

Grove contends his trial counsel's performance was deficient for not consulting him about whether to request a mistrial. (Petitioner's Closing Argument, p.24.) Grove did not plead failure to consult with him as a cause of action, however. Rather, his amended petition alleged that "Defense counsel's performance was deficient because he failed to move for a mistrial after many jurors fell asleep during the testimony." (Amended Petition, p.33, ¶ 90.) Because Grove never alleged that failure to consult with him about seeking a mistrial was deficient performance, that claim is not before this Court.

Even if the claim had been pled, it fails both factually and legally. It fails factually because Grove presented no evidence that he was not consulted or that, had he been consulted at the time, he would have wanted a mistrial. It fails legally because, with respect to Mr. Parnes, no court has ever said that electing not to ask for a mistrial because of a sleeping juror is the legal equivalent of waiving the jury and proceeding with a court trial. As set forth above, there are many cases addressing the legal significance of a claim of a sleeping juror. Grove has elected to address none of them, and none of them support his legal theories. It is generally not deficient performance to fail to advance a "novel legal theory." Abdullah, 2015 WL 856787, *96.

Grove has not articulated, much less proven, a claim of deficient performance for failing to seek a mistrial, as alleged in his pleadings. He instead argues it was deficient performance to not consult with him about whether to seek a mistrial, a theory neither pleaded nor supported by any evidence. Grove has therefore failed to prove his allegations of deficient performance.

D. Grove Has Failed To Prove Prejudice

"To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different." Heilman v. State, 158 Idaho 139, ___, 344 P.3d 919, 925 (Ct. App. 2015). Here the outcome would have been different if the court granted a mistrial. As set forth above, however, a motion for a mistrial would not have been granted. To be entitled to a mistrial Grove would have had to establish that more than two jurors (because there were two alternates) were sleeping to a degree that disqualified them from continued jury service. The evidence failed to prove that jurors were sleeping, much less sleeping to a degree requiring the remedy of a mistrial.

Grove's argument is apparently that if a juror nods off the jury trial is rendered equivalent to a court trial. This is not a cognizable theory of prejudice because it relies on no cases actually addressing the legal standards by which a mistrial should be granted because of an inattentive juror. In order to prevail under the relevant standards Grove would have had to establish by clear and convincing evidence that a juror was inattentive, as well as "the identity and duration of the specific testimony, argument or instructions the juror missed." State v. Strange, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2008); see also Campbell v. State, 130 Idaho 546, 549, 944 P.2d 143, 146 (Ct. App. 1997). He would also have had to prove that alternate remedies would have been inadequate, State v. Bolen, 143 Idaho 437, 441, 146 P.3d 703, 707 (Ct. App. 2006).

Because Grove's claims of prejudice are not based on the legal standards actually relevant to his claim, they should be rejected.

Grove's claim that his prejudice is automatic is not grounded in law. Under the relevant legal standards Grove has failed to prove that the outcome of the trial would have been different had be made a motion for a mistrial because he has failed to prove a mistrial would have been granted.

IV.
Grove Has Failed To Prove Either Deficient Performance Or Prejudice In Relation To Closing Arguments

A. Introduction

The final claim the Court identified as subject to consideration at the evidentiary hearing was that defense counsel was ineffective for failing to "object to multiple instances of misconduct by the prosecuting attorney" and failing to "move for a mistrial or curative instruction following the prosecutor's closing and rebuttal arguments." (Summary Dismissal Order, p.39.) In particular, in his Amended Petition, Grove alleged the prosecutor committed misconduct during closing argument by (1) twice misstating the "defense position regarding preexisting head injury," (3) using the phrase "smoke and mirrors to get you confused" in relation to Dr. Arden's testimony, (4) "suggest[ing] without supporting evidence that Dr. Arden's 'financial position' leads him to decide what cases he can take," (5) commenting that "a 'colleague' said that Dr. Arden's answers during cross-examination were slippery as an ice cube" and "opin[ing]" that Dr. Arden "was stretching things," (6) telling the jury "without supporting evidence that '[p]arents kill babies all the time,'" (7) telling the jury "without supporting evidence that 'there are literally thousands of [similar] incidents in any given span of time," (8) telling the jury "without supporting evidence that he believed that 'our local paper has probably

shown . . . probably six or more of these cases since – since this one started,'" (9) saying that "Dr. Ross had the unenviable task of taking [K.M.'s] body apart piece by piece," (10) implying that "he had evidence not presented at trial that Mr. Grove had previously been 'violent with [K.M.];" (11) saying, "we don't want to let a murderer go free," (12) saying the state did not call K.M.'s biological father as a witness because the state's "medical experts unanimously, to no exception, said he could not have done it," and (13) arguing "without supporting evidence that the emotional breakdown of Mr. Grove at trial showed that Mr. Grove had a different kind of 'emotional breakdown, an instantaneous fit of anger, that morning that resulted in these injuries." (Amended Petition, pp.16-17.)

Grove failed to prove deficient performance or prejudice related to counsel's failure to object to any portion of the prosecutor's closing argument about which he complains.

B. Grove Failed To Meet His Burden Of Proving He Is Entitled To Relief On His Claim That Counsel Was Ineffective In Relation To The Prosecutor's Closing Argument

"From a strategic perspective . . ., many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991). A defense attorney may also decide not object because he believes the prosecutor's argument is helpful to his case or believes he can capitalize on the prosecutor's statements during his own closing argument. Id.; see also Lambert v. McBride, 365 F.3d 557, 564 (7th Cir. 2004) ("Under *Strickland*, we must note that there may very well be strategic reasons for counsel not to object during closing arguments. Counsel may have been trying to avoid calling attention to the statements and thus giving them more force."); United States v. Daas, 198 F.3d 1167, 1179 (9th Cir. 1999) (counsel's decision not

to object to the prosecutor's closing argument "falls within the range of permissible conduct of trial counsel"). "Whatever the actual explanation, *Strickland* requires [the Court] to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Molina, 934 F.2d at 1448 (quoting Strickland, 466 U.S. at 689). "This presumption especially applies to silence in the face of allegedly improper arguments." Vicory v. State, 81 S.W.3d 725, 731 (Mo. App. 2002) (citation omitted).

In addition to the Strickland standards applicable to Grove's claim that counsel was ineffective for failing to object to several portions of the prosecutor's closing argument, the Court should also consider the overriding legal standard applicable to closing arguments: "Generally, both parties are given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom." State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009) (citations omitted).

In an effort to meet his burden, Grove ignores most of the applicable legal standards. As the foregoing authority indicates, it is well-within counsel's strategic decision-making authority to not object during closing argument, even if he could technically do so. At the evidentiary hearing, Grove, usually without providing any context, asked trial counsel why he did not object to several of the statements the prosecutor made during closing that Grove believes were improper. (See generally E.H. Tr., pp.220-228; p.230, L.18 – p.231, L.3.) Frequently Mr. Chapman could not provide a reason he did not object. (Id.) That does not, however, mean that the decision, *at the time*, was not strategic or tactical, based on ignorance of the law, or based on some other shortcoming capable of objective evaluation. In fact, on cross-examination, Mr. Chapman agreed there are a variety of considerations relevant to the courtroom dynamics during closing argument, including tone, "circumstances and the context," and tactical concerns related

to juror perceptions. (E.H. Tr., p.231, L.16 – p.233, L.3, p.238, L.18 – p.239, L.3.) Mr. Chapman also explained the difficulty with providing specific reasons for failing to object in relation to a trial that occurred almost seven years ago. (E.H. Tr., p.241, L.23 – p.243, L.5.)

Further, a defense attorney is undoubtedly not constitutionally obligated to object to statements that are not improper. For example, in this case Grove contends an objection should have been made to the prosecutor's use of the phrase "long-term" because it is different than the defense theory that the brain injury occurred prior to the time K.M. was alone with Grove. (Petitioner's Closing Argument, p.26.) However, as defense counsel acknowledged at the evidentiary hearing in response to the question whether the defense theory was that "there was some long-term brain injury," "it depends on how you define long term." (Trial Tr., p.224, Ls.13-16.) Disagreement over such terminology does not demonstrate objectionable misconduct in terms of "misrepresenting" the defense's theory of the case, much less show that counsel's failure to object was deficient under Strickland.

Even if this Court could find that Grove met his burden of establishing that counsel was deficient for failing to object to one or more of the statements the prosecutor made during closing argument, Grove failed to prove prejudice. There is no reasonable probability that the result of the trial would have been different if counsel had objected. Any objection, even if sustained, would have only resulted in reiterating instructions the jury received anyway. (Exhibit A (#36211 R., pp.225 (Instruction No. 3 – instructing jury it could only consider evidence and defining evidence), 228 (Instruction No. 4 – again defining evidence and specifically instructing that arguments of counsel are not evidence and that if facts as remembered by jurors were different than what was stated by the lawyers, jurors should follow their own memories)).) In

addition, given the weight of the evidence presented, Grove was not prejudiced by any deficiency in counsel's failure to object to any portion of the prosecutor's closing argument.

Nor is Grove entitled to relief based on any cumulative alleged deficiencies by counsel. (Petitioner's Closing Argument, p.34.) Because Grove failed to prove counsel was deficient in any manner, there is no alleged deficiency to accumulate. Even if this Court finds one or more deficiencies, Grove has failed to show any sufficient prejudice entitling him to relief.

CONCLUSION

Grove failed to meet his burden of proving he is entitled to relief on any of the claims that were properly before the Court at the evidentiary hearing. The Court should, therefore, dismiss the remaining claims from Grove's Amended Petition and enter judgment denying Grove's request for post-conviction relief.

DATED this 8th day of May 2015.

JESSICA M. LORELLO
Deputy Attorney General
Nez Perce County Special Prosecutor

FOR
KENNETH K. JORGENSEN
Deputy Attorney General
Nez Perce County Special Prosecutor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of May 2015, I caused a true and correct copy of the foregoing document to be emailed and placed in the United States mail, postage prepaid, addressed to:

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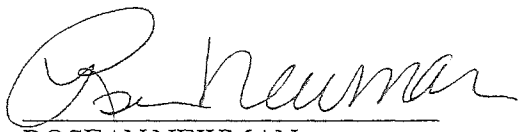

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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CV-12-01798 **PETITIONER'S REBUTTAL TO RESPONDENT'S CLOSING ARGUMENT**

I. INTRODUCTION

COMES NOW, Petitioner Stacey Grove, through counsel Dennis Benjamin and Deborah Whipple, and offers this Rebuttal to Respondent's Closing Argument.

A. *Ineffective Assistance in the Direct and Cross-Examination of Mr. Grove*

1. Evidence regarding Mr. Grove's relationship with his son and child support

The Respondent argues that "[i]t was not deficient for counsel to inquire into this area [Mr. Grove's relationship with his son] given that the defense clearly wanted to portray [Mr.] Grove as a caring father-figure to K.M. and his sister - a reasonable strategy under the

circumstances of this case." Respondent's Argument, pg. 10. This argument is flawed because it ignores the fact that it was not a strategic decision to bring that evidence out. Defense counsel testified that he could not recall why he elicited the evidence from Mr. Grove on direct examination. He also testified that the evidence was unfavorable to Mr. Grove. Evidentiary Hearing Transcript ("EH Tr.") p. 187, ln. 14-24. In addition, the Respondent's suggestion that it was a tactical choice to bring out the evidence is incorrect. In fact, defense counsel filed a motion in limine to exclude "any mention of the relationship that Stacey Grove has with his son, Alex Light, and/or child support obligations." Exhibit A, Vol. 1B, p. 174.

The Respondent also argues that "[i]t was not an unreasonable tactical decision for the defense to ask the question" because the state would have inquired about Mr. Grove's relationship with his son on cross-examination. Respondent's Argument, pg. 10. But this tactic did not further the Respondent's supposed defense strategy. Mr. Grove's relationship with his son does not show either that he was or was not a caring father figure to [redacted] and had defense counsel not raised the issue on direct examination the state could not have cross-examined upon it. Defense counsel knew the evidence was prejudicial and excludable and the fact that he unnecessarily presented the evidence to the jury is a "shortcoming[] capable of objective review" which need not be deferred to by this Court. *State v. Abdullah*, — Idaho —, — P.3d —, 2015 WL 856787, *112 (2015).

Not only was defense counsel's performance deficient when he unnecessarily raised the topic of Mr. Grove's relationship with his son, his failure to exclude the evidence that Mr. Grove was behind on his child support payments was also deficient. Whether Mr. Grove was current or delinquent with his obligations has nothing to do with whether he was a caring caretaker to

[redacted] And the fact that defense counsel sought to exclude that evidence and did not raise it himself during the direct examination of Mr. Grove shows that he did not intend to bring that fact to the jury's attention. Thus, as previously argued, the failure to obtain a pre-trial decision on his motion in limine was objectively unreasonable. The same is true for defense counsel's failure to object to the state's cross-examination on the topic. Defense counsel could not state a reason for failing to object to the prosecutor's cross-examination on that topic and it could not have been in furtherance of the defense strategy. Evidentiary Hearing ("EH") Tr. p. 189, ln. 3-5. Thus, it was deficient performance for defense counsel to let the prosecutor's misconduct go unchallenged.

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

The Respondent does not address Mr. Grove's argument that defense counsel's performance was deficient because he failed to move to strike the prosecutor's comments after his objection to prosecutorial misconduct during cross-examination was sustained. Verified Amended Petition, p. 32; Petitioner's Closing Argument, pg. 7-9.[1] Thus, no reply is needed.

3. Prosecutor's question about Mr. Grove's emotional state

The Respondent seeks to justify the prosecutor's line of questioning about Mr. Grove's use of Ativan by commenting that "it is unclear why a witnesses's ability to perceive and recall events would not be relevant." Respondent's Argument, pg. 8. It is clear, however, that Mr.

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[1]As previously noted, the trial record shows that the prosecutor characterized Mr. Grove's sworn testimony as the "story you told, which is "the story you need the jury to believe" and then opined that "some things . . . just don't really make sense." Exhibit B, p. 1113, ln. 8-13. While defense counsel's objection was sustained, he did not ask that the comments be stricken or that the jury be instructed to disregard the comments. *Id.* The comments should have been stricken because a prosecutor should not interject his personal opinion and beliefs about the credibility of a witness or the guilt or innocence of the accused. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007)

Grove's ability to *perceive events* occurring at the time of the charged incident in July 2006 could not have been affected by his three-day-long use of Ativin during the trial in July of 2008. Further, it is a far-stretch for the Respondent to even claim it could have affected Mr. Grove's ability to accurately recall the events he previously perceived since Ativin is not a narcotic, intoxicant or hallucinogen.[2] In this regard, it is worth noting that Mr. Spickler never presented any evidence that Ativan might affect Mr. Grove's ability to accurately recall the events of July 2006. Likewise, Mr. Stickler never asked if the Ativan affected Mr. Grove's demeanor or made any attempt to prove that it could.

More importantly, the Respondent's argument misses the purpose of the questioning. Mr. Spickler was not interested in the effect of the Ativan on Mr. Grove's demeanor or ability to testify. He wanted to bring out the irrelevant and highly prejudicial fact of Mr. Grove's "emotional breakdown" before the jury. As the Respondent frankly admits, "the state's theory was that [Mr.] Grove had an emotional breakdown on the morning that the injuries were inflicted on [the] child[.]" Respondent's Argument, pg. 9 (internal quotation marks omitted). But, the state had a problem with its theory. It had no evidence to support it. There was no evidence presented at trial that Mr. Grove was in a homicidal emotional state before, during or after the time he was alone with [redacted] So, the state had to resort to improper questioning about Mr. Grove's medical condition during trial to show this imagined emotional breakdown. That evidence was irrelevant because "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a

[2] Ativan, the trade name for Benzodiazepine, "has a tranquilizing action" on the Central Nervous System "with no appreciable effect on the respiratory or cardiovascular systems." www.pdr.net/drug-summary/ativan-tablets?druglabelid=2135&id=1869 (last visited 5/12/2015).

particular occasion" except in limited situations not applicable here. I.R.E. 404(a).

Even if such evidence was admissible character evidence, the fact that Mr. Grove was overcome during trial with the effect of loss of sleep does not tend to prove he had a totally different type of emotional breakdown in 2006, a breakdown which the state imagined to be "an instantaneous fit of anger, that morning that resulted in these injuries to the kids -- to the kid, to [redacted] Exhibit B, p. 1458, ln. 13-19. There was no evidence that Mr. Grove's medical condition during the trial was an expression of some long-standing underlying character defect which could manifest itself in a homicidal rage. Thus, it was irrelevant under I.R.E. 401 because it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" and was not admissible under I.R.E. 402.

Trial counsel did not strategically fail to object to the above. He testified that he did not believe it was objectionable. EH T. p. 193, ln. 5-10. Thus, Mr. Grove has shown that defense counsel's failure to object "resulted from . . . ignorance of the relevant law" and thus is "a basis for post-conviction relief for post-conviction relief under a claim of ineffective assistance of counsel[.]" *State v. Abdullah, supra.*

4. Prejudice

The Respondent argues that the jury learning that Mr. Grove's use of Ativan did not render the jury's verdict unreliable, Respondent's Argument, pg. 10, but that argument misses the point. It was the evidence about the "emotional breakdown" which the state used to establish its theory that Mr. Grove had a previous emotional breakdown and brutally beat [redacted] to death.

Next, the Respondent argues that it is "unclear" how the improper evidence affected Mr.

Grove's credibility, Respondent's Argument, pg. 12, but Mr. Grove has already explained that the evidence showing Mr. Grove had a bad relationship with his biological son and that he was not even paying child support painted him as a bad person and bad care giver and the prosecutor's comments that Mr. Grove needed the jury to believe his story suggested that Mr. Grove would lie to them because had to. That all goes to the believability of Mr. Grove's testimony.

Finally, while the Respondent argues that each individual instance of deficient performance was not prejudicial under *Strickland v. Washington*, 466 U.S. 688 (1984), it does not address Mr. Grove's cumulative error argument.

B. ***Ineffective Assistance of Counsel in the Direct and Cross-Examination of Dr. Arden***

Mr. Grove has, as set out in his Closing Argument, established by a preponderance of the evidence that trial counsel was ineffective in the preparation for and presentation of Dr. Arden's testimony at trial. The Respondent argues that the failure to supply Dr. Arden with the iron slides was not deficient performance because Dr. Arden could form an opinion without them and that there was no prejudice because the slides were not exculpatory. Respondent's Closing p. 13. This argument misses the central point - that it was counsel's duty to supply the expert with all the available materials, including the iron slides, which were used to impeach Dr. Arden's opinion at trial, and that the slides not only were actually exculpatory, but even if they had not been exculpatory, the impeachment with them was prejudicial to Mr. Grove's defense and would not have occurred had counsel properly fulfilled his obligation to secure all the evidence that would be used by the state against Mr. Grove and to properly get it to his expert prior to trial.

Mr. Grove has also demonstrated by a preponderance of the evidence that counsel was ineffective in the presentation of Dr. Arden's testimony at trial. Specifically, counsel was ineffective in failing to stop the improper impeachment of Dr. Arden and in failing to rehabilitate him following the improper impeachment. The Respondent argues that counsel was simply making a tactical choice to not stop the improper impeachment and in not rehabilitating Dr. Arden on redirect. Thus, the Respondent argues, the decision to not act could not be deficient performance. Respondent's Closing p. 20-21. However, this argument is contrary to the record.

1. Deficient Performance in Failing to Provide the Iron Slides to Dr. Arden

With regard to the iron slides, Dr. Arden testified that he had asked Mr. Chapman to send him all the microscopic slides that had been made by the medical examiner who performed the autopsy, including the iron stains. EH Tr. p. 134, ln. 8-11; p. 136, ln. 8-10; p. 138, ln. 6-10. Mr. Chapman testified that he was aware prior to trial of the existence of the iron slides, but did not ask for the slides in his letter to the prosecutor seeking materials for Dr. Arden's review. EH Tr. p. 201, ln. 13-p. 204, ln. 1. Mr. Parnes testified that failure of trial counsel to obtain the iron slides violated reasonable professional norms because provision of all relevant information to an expert is critical to an expert's ability to review the matter fully and to have credibility before the jury. EH Tr. p. 254, ln. 20-p. 255, ln. 15.

In his closing argument, Mr. Grove cited this Court to *State v. Shackelford,* 150 Idaho 355, 385, 247 P.3d 582, 612 (2010); *Murphy v. State,* 143 Idaho 139, 146-47, 139 P.3d 741, 748-49 (Ct. App. 2006); and *Rompilla v. Beard,* 545 U.S. 374, 387, 125 S.Ct. 2456, 2466 (2005), each of which supports the conclusion that failure to properly prepare Dr. Arden by providing him with all the slides, including the iron stains, which the state intended to use against Mr.

Grove, was deficient performance.

The Respondent has not addressed the case law at all in its closing. Rather, the Respondent argues, contrary to the evidence presented, that Dr. Arden never requested all the slides prior to trial. Respondent's Closing p. 14, "The evidence in the case shows that Mr. Chapman arranged for Dr. Arden to be supplied with all of the materials Dr Arden requested and felt he needed." From this, the Respondent asks this Court to conclude that counsel's performance was not deficient.

This argument is directly contrary to Dr. Arden's unrebutted testimony that he had asked for all the microscopic slides prior to trial, including the iron stains. EH Tr. p. 134, ln. 8-11; p. 136, ln. 8-10; p. 138, ln. 6-10. The Respondent certainly had the opportunity to rebut this evidence by asking Mr. Chapman whether Dr. Arden asked him for less than all the slides prior to trial, but the Respondent chose not to ask this question. The validity of the Respondent's argument that Dr. Arden never asked for all the slides must be measured against the actual record and, of course, common sense. The Respondent's argument that Dr. Arden never asked for all the materials relied upon by the state's experts is not only contrary to Dr. Arden's testimony at the evidentiary hearing, but also contrary to common sense. There is no logical reason for Dr. Arden to have requested all the microscopic slides, except that he wished Mr. Chapman to withhold the iron stains.

While the Respondent's argument is contrary to the record and common sense, what is even more important is that the Respondent's argument is beside the point. It is not the expert's job to obtain the materials needed for the expert's review. That is the job of counsel. As discussed in *Rompilla,supra,* it is counsel's duty to obtain and review the evidence the state will

be using against the client.

> The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in circumstances of a case like this one:
>
> > 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction. The investigation should always include efforts to secure the information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

Rompilla, 545 U.S. at 387, 125 S.Ct. at 2465 (footnote omitted).

The iron stains were information in the possession of the prosecution and law enforcement. It was incumbent upon defense counsel, not Dr. Arden, to obtain the slides. It was further incumbent upon defense counsel, not Dr. Arden, to send those slides to Dr. Arden. *See, Murphy v. State, supra.* In failing to obtain the slides and forward them to Dr. Arden for his review, defense counsel provided deficient performance.

The Respondent attempts to persuade this Court not to reach the conclusion that counsel was deficient by arguing that "Any finding that Dr. Arden requested additional information he felt was necessary to thoroughly review the case and it was not provided to him would require a conclusion that Dr. Arden was deliberatively deceptive in his trial testimony." Respondent's Closing p. 14. However, as noted above, whether Dr. Arden requested the slides or not is beside the point. Counsel had a duty to provide the slides. Counsel failed in that duty. And, further, the Respondent's logic is flawed. Dr. Arden testified at trial that he had the information needed to

form opinions about the case. Ex. B, p. 1252, ln. 25-p. 1253, ln. 3. As explained in the Evidentiary Hearing, that is a different question than the question of whether he received all the slides that existed in the case and that would be used by the state against Mr. Grove. EH p. 138, ln. 19-p. 139, ln. 10. Dr. Arden was honest with the jury when he testified that he had sufficient information to form opinions about the case. There was nothing deceptive about his testimony. Even if Dr. Arden's forthrightness was at issue in this post-conviction case, he was forthright in his trial testimony. But, in any event, a finding of deficient performance is not dependent upon a finding that Dr. Arden was not forthright.

Contrary to the Respondent's arguments, counsel was deficient in failing to provide Dr. Arden with the iron slides.

2. Prejudice From the Deficiency in Failing to Provide the Iron Slides to Dr. Arden

The Respondent argues that the failure to provide Dr. Arden with the iron slides was not prejudicial because the record did not establish that Dr. Arden made any truly new findings based upon this review of the slides. Respondent's Closing p. 15. In fact, Dr. Arden did testify in the Evidentiary Hearing that in viewing the iron stains he was able to date the injury to the mesentery as weeks rather than days prior to death. EH p. 159, ln. 8-p. 168, ln. 11. Dr. Arden testified that "[T]hat's what different from simply reading in the report, there is positive iron staining. This tells me that something else has gone on that is substantially older than whatever is happening in the fresher appearing hemorrhage. And this was not available to me by interpreting the written report without personally examining the iron stains." EH p. 164, ln. 1-7. He further testified that because he could see iron stains in the connective tissue separate from the area where he could

still see hemorrhage, he can conclude that the mesentery injuries were weeks rather than a week old. EH p. 168, ln. 8-11. This contrasts with his trial testimony that the injuries to the mesentery appeared to be days and "possibly" a week or more old. Ex. B, p. 1317, ln. 12-13. Likewise, in the evidentiary hearing, Dr. Arden was able to testify after viewing the iron stain slides that some part of the hemorrhage in the optic nerve was older than the age of three plus days that was presented at the trial. EH p. 168, ln. 19-p. 169, ln. 10; Ex. B, p. 1294, ln. 6-9. This was especially significant because Dr. Ross testified that the hemorrhage in the optic nerve was possibly the result of the hemorrhages in the brain. Ex. B, p. 927, ln. 10-20. Dr. Ross's testimony combined with Dr. Arden's dating the optic nerve injures as older than a few days goes to prove that the fatal head injuries were not inflicted during the time Mr. Grove was alone with [redacted]. In other words, by seeing the iron stains, Dr. Arden was able to effectively rebut the state's evidence that [redacted] sustained the head injuries in the few minutes prior to the 911 call.

But, even if Dr. Arden had not found anything new in the iron stains, the failure to provide him the stains was prejudicial because the state used that failure to undermine the credibility of Dr. Arden's trial testimony. The prosecutor questioned Dr. Arden extensively about the iron stains at trial. Ex. B, p. 1355, ln. 9-p. 1364, ln. 25. And, all Dr. Arden could do was to respond that he could only rely upon the autopsy report because he had never seen the iron stains. Ex. B, p. 1355, ln. 9-19. This cross-examination undermined Dr. Arden's credibility with the jury because the jury would conclude that Dr. Arden had not seen all the evidence the state's experts had seen and therefore his opinion could not be as accurate as their opinions.

The Respondent further argues that the existence of older injuries does not call the jury's verdict into question. Respondent's Closing p. 15-16. In other words, the Respondent appears to

argue that the older injuries were not exculpatory. However, as Mr. Grove explained in his Closing Argument at page 19, had the jury known that [redacted] had been active for over a week with retinal, mesentery, and pancreas injuries, there is a reasonable probability that at least one juror would have concluded that Kyler remained active for some time after receiving the fatal injuries. In this, the evidence from the iron stain slides was exculpatory.

The Respondent also argues that Mr. Grove did not present any evidence of the earlier injuries being significant in scope or severity. Respondent's Closing p. 16. However, the record is contrary to this argument. Dr. Hunter testified that the autopsy showed "extensive injuries to the intestines." Ex. B, p. 871, ln. 3-21. He further opined that [redacted] would have been in "absolute agony" from the muscle injuries. Ex. B, p. 872, ln. 5-15. Dr. Ross testified that the abdominal injuries were very debilitating injuries which would have been very painful. Ex. B, p. 943, ln. 18-22. Dr. Harper described the abdominal injuries as "quite awful" and "major, major" trauma. Ex. B., p. 1034, ln. 18-p. 1035, ln. 11. Dr. Harper further opined that the injury to the mesentery would have been fatal if [redacted] had not died from the head injury. Ex. B, p. 1058, ln. 1-8.

The older injuries were clearly extremely serious injuries as testified to by the state's own medical witnesses. Dr. Arden's testimony that the abdominal injuries were older than the few minutes before 911 was called was vital. It would have created a reasonable doubt that [redacted] was fatally injured during the short time he was with Mr. Grove. In addition, had the jury been aware that some part of the retinal injury was older than a week per Dr. Arden's testimony based on the iron slides and that the retinal injury was possibly caused by the fatal head injuries per Dr. Ross's testimony, then the jury would have had a reasonable doubt that the fatal head injury was

inflicted just prior to the 911 call.

Further, the Respondent's argument that "because Dr. Arden detected no additional brain injuries the testimony related to the physical effects of that ultimately fatal injury are completely unimpeached," Respondent's Closing p. 16, is, like its earlier argument, is not on point. Dr. Arden testified at trial extensively as to the head injuries. The fact that he did not find any additional brain injuries as a result of his inspection of the brain slides does not mean that there was no evidence produced at trial to challenge the state's medical witnesses' testimony as to the timing of the head injuries. In fact, as discussed above, inspection of the iron slides allowed Dr. Arden to provide exculpatory evidence that the head injuries did not occur when Mr. Grove was alone with [redacted] Nor, does the fact that no additional head injuries were observed change the fact that counsel was deficient in failing to get Dr. Arden the iron stains. Nor, does it change that fact that the failure to get the iron stains was prejudicial because as noted above, the state extensively questioned Dr. Arden about not having reviewed the iron stain slides which cast a doubt upon all of his testimony including his testimony about the head injuries. The state certainly never attempted at trial to cast doubt only upon Dr. Arden's opinions as to the abdominal injuries. Rather, the state attacked Dr. Arden's preparation and credibility in its entirety. Ex B, p. 1425, ln. 3-p. 1430, ln. 14; p. 1461, ln. 9-p. 1466, ln. 1.

The Respondent's last argument against a finding of prejudice is that the testimony about the iron stains was not even relevant. Respondent's Closing p. 17. The testimony was, as discussed above, relevant because it undermined the testimony of the state's medical witnesses' testimony about the timing of [redacted]s injuries which was the central issue at trial. And, moreover, the Respondent is judicially estopped from arguing that evidence of the iron stains was

irrelevant as it relied upon that evidence to obtain its conviction. Ex. B, p. 1355, ln. 6-p. 1364, ln. 2. *McCallister v. Dixon,* 154 Idaho 891, 894, 303 P.3d 578, 581 (2013), stating, "Judicial estoppel precludes a party from advantageously taking one position and then subsequently seeking a second position that is incompatible with the first."

In sum, Mr. Grove has proven by a preponderance of the evidence both deficient performance and prejudice in the failure of trial counsel to supply Dr. Arden with the iron stain slides prior to trial.

3. Deficient Performance in The Presentation of Dr. Arden's Testimony

As set out in Mr. Grove's Closing, Mr. Grove has 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 Respondent responds to this proof and argument by asserting that trial counsel made the tactical choice to allow the improper impeachment and to not rehabilitate Dr. Arden and therefore the decision cannot be deficient performance. Respondent's Closing p. 17-21.

The Respondent also argues that Mr. Grove did not demonstrate prejudice because the impeachment was proper and because there was "little reason to believe that the evidence of mismanagement played any significant role" in the jury's deliberations. Respondent's Closing p. 17-21.[3] However, the Respondent's argument is contrary to the record and contrary to the law.

[3] The Respondent also argues in a footnote that this Court should not consider deficient performance in the failure to object to questioning and argument to the effect that Dr. Arden was on a paid mission for the defense because the claim was not made in the petition. Respondent's Closing, p. 17, footnote 5. In making this argument, the Respondent has confused allegations supporting claims with claims. The claim that Mr. Grove was denied effective assistance of

As the Respondent notes, Mr. Chapman testified that the improper impeachment was not relevant to Dr. Arden's medical opinions or his credibility and that it could be prejudicial. EH Tr. p. 205, ln. 1-13, cited in Respondent's Closing, p. 20, footnote 6. While the Respondent appears to argue that there could be a strategic reason for not objecting to potentially prejudicial evidence that is not relevant, it does not cite this Court to any support for that argument. This is likely because there is no such support. Likewise, the Respondent does not cite this Court to any place in the record where Mr. Chapman testified that it was his strategic choice to allow this evidence without objection. There can be no possible strategic reason for allowing in irrelevant evidence that is harmful to the client, especially when, as in this case, the evidence could have been kept out by a motion in limine thus eliminating any possible negative consequences to an attempt to eliminate the evidence.

As Mr. Parnes testified, the failure to object to this evidence was deficient performance. EH p. 256, ln. 19-p. 261, ln. 3. The evidence was inadmissible under IRE 401, 402, 403, and 404. Moreover, a great part of it was evidence of other bad acts which could not be admitted without prior notice from the state under IRE 404(b), a notice which the state failed to give. The failure to object to the improper impeachment was objectively unreasonable.[4]

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counsel at trial in violation of the state and federal constitutions. Amended Verified Petition p. 24. While the allegations in support of the petition did not include that counsel was deficient in failing to object to the "on a mission" inappropriate questioning and argument, the claim of ineffective assistance was clearly before the Court. *See, Newman v. State,* 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct.App. 2004), noting the difference between claims and allegations supporting the claims.

[4] The Respondent tries to characterize Mr. Parnes' testimony as testimony only that he personally would have conducted the defense according to a different strategy than Mr. Chapman chose. Respondent's Closing p. 21. However, this argument misconstrues Mr. Parnes' testimony. Mr. Parnes specifically testified that counsel's failure to object to the inadmissible

Mr. Parnes' testimony is consistent with the case law. In *McKay v. State,* 148 Idaho 567, 571, 225 P.3d 700, 703 (2010), the Supreme Court held that counsel's performance was deficient when there was no conceivable tactical justification for the failure to object to inadequate jury instructions. Likewise here, there was no conceivable tactical justification for the failure to file a motion in limine or object at trial to the improper impeachment.

Mr. Grove has proven deficient performance by a preponderance of the evidence.

4. Prejudice From the Deficient Performance in Presenting Dr. Arden's Testimony

The Respondent has argued that Mr. Grove did not prove prejudice by a preponderance of the evidence because the improper impeachment evidence was admissible and therefore there was no prejudice in not objecting. At the same time, the Respondent argues that even if the evidence was inadmissible there was no prejudice because it was unlikely that the evidence played any role in the verdict because it "did not ultimately undercut Dr. Arden's medical opinion." Respondent's Closing p. 23-25.

The Respondent argues that the evidence was properly admissible with this reasoning: "That Dr. Arden was forced from his chosen career path because of allegations of mismanagement and therefore had a gap in employment and had to build a business was all relevant to show bias in taking this case and reaching conclusions helpful to the defense." Respondent's Closing p. 23. This argument might carry the day if in fact the state had presented impeachment showing that Dr. Arden was unemployable, was desperate for money, and thus lied to the jury in order to collect his expert fees. But, that is not the evidence the state presented.

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testimony was deficient performance - not because it was a different strategy from that which Mr. Parnes would have chosen if he had been trial counsel, but because the failure was not the result of a strategic decision and was objectively unreasonable. EH p. 260, ln. 23-p. 261, ln. 3.

There was no indication that Dr. Arden was unemployable, that his income was precarious, or that he was desperate for money and work. Moreover, there was no evidence that he was the sort of man who, even if he was in such a situation, would lie to a jury in order to obtain the fees the defense could pay for his expert testimony. Nor was there any evidence that Mr. Chapman was the sort of attorney who would seek out an indigent desperate unemployable doctor so that he could put medically questionable "expert" testimony before the jury. In short, there is absolutely no evidence that Dr. Arden is dishonest. Nor is there any evidence that Mr. Chapman would seek out a dishonest expert and knowingly put dishonest testimony before the jury. The Respondent's relevancy argument fails because the evidence before the jury did not go to prove bias or dishonesty.

At the same time, the Respondent argues that even if the evidence was inadmissible and did, as it concedes "arguably [have] some potential for unfair prejudice," Respondent's Closing p. 23, the evidence did not play a role in the verdict. Why in the world would the state have sought out and presented this evidence if it did not believe that the evidence would play a role in the verdict? Why would the prosecutor question Dr. Arden so extensively about his departure from the Washington, D.C. medical examiner's office at the end of his cross-examination at trial, if the evidence would not play a role in the jury's verdict? Ex. B, p. 1372, ln. 8-p. 1378, ln. 9; p. 1382, ln. 6-p. 1388, ln. 12. Why would the prosecutor make the arguments in closing and rebuttal set out in Mr. Grove's Closing at pages 20-21 focusing on the exit from the Washington, D.C. office if the state did not believe that the evidence was going to play a role in the verdict?

The Respondent's argument in its Closing in this case is contrary to its position at trial and is not sensible in light of the record the state itself created at trial. It should be rejected both

on the grounds of judicial estoppel, *McAllister, supra,* and because it is inconsistent with the trial record.

Mr. Grove has proven prejudice by a preponderance of the evidence.[5]

C. *Ineffective Assistance With Regard to Sleeping Jurors*

Mr. Grove presented unrebutted evidence in the hearing on the petition that one or more jurors had slept at various points in the trial. He has also argued that the failure of counsel to consult with Mr. Grove and alert the Court through a motion for a mistrial was deficient performance. Closing Argument p. 23-26. Mr. Grove presented expert testimony, EH p. 261, ln. 19-p. 263, ln. 14, and case law, *State v. Umphenour,* S.Ct. No. 41497, ___ Idaho ___, ___ P.3d ___, 2015 WL 1423789 (Ct. App. March 30, 2105), relying on *State v. Swan,* 108 Idaho 963, 966, 703 P.2d 727, 730 (Ct. App. 1985), which confirms that the Idaho Constitution requires the defendant's personal waiver of the right to a jury trial. Mr. Grove has set out how the failure of counsel to consult him regarding action to be taken regarding the sleeping jurors potentially impeded his right to a unanimous jury and amounted to a waiver which counsel cannot make without the client's consent. Closing Argument p. 24. Mr. Grove has thus carried his burden of proof on this matter.

The Respondent has responded by arguing that Mr. Grove failed to show that a mistrial

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[5] Mr. Grove also proved by a preponderance of the evidence that had counsel objected to the improper impeachment at trial and the evidence was nonetheless admitted the matter would have been reviewed on appeal under the standard of free review with the burden on the state to prove harmlessness beyond a reasonable doubt. EH p. 258, ln. 1-14. *State v. Carson,* 151 Idaho 713, 717, 264 P.3d 54, 58 (2011); *State v. Perry,* 150 Idaho 209, 221-22, 245 P.3d 961, 973-74 (2010). Closing p. 21-22. The Respondent has not disputed this statement of the law nor argued that Mr. Grove did not show a reasonable probability that he would have prevailed on appeal had the error been preserved. On this basis also, Mr. Grove has carried his burden of proof.

would have been granted and that the tactical choice to not move for a mistrial was based on any objective shortcoming. The Respondent further denies any prejudice. Respondent's Closing p. 25.

The Respondent's argument regarding whether a mistrial would have been granted is beside the point. The question is not whether a mistrial would have been granted. The question is whether counsel was deficient in waiving the right to a unanimous jury without consulting the client. This is not a tactical decision that counsel may make. *Umphenour, supra*; *Swan, supra*; ICR 23(a). *See also, State v. Wheeler,* 114 Idaho 97, 102, 753 P.3d 833, 838 (Ct. App. 1988).

The Respondent attempts to evade the conclusion that counsel was deficient by arguing that Mr. Grove did not plead that the failure to consult him was deficient performance. Again, the Respondent has confused claims with allegations in support of the claims. Mr. Grove clearly claimed ineffective assistance of counsel. Amended Petition p. 33. This Court clearly articulated that the issue before it was whether counsel was deficient in not alerting the Court to the sleeping jurors. Opinion and Order on Motion for Summary Judgment p. 39. If the Respondent believed that this claim of ineffective assistance was not properly before the Court, the Respondent should have moved to reconsider the Court's order granting an evidentiary hearing on the matter. Having failed to do so, the Respondent consented to the matter being tried before the Court. IRCP 15(b) stating that when issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

The Respondent also argues that Mr. Grove did not present any evidence that he was not consulted by counsel. Respondent's Closing p. 30. However, Mr. Chapman specifically testified

that he cannot recall consulting with Mr. Grove about the sleeping jurors and that he did not obtain a written waiver from Mr. Grove. EH p. 219, ln. 3-12.

The Respondent further argues that counsel did not have a duty to move for a mistrial because to request one would have advanced a "novel legal theory." However, it is not a novel theory that the waiver of a jury trial is an action that requires the personal waiver of the defendant. ICR 23(a) and *Swan, supra. See also, State v. Strange,* 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2008), noting that sleeping during trial may constitute juror misconduct. There is nothing novel about the idea that if one or more jurors are sleeping and thus not present for the trial that the right to the jury trial has been impeded.

The Respondent lastly argues that Mr. Grove's argument that counsel's deficiency in failing to consult him about waiving his right to a jury trial amounted to structural error is "not grounded in the law." Respondent's Closing p. 32. However, the Respondent does not elaborate on or explain its position and so Mr. Grove cannot respond to it. Mr. Grove stands on his argument that the deficiency created a structural error that is to be treated as presumptively prejudicial per *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984). Closing Argument p. 25.

The Respondent also argues that Mr. Grove has not shown prejudice per *Strickland.* Respondent's Closing p. 32. However, Mr. Grove has shown prejudice. He has shown that the case turned on the medical evidence, which absent the improper impeachment of Dr. Arden, provided greater support for the defense than for the state. Had the jurors all been awake for all of the expert testimony, there is a reasonable probability that the result of the trial would have been different. Moreover, had counsel not been deficient in failing to consult with Mr. Grove,

there is a reasonable probability that he would have declined to waive his right to a jury trial - as evidenced by his election to proceed to a jury trial in the first place. This would have resulted in some sort of remedy – whether a mistrial or, if possible, the dismissal of the sleeping jurors as alternates. In either event, there is a reasonable probability, given the evidence presented, that Mr. Grove would not have been convicted in this trial by this jury.

D. ***Ineffective Assistance With Regard to Prosecutorial Misconduct in Closing***

Mr. Grove alleged in his petition that defense counsel's performance was deficient because he failed to object to multiple instances of misconduct by the prosecutor and failed to move for a mistrial after the prosecutor's closing and rebuttal arguments. Amended Verified Petition, p. 34-35. In his Closing Argument, he set forth each of those examples and demonstrated why an objection was called for and showed that defense counsel could not account for why he did not object.

The Respondent does not address these instances individually, but instead resorts to generalities about how there might be legitimate reasons for not objecting. Respondent's Arguments, pg. 33-34. In doing so, it ignores the evidence presented at the hearing where defense counsel could not account for the failure to object. Defense counsel did not testify that he feared the jury might see an objection "to be a sign of desperation or hyepertecnicality." He did not testify that he thought any of the prosecutorial misconduct was "helpful to his case" or that he believed that he could "capitalize on the prosecutor's statement during his own closing argument." (And, in the case of the emotional breakdown evidence discussed in Part A, defense counsel's attempt to address that issue in closing only opened the door to a devastating rebuttal argument.) Nor did defense counsel testify that the failure to object was based upon a decision

"to avoid calling attention to the statements and thus giving them more force." Thus, this Court need not "indulge in a strong presumption" that counsel's failure to testify falls within the wide range of reasonable professional assistance. *See* Respondent's Argument, pg. 33 (quoting cases). Mr. Grove presented evidence that the failure to object was below the standards of reasonable assistance and defense counsel could not state any reason why he failed to object. Thus, Mr. Grove has overcome the presumption with evidence.

The fact that defense counsel could not state a reason for failing to object was "important in terms of making a decision about deficient performance, that it implies that there's no . . . tactical or strategic reason thought out and planned for." EH Tr. p. 271, ln. 11-17. The Respondent belatedly complains, however, that Mr. Grove "usually" did not give defense counsel any context when asking him about individual instances of deficient performance. Respondent's Argument, pg. 34. Mr. Grove disagrees with the blanket statement, but even if it were true, the Respondent ignores the instances where, in its opinion, context was given. It also ignores that it had a full and fair opportunity to cross examine defense counsel about each of the instances and give the matter all the context it felt appropriate, but failed to do so. The Respondent knew well in advance that defense counsel would be questioned on the specific instances raised at the hearing. It attended the deposition of defense counsel, had a copy of the transcript of that deposition and knew from pages 16-18 of the Verified Amended Petition precisely where Mr. Grove believed objections should have been made.[6] One can only presume that the Respondent made no effort to ask defense counsel if there were possible explanations for the failure to make

[6] Paragraph 50 of the Amended Petition alleged: "Defense counsel did not object to any of the misconduct alleged in paragraphs 47-49." Thus, the Respondent had ample advance notice of what would be asked and would have provided its own "context" had it thought it was needed.

specific objections because it knew there were none.

Mr. Grove has shown that a reasonable professional defense attorney would not have let the prosecutor: 1) misrepresent the defense's theory of the case; 2) argue facts not in evidence; 3) appeal to the emotions, passions and prejudice of the jury through the use of inflammatory tactics; 4) diminish the state's burden of proof beyond a reasonable doubt;[7] and 5) argue conclusions not supported by the evidence. While both sides in a trial have traditionally been afforded considerable latitude in closing argument to the jury, a prosecutor exceeds the scope of this considerable latitude if he or she "attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence." *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). That was the case here and defense counsel should have done something to stop it.

Finally, the Respondent argues that there could be no prejudicial effect because "[a]ny objection, even if sustained, would have only resulted in reiterating instructions the jury received anyway." Respondent's Argument, pg. 35. But that is not the case. Had proper objections been made, the prosecutor's misstatement of the defense theory of the case would have been stricken and the jury would have been instructed to disregard. The same is true regarding the prosecutor's comment about how horrible it was to perform the autopsy. While the jury might have heard one of the assertions about the widespread problem of care givers killing infants that comment would

[7] Defense counsel testified that he did not know whether the prosecutor's argument that the jury didn't want to let a murderer go free was objectionable. EH Tr. p. 223, ln. 1-19. So, the failure to object would not have been a matter of tactics as theorized by the Respondent. Rather, the failure to object must have been based upon ignorance of the law as the comment was clearly improper.

have been stricken and the rest of the comments never would have been made at all. And if the jury heard the state's argument that it acceptable to convict Mr. Grove even if the evidence did not support such a verdict because "we don't want to let a murderer go free," it also would have heard the Court tell them that was a misstatement of law. Finally, had an objection to the cross-examination question about Mr. Grove's "emotional breakdown" been made, the jury would not have heard the prosecutor's closing argument that incident proved that Mr. Grove had another breakdown when he was alone with [redacted] Had the jury not been exposed to such improper argument, there was a reasonable probability of a different result and relief should be granted.[8]

E. *Cumulative Prejudicial Effect of the Totality of the Deficient Performance*

The Respondent does not dispute that the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *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); *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003). Here, Mr. Grove was prejudiced by defense counsel's deficient performance during: 1) his own direct and cross-examinations; 2) the direct and cross-examination of Dr. Arden; 3) the time the jurors were sleeping while testimony was being presented; and 4) the multiple instances of prosecutorial misconduct in closing argument. So, even if each individual instance of deficient performance was not enough to undermine confidence in the verdict, the Court should find that totality of the effect was prejudicial under *Strickland.*

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[8] The Respondent does not dispute the claim that defense counsel was also ineffective for failing to preserve the prosecutorial misconduct claim for appeal by making timely objections. Given the enormity of the misconduct, it is reasonably probable that Mr. Grove's conviction would have been reversed had the issue been preserved for appeal.

III. CONCLUSION

For all the reasons above, this Court should grant the petition, vacate the judgment and sentence in the criminal case, release Mr. Grove on his own recognizance pending further proceedings, and order that a new trial be held within a reasonable amount of time.

Respectfully submitted this 14th day of May, 2015.

Deborah Whipple
Attorneys for Stacey Grove

Dennis Benjamin

CERTIFICATE OF SERVICE

I CERTIFY that on May 14, 2015, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

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

STACEY LEWIS GROVE, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 2012-1798 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; ORDER DENYING MOTION TO RECONSIDER**

This matter came before the Court for an evidentiary hearing to determine four remaining issues from the Petition for Post Conviction Relief. The Petitioner was represented by Dennis Benjamin and Deborah Whipple, of the firm Nevin, Benjamin, McKay & Bartlett. The State was represented by Jessica Lorello and Kenneth Jorgensen, of the office of the Idaho Attorney General. Evidence was presented to the Court on March 24, 2015. The parties also presented oral argument on Petitioner's Second Motion to Reconsider. Following the hearing, the Court allowed the parties additional time to submit written closing arguments. The Court, being fully advised in the matter, hereby renders its decision.

BACKGROUND

Following a trial by jury, Stacey Grove was found guilty of first degree felony murder by aggravated battery of a child under twelve years old. The victim was twenty-three month old [redacted] Martin. The jury returned the guilty verdict on July 30, 2008. Judgment of conviction was entered on January 28, 2009. The Idaho Court of Appeals considered the Petitioner's appeal of his judgment of conviction. On March 25, 2011, the Court issued an appellate opinion which affirmed Grove's conviction of first degree felony murder.

A detailed factual summary of this case is found in the Court of Appeals Opinion, *State v. Grove*, 151 Idaho 483, 485-489, 259 P.3d 629, 631-635 (Ct. App. 2011). The Petitioner initiated this proceeding for post-conviction relief by filing a Verified Petition for Post-Conviction Relief on September 7, 2012. On April 30, 2013, the Court heard oral argument on the parties' cross-motions for summary disposition. This Court issued an Opinion and Order on Motions for Summary Disposition on July 11, 2013, wherein this Court found the Petitioner had raised a material issue of fact with respect to four claims of ineffective assistance of counsel within the Amended Verified Petition for Post-Conviction Relief.

Following the Court's order on summary disposition, the Petitioner filed a motion to reconsider, which was denied on November 11, 2013. Evidence was presented on the post-conviction claims in open court on March 24, 2015. The Court also heard the Petitioner's second motion for reconsideration. First this Court will address the motion to reconsider. Then the Court will review the legal standard for post-conviction relief and

set forth findings of fact from the evidence presented, followed by conclusions of law on these four remaining claims.

SECOND MOTION TO RECONSIDER

The Petitioner has filed a second motion for reconsideration, asking this Court to reconsider its order granting the Respondent's motion for summary disposition as to the confrontation clause issue and the Confrontation Clause aspects of the ineffective assistance of counsel claim. The Court has reviewed the motion and finds there still remains a split of authority on the issue of whether an autopsy is considered "testimonial" for purposes of Confrontation Clause analysis. Therefore, the Court stands by the ruling set forth in the *Opinion and Order on Petitioner's Motion for Reconsideration,* filed November 21, 2013.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post-conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a)

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App. 1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

In a proceeding for post-conviction relief, the petitioner bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941 (Ct. App.1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court's own initiative. However, "[s]ummary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief." *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655. "If

the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue." *Sanchez*, at 711, 905 P.2d at 644. "It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing." *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

FINDINGS OF FACT ON REMAINING ISSUES FOR POST-CONVICTION RELIEF

There are four issues which were addressed at the evidentiary hearing. Accordingly, findings of fact will be presented as they apply to each issue, following these general facts of the case:

1. Grove hired attorney Scott Chapman to represent him during the criminal proceedings. Chapman filed motions in advance of the trial, and represented Grove throughout the entire proceedings. Sarah Geis assisted Chapman during the trial as a paralegal.
2. At the time of the evidentiary hearing, Chapman had been an attorney for almost thirty years. Chapman's area of practice has become more focused on criminal defense over his years of practice. Chapman estimated he has handled over 500 criminal cases and represented clients in over twenty jury trials, typically averaging one to two criminal trials per year.
3. Chapman presented Grove's case following the legal theory that the injuries that led to the victim's death occurred prior to the early morning hours of July 10, 2006. The State presented evidence that the injuries occurred on the morning of July 10, 2006, while the victim was alone with Grove.

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.

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.

Whether counsel was deficient for failing to move for a mistrial because jurors may have been sleeping during the presentation of testimony.

16. Debbie Grove, Carol Grove, Lori Stamper, Karen Stamper, Craig Stamper, and Justina Hyder were all present in the gallery during various dates of the trial, to support Stacey Grove. From their vantage point in the gallery, each witness described what they viewed to be jurors sleeping during the presentation of evidence in this case.

17. The State presented testimony from the following individuals who presided as jurors in the criminal trial: Kim Behler, Casey Neiman, Kendall Loetscher, Michael Keller, Sharon Taylor, Gregory Lind, and Nanda Lamb. Each juror

testified that they did not sleep during the presentation of evidence, nor did they notice any of the other jurors sleeping.

18. While the observers in the gallery were credible in their testimony, the jurors themselves were in the best position to recognize whether they personally were sleeping, or whether a fellow juror on the panel fell asleep during the proceedings. The jurors all testified consistently that they did not sleep, nor did they notice anyone sleeping.

19. Chapman testified that during the trial it came to his attention that someone thought a juror was sleeping. He could not recall if he was told the juror was sleepy or that the juror was sleeping. After Chapman was advised of the concern, the Court called for a lunch recess. Chapman did not take any actions regarding the issue.

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.

CONCLUSIONS OF LAW

Ineffective assistance of counsel claims are judged under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984).

> To prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must show that the attorney's performance was deficient and, in most cases, must also show that prejudice resulted from the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Berg v. State,* 131 Idaho 517, 520, 960 P.2d 738, 741 (1998); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). Deficient performance is established if the applicant shows that the attorney's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Russell,* 118 Idaho at 67, 794 P.2d at 656. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance the outcome of the criminal case would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697; *Berg,* 131 Idaho at 520, 960 P.2d at 741; *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Russell,* 118 Idaho at 67, 794 P.2d at 656.

Mintun v. State, 144 Idaho 656, 658-659, 168 P.3d 40, 42-43 (Ct. App. 2007). It is well established that 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 performance is within the wide range of reasonable professional assistance. *Gibson v. State*, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986).

> 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. *Pratt v. State,* 134 Idaho 581, 584, 6 P.3d 831, 834 (2000). "There is a strong presumption that counsel's performance fell within the wide range of professional assistance." *State v. Hairston,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (internal quotations omitted) (quoting *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)).

State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008).[1]

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[1] Idaho appellate courts look to the bedrock principles governing ineffective assistance of counsel claims as articulated by the United States Supreme Court in *Strickland.* Recently, the Idaho Court of Appeals in *Stevens v. State*, 156 Idaho 396, 327 P.3d 372 (Ct. App. 2013) stated:

> This Court has long adhered to the proposition that tactical or strategic decisions of counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State,* 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct.App.2011). There is a strong presumption that counsel's performance fell within the wide range of professional assistance. *State v. Shackelford,* 150 Idaho 355, 383, 247 P.3d 582, 610 (2010); *State v. Hairston,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999). Because it proves important in this case, we note that in *Strickland,* the United States Supreme Court elaborated regarding the considerations applicable when a court is determining whether counsel rendered deficient performance:
>
> > Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
> >
> > The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
>
> *Strickland,* 466 U.S. at 689–90, 104 S.Ct. at 2065–66, 80 L.Ed.2d at 694–95 (citations omitted).

Id. at 409-10, 327 P.3d at 385-86.

The Petitioner sets forth several claims that trial counsel was ineffective. Material issues of fact were raised with respect to four issues, each will be addressed below.

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

The Petitioner asserts counsel's performance was deficient during the direct and cross-examination of the Petitioner during the criminal trial. Specifically, the Petitioner claims counsel was deficient because he introduced evidence regarding the Petitioner's relationship with his son, Alex, and then failed to object when the prosecuting attorney asked whether the Petitioner was behind on child support payments. The Petitioner asserts counsel's performance was deficient for failing to move to strike the prosecutor's comments after an objection to a statement, "the story you need the jury to believe," was made. Finally, the Petitioner asserts defense counsel was deficient for failing to object when the prosecutor questioned Grove about his emotional state which led to a delay of the trial.

The Petitioner has not met his burden of showing counsel was ineffective with regard to direct and cross-examination of Grove. The testimony in question falls into the category of strategic and tactical decision making which occurs during the trial process. The decisions made by counsel are within the wide range of reasonable professional assistance. None of the issues raised by the Petitioner are matters which resulted from inadequate preparation, ignorance of the law or other shortcomings capable of objective review. *See Pratt v. State*, 134 Idaho 581, 584, 6 P.3d 831, 824 (2000).

a. Testimony regarding Grove's relationship with his biological son.

The Petitioner asserts that counsel questioned Grove about the bad relationship between Grove and his biological son. Exhibit B, p. 1074, ln. 1-24. At the evidentiary

hearing counsel stated he could not recall why he elicited this testimony and agreed when asked if the evidence was unfavorable to Grove. Evidentiary hearing transcript, p. 187, ln. 14-24. The Petitioner asserts counsel was deficient by failing to object when the prosecutor questioned Grove about failing to pay child support, which was not relevant to the issues of the case. Ultimately, the Petitioner claims that counsel's actions portrayed Grove as an uninvolved dad in a case where he was accused of harming a child. The Petitioner relies on a case from the Tenth Circuit, *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002) to argue that where an attorney accidentally brings out damaging testimony due to a failure to prepare, his conduct cannot be called a strategic choice. *See Fisher*, 282 F.3d at 1296.

The *Fisher* case is distinguishable from the case at hand. In *Fisher*, trial counsel's strategy was very poor: counsel admitted to attempting to conduct his investigation at trial. *Id.* at 1294.[2] In the case before this Court, Petitioner cannot establish that trial

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[2]The *Fisher* Court reviewed an objectively unreasonable failure to investigate. In *Fisher*, there was no virtually no pretrial preparation or investigation. The same cannot be said in the case before this Court.

> The lack of preparation revealed by these illustrative exchanges indicates an objectively unreasonable failure to investigate. Counsel has a duty to investigate all reasonable lines of defense, or make reasonable determinations that such investigation is not necessary. *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. A decision not to investigate cannot be deemed reasonable if it is uninformed. *Id.* Mr. Porter's decision not to undertake substantial pretrial investigation and instead to "investigate" the case *during* the trial was not only uninformed, it was patently unreasonable.
>
> Nor can the actions described above be considered part of a general trial strategy of pointing to holes in the state's evidence to create a reasonable doubt. Mr. Porter could have pursued such a strategy: he elicited testimony about certain physical aspects of the crime and his client that the state itself never introduced or used to link his client to the crime. Mr. Porter could have argued to the jury it should infer from these circumstances that the state had no physical evidence against Mr. Fisher, or even that its evidence exonerated him. However, "the mere incantation of 'strategy' does not insulate attorney behavior from review." *Brecheen v. Reynolds,* 41 F.3d 1343, 1369 (10th Cir.1994) (internal quotation omitted). Here it is evident that counsel did not have a strategy of pointing to holes in the evidence or trying to create a reasonable doubt in jurors' minds.
>
> To the contrary, it is obvious that during his direct and cross examinations Mr. Porter had no idea he might elicit information that could be useful to such a strategy. Furthermore, he made no attempt whatsoever to draw the jury's attention to any gaps in the state's evidence, and never otherwise articulated a reasonable doubt theory to the jury.

counsel had not prepared for trial; he relies instead on pointing to one instance in the trial where he contends evidence was not favorable to his case.

The Petitioner presented evidence from Attorney Andrew Parnes wherein Mr. Parnes found that there was no valid strategic purpose for defense counsel to elicit from Grove the evidence of his relationship with his son. Parnes also testified that counsel's failure to object to the prosecutor's question regarding child support was also below reasonable professional standards. Ultimately, the Petitioner contends that this portion of the case resulted in no strategy on the part of trial counsel.

To satisfy the requirements of *Strickland*, the Petitioner must show that the attorney's performance was deficient and, that prejudice resulted from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). The Court does not find that counsel's representation fell below reasonable professional standards with respect to the testimony regarding Grove and his son. 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. In other words, there is no evidence the outcome of the trial would have been different but for this avenue of testimony. While in hindsight it may have appeared that Grove had a bad relationship with his biological son, this has minimal bearing on whether Grove committed a battery

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> Consequently, the accidentally elicited damaging testimony remained just that, damaging, rather than part of a strategy designed to benefit his client. Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a "choice" at all. *See Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 (counsel's failure to investigate must be the product of a reasonable decision that the particular investigation is unnecessary or it is deficient). We conclude counsel's uncontroverted failure to investigate some of the most obvious aspects of the case was unreasonable and deficient.

Fisher, 282 F.3d at 1296.

upon [redacted] Martin. Therefore, the Petitioner's claim of ineffective assistance of counsel is denied.

b. Failure to move to strike statement of prosecutor "the story you need the jury to believe."

The Petitioner asserts counsel was ineffective for failing to move to strike the prosecutor's comments. The trial record shows that the prosecutor characterized Grove's sworn testimony as the "story you told, which is the 'the story you need the jury to believe' and then the prosecutor opined that "some things . . . just don't really make sense." Exhibit B, p. 1113, ln. 8-13. Defense counsel's objection was sustained, but counsel failed to ask the comments be stricken, or that the jury be instructed to disregard the comments.

The Petitioner relies on cases which held that the failure to object to improper statements by the prosecutor have been found to be deficient performance under *Strickland*. *See People v. Bodden*, 82 A.D.3d 781, 784, 918 N.Y.S.2d 141, 143 (2011). In the case at hand, there was an objection to the statement. The Petitioner fails to establish that counsel's failure to ask for a motion to strike rises to the level of deficient performance. Further, there is nothing in the record of this case to establish, that but for the failure to request the Court strike the testimony, the outcome of the case would have been different. Therefore, the Petitioner fails to meet his burden on this claim.

c. Prosecutor's questions about Grove's emotional state.

In the criminal trial, Grove was scheduled to testify on Friday; however, the case was delayed until Monday because Grove was unable to testify, nor aid in his defense, due to his emotional state on that day. The jury was informed that an unforeseen medical situation had arisen which affected the court's ability to proceed that day. During the

State's cross-examination of Grove, the prosecutor asked if Grove was currently taking any medications, when the medication was prescribed, and whether it was prescribed due to Grove's emotional state on Friday. Exhibit B, p. 1120, ln. 9-12. At the evidentiary hearing Attorney Parnes testified that in his opinion defense counsel should have objected to the testimony as irrelevant and highly prejudicial.

The Petitioner relies on *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986) to support his argument that performance is deficient where a prosecutor used cross-examination to bring in extraneous and at times unfounded charges to blacken the defendant's character. In the *Wolf* case, the court found defense counsel was deficient, because the attorney's strategy of the case was to not object to any line of questioning by the prosecutor.

> Any doubt about the prejudicial effect of the improper cross-examination is erased when we consider Wolf's last challenge to his conviction, which is that his trial counsel was totally incompetent. Counsel made no objection to any of the improper cross-examination. The government argues that this was a tactical decision: a tactic of no objections. It is true that lawyers will frequently not object to objectionable questions, believing either that the witness will give an answer helpful to the defense (or at least not harmful to it) or that too-frequent objecting will irritate the jury or make it think the defendant is trying to hide the truth. But to have a *policy* of never objecting to improper questions is forensic suicide. It shifts the main responsibility for the defense from defense counsel to the judge. It would make no sense in a case like this where the prosecutor was intent on bringing in extraneous and at times unfounded charges in order to blacken the defendant's character. The failure to object to any of the improper cross-examination discussed above is incomprehensible, as is the failure to object to the instruction on intent or to offer a "dominant purpose" instruction.

United States v. Wolf, 787 F.2d at 1099. Wolf is clearly distinguishable from the case at hand. In this matter, there is no evidence in the record that defense counsel was operating in a manner similar to the defense attorney in *Wolf.*

The Petitioner has not established that counsel was deficient for failing to object to the questions regarding Ativan at the trial. This issue falls into tactical and strategic decision making, and thus, does not establish counsel was ineffective.[3] Further, the Petitioner has not shown that had the testimony not been elicited, the outcome of the case would have been different. Therefore, this claim of ineffective assistance of counsel is dismissed.

2. Whether counsel was deficient during the direct and cross-examination of Dr. Arden.

The Petitioner has presented a question of material fact regarding whether counsel rendered deficient performance in the presentation of the expert testimony of Dr. Arden. The Petitioner asserts that Dr. Arden was not supplied with all existing microscopic slides for examination prior to trial. Further, the Petitioner asserts counsel was deficient for failing to object when the Prosecutor elicited testimony for purposes of impeaching Dr. Arden.

a. Whether counsel was deficient for failing to provide the iron stain slides.

At the evidentiary hearing, Dr. Arden testified that he had asked defense counsel to send him all the microscopic slides that had been made by the medical examiner who performed the autopsy, which included iron stain slides. Attorney Chapman testified that the letter he sent to the prosecutor requested recuts for Dr. Arden's review, but not specifically iron stain slides. Attorney Parnes opined that failing to obtain the iron slides

[3] The Petitioner presented the testimony of Attorney Parnes to establish that defense counsel should have objected to the cross-examination regarding Grove's use of Ativan, and emotional state. While Attorney Parnes testified that he would have objected, this does not establish that defense counsel was ineffective when he made a different decision. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

for Dr. Arden prior to trial violated reasonable professional norms because providing all relevant information to an expert is critical to the expert's ability to review the matter fully.

During the trial, defense counsel asked Dr. Arden if there was additional information he needed in order to form opinions about the case. Dr. Arden responded that he requested recuts, and those were provided.[4] During the evidentiary hearing Dr. Arden testified he had received all the information he needed to form opinions about the case. Evidentiary Hearing Transcript at 133-138. Because Dr. Arden had sufficient evidence to support the opinions he presented in the case, the Petitioner fails to establish counsel was deficient.

Further, the Petitioner cannot establish that but for counsel's failure to provide the iron stain slides; the outcome of the case would have been different. 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. Evidentiary Hearing Transcript at 162-177. However, during the trial Dr. Arden testified regarding his observations of injuries that were more than a week old based upon his examination of the evidence provided to him at that time.[5] The existence of injuries older than those which caused the victim's death does not call the verdict into

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[4] At the trial Dr. Arden testified as follows:

> Q. Did you feel like there was any information that you needed in order 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 you and the state arranged for them to be provided. So, what I requested I was given.

Trial Transcript, Volume II, p. 1252, ln. 25-p. 1253, ln.9.

[5] Trial transcript, Volume II, p. 1302 (discussing older, healed injuries); p. 1308(discussing older injuries in context of whether the victim would have shown severe symptoms); p. 1340 (acknowledging that his findings of prior injuries were disclosed in pre-trial discovery); p. 1363 (discussing older injuries with scarring).

question. While the iron stains may have helped Dr. Arden discuss older injuries to the eye, back and mesentery, there is no evidence regarding the significant injuries to the victim's brain. Therefore, because the Petitioner fails to establish that Dr. Arden's presentation from the iron stains would have changed the outcome of the trial, this claim is dismissed.

b. Whether counsel was deficient for failing to object when the Prosecutor elicited testimony for purposes of impeaching Dr. Arden.

The Petitioner asserts trial counsel was ineffective for failing to object to the prosecutor's attempt to impeach Dr. Arden regarding alleged gross mismanagement when he was the Medical Examiner in the District of Columbia and failing to attempt to rehabilitate Dr. Arden on re-direct examination. At the evidentiary hearing, Attorney Chapman testified that he was aware of the impeachment issues from discussions with Dr. Arden and from his own internet research; he assumed the prosecutor would also be aware of this information; that he did not believe the accusation evidence was relevant, and could be prejudicial; and that he could have made a pretrial motion in limine to exclude the evidence.[6] Attorney Parnes opined counsel's failure to object and failure to file a motion in limine were prejudicial and deficient performance.

The Petitioner's claim that trial counsel did not adequately address cross-examination and impeachment of Dr. Arden falls within the area of tactical or strategic decision making.

> "[C]ounsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions, as does counsel's presentation of medical evidence." *Giles,* 125 Idaho at 924, 877 P.2d at 368. "[S]trategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to

[6] Evidentiary hearing transcript, at 128, 131, 204-207.

> have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." *Pratt,* 134 Idaho at 584, 6 P.3d at 834.

State v. Abdullah, 158 Idaho 386, 348 P.3d 1, 116 (2015). In the case at hand, there is no evidence to support counsel's decisions resulted from inadequate preparation or ignorance of the relevant law. Therefore, the Petitioner cannot establish counsel was ineffective based upon the strategies he employed regarding the prosecutor's attempts to impeach Dr. Arden.

Further, the Petitioner has not shown that but for the impeachment of Dr. Arden, the outcome of the case would have been different. The evidence that Dr. Arden was forced to change career paths due to mismanagement was admissible for purposes of impeachment in this case, it calls into question the witnesses credibility. Second, the impeachment evidence was a small portion of the case compared to the significant amount of medical evidence presented in the case. The Petitioner has not established that had the prosecutor not attempted to impeach Dr. Arden, the outcome of the case would have been different.

3. **Whether counsel was deficient for failing to move for a mistrial because jurors may have been sleeping during the presentation of testimony.**

The Petitioner raised a material issue of fact regarding whether defense counsel was deficient for failing to bring to the Court's attention that jurors may be sleeping. During the evidentiary hearing, several individuals from the gallery testified regarding their observations of what appeared to be jurors sleeping during the presentation of testimony. However, several of the jurors also testified, and each stated they did not sleep during the trial. The Court found the testimony of the jurors to be credible, and thus, found no evidence that jurors were sleeping during the presentation of evidence.

The Petitioner asserts counsel was ineffective for failing to seek a mistrial when the jurors were inattentive. "Where a claim of ineffective assistance is predicated on counsel's failure to file a motion, a conclusion that the motion would not have been successful generally precludes a finding of prejudice." *Zepeda v. State*, 152 Idaho 710, 715, 274 P.3d 11, 16 (Ct. App. 2012). The Petitioner cannot establish by clear and convincing evidence that the motion for a mistrial would have been granted, had it been made.

In *State v. Strange*, 147 Idaho 686, 214 P.3d 672 (Ct. App. 2008) the Idaho Court of Appeals considered whether a juror's inability to hear testimony constituted juror misconduct.

> Idaho courts have not previously considered whether a juror's inability to hear testimony constitutes juror misconduct. A juror's inattentiveness, through sleeping or drawing during witness testimony, may constitute misconduct. *See Bolen,* 143 Idaho at 440-41, 146 P.3d at 706-07. Here, Strange has failed to show by clear and convincing evidence that the juror's difficulty with hearing constitutes misconduct. The complaints from the jurors dealt with what they considered bad acoustics and a poor sound system. Aware of the problem during trial, the court instructed defense counsel on separate occasions to speak louder. One juror needed the use of a listening enhancement device, which was provided. Post trial, the jurors, upon questioning, indicated that they were able to hear the questions presented to the witnesses at trial as well as the answers. The difficulty in hearing was not attributed to the jurors. Therefore, the district court did not err in determining no juror misconduct occurred.
>
> Even if we assume the difficulty with hearing amounted to misconduct, Strange failed to show he was prejudiced thereby. To establish prejudice, a defendant must show the identity and duration of the specific testimony, argument or instructions the juror missed. *See, e.g., Chubb v. State,* 640 N.E.2d 44, 48 (Ind.1994); *Ratliff v. Commonwealth,* 194 S.W.3d 258, 276 (Ky.2006); *State v. Chestnut,* 643 S.W.2d 343, 346-47 (Tenn.Crim.App.1982); *see also State v. Hayes,* 270 Kan. 535, 17 P.3d 317, 319-21 (2001) (reversing trial court's denial of motion for mistrial based on juror's complete inability to hear defendant's testimony, which violated defendant's rights to an impartial jury and due process). In this case, the jurors who had difficulty hearing during the trial testified that

> their greatest difficulty was with hearing defense counsel when he was sitting down at the defense table. Strange failed to identify any specific portion of the trial that the jurors missed because they were having a hard time hearing defense counsel. The general complaint expressed by the jurors is insufficient to show prejudice. *See, e.g., People v. King,* 121 P.3d 234, 241-42 (Colo.Ct.App.2005); *Durham v. State,* 867 A.2d 176, 181 (Del.2005). The district court did not err in determining that there was no basis to determine that the jurors were unable to receive and consider fully the evidence presented at trial.

Id. at 689, 214 P.3d at 675.

In the case at hand, the Petitioner fails to show by clear and convincing evidence that jurors were sleeping, which rose to the level of juror misconduct.[7] Based upon the evidence presented, the preponderance of the evidence supports a determination that the jurors did not sleep during the presentation of evidence. Trial counsel was informed a juror might be sleepy, or sleeping. After this report, the Court called for a lunch recess. The record does not indicate whether the recess was taken because jurors were not paying attention, or because it was a reasonable time for a break based upon the flow of the proceedings. Based upon the evidence presented, Grove's attorney acted in a manner that fell within an objective standard of reasonableness.

Further, the Petitioner has failed to meet his burden to establish he was prejudiced as a result of the alleged misconduct. Finally, there is no evidence in the record that had defense counsel made a motion for a mistrial, that it would have been successful. Thus, this claim of ineffective assistance of counsel is dismissed.

[7] The Petitioner relies on *State v. Umphenour*, S.Ct. No. 41497, 2015 WL 1423789 (Ct. App. March 30, 2015) for the proposition that the Idaho Constitution requires that waiver of the right to a jury trial requires the defendant's personal waiver. In the case at hand, because the Petitioner fails to show by a preponderance of the evidence that jurors were sleeping, he cannot establish that his right to jury trial was waived. Therefore, the case at hand is distinguishable from the waiver issue discussed in *Umphenour*.

4. Whether defense counsel's performance during closing argument was deficient.

Lastly, the Petitioner asserts that counsel's performance was deficient during closing statements because he failed to object to multiple instances of misconduct by the prosecuting attorney.[8] Further, defense counsel failed to move for a mistrial or curative instruction following the prosecutor's closing and rebuttal arguments.

> The right to effective assistance extends to closing arguments. *See Bell v. Cone,* 535 U.S. 685, 701–02 (2002); *Herring v. New York,* 422 U.S. 853, 865 [95 S.Ct. 2550, 2556–57, 45 L.Ed.2d 593, 602] (1975). Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," *Herring,* 422 U.S. at 862 [95 S.Ct. at 2555, 45 L.Ed.2d at 600], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. *See Bell,* 535 U.S. at 701–02 [122 S.Ct. at 1863–54, 152 L.Ed.2d at 931]. Judicial review of a defense attorney's summation is therefore highly deferential....
> *Yarborough v. Gentry,* 540 U.S. 1, 5–6, 124 S.Ct. 1, 4, 157 L.Ed.2d 1, 7–8 (2003).

State v. Abdullah, 158 Idaho 386, 348 P.3d 1, 123 (2015). In the case at hand, the decision to not repeatedly object during closing arguments is a strategic decision. Decision made by trial counsel during the presentation of closing arguments fell within the wide range of reasonable professional assistance. From a strategic perspective, it is

[8] The alleged instances of misconduct include:

1. The prosecutor misstating the defense position regarding pre-existing head injury as "some long-term brain injury"
2. The prosecutor told the jury without supporting evidence that "caretakers kill little babies all the time," that "parents kill babies all the time," that "there are literally thousands of similar incidents in any given span of time," and that "our local paper has shown . . . probably sic more of these cases since – since this one started."
3. The prosecutor argued that "Dr. Ross had the unenviable task of taking Kyler's body apart piece by piece."
4. The prosecutor argued that "we don't want to let a murderer go free."
5. The prosecutor argued without supporting evidence that the emotional breakdown of Grove at trial showed that Grove had a different kind of emotional breakdown, an instantaneous fit of anger, that morning, that resulted in these injuries."

reasonable for a trial lawyer to refrain from objecting during closing arguments to all but the most egregious misstatements made by opposing counsel. During closing argument, Chapman presented a strategic and tactical argument based upon his theory of the case, as well as explained how the State failed to meet the burden of proof. Therefore, the Petitioner has not established the counsel's performance was deficient based on this claim.

Further, even if counsel were deficient for failing to repeatedly object during the closing statements, the Petitioner fails to prove prejudice. There is no reasonable probability that the outcome of the case would have been different if counsel had objected. Therefore, the petitioner's claim is dismissed.

5. Whether the Petitioner established there was a cumulative prejudicial effect of the totality of the deficient performance.

The Petitioner asserts that separate errors by counsel should be analyzed together to determine whether the cumulative effect deprived the defendant of his right to effective assistance of counsel. Having reviewed each claim separately and finding the Petitioner has not met his burden of proof, there is no support for a claim of cumulative prejudicial effect. Therefore, the petition for post-conviction relief is dismissed.

CONCLUSION

The Petitioner was afforded the opportunity to present evidence on four separate claims of ineffective assistance of counsel. Based upon the foregoing determinations, the Petitioner failed to meet his burden of proving he is entitled to relief on any of the claims. Therefore, the Petitioner's Amended Petition for Post-Conviction Relief is dismissed in its entirety.

ORDER

The Petitioner's Second Motion for Reconsideration is hereby DENIED. IT IS FURTHER ORDERED the Petition for Post-Conviction Relief is hereby DISMISSED.

IT IS SO ORDERED.

DATED this 25th day of August 2015.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; ORDER DENYING MOTION TO RECONSIDER was faxed & mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 25th day of August, 2015, to:

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PATTY O. WEEKS, Clerk

By _____ Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

FILED

2015 AUG 25 PM 1 55

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY LEWIS GROVE,	)	
Petitioner,	)	**CASE NO.** CV 2012-1798
v.	)	**FINAL JUDGMENT**
STATE OF IDAHO,	)	
Respondent.	)	

JUDGMENT IS ENTERED AS FOLLOWS: All claims contained within the Petition for Post-Conviction relief are hereby DISMISSED.

DATED this 25th day of August 2015.

Carl B. Kerrick – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINAL JUDGMENT was:

_____ hand delivered via court basket, or

_✓_ faxed & mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 25th day of August, 2015, to:

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Criminal Law Division
P O Box 83720
Boise ID 83720-0010

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY
EX-OFFICIO AUDITOR AND RECORDER
STATE OF IDAHO

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
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(208) 345-8274 (f)

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, State of Idaho, AND ITS ATTORNEY, the Ada County Prosecutor, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Stacey Grove, appeals against the above named Respondent to the Idaho Supreme Court from the final judgment dismissing his petition for post-conviction relief filed on the 25th day of August, 2015, the Honorable Carl Kerrick, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issue on appeal is listed below which the Appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal: Did the Court err in failing to grant Petitioner's Petition for Post Conviction Relief?

4. No order sealing any portion of the record has been issued.

5. Transcript:

(a) A reporter's transcript is requested.

(b) The Appellant requests the preparation of the following portions of the reporter's transcript in both hard copy and electronic format:

- 12/18/2012 Hearing - Court Reporter: Nancy Towler
  Number of Transcript Pages for this hearing estimated: less than 100 pages
- 02/12/2013 Hearing - Court Reporter: Nancy Towler
  Number of Transcript Pages for this hearing estimated: less than 100 pages
- 04/30/2013 Hearing - Court Reporter: Nancy Towler
  Number of Transcript Pages for this hearing estimated: N/A
- 10/28/2013 Hearing - Court Reporter: Nancy Towler
  Number of Transcript Pages for this hearing estimated: less than 100 pages
- 03/24/2015 and 03/25/2015 Evidentiary Hearing - Court Reporter: Nancy Towler
  Number of Transcript Pages for this hearing estimated: 325 PAGES
- 05/29/2015 Hearing - Court Reporter: Nancy Towler

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included Rule 28, I.A.R:

- 09/07/2012 Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Stevie Grove in Support of Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Lori Stamper in Support of Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Carol Grove in Support Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Lynette Walton in Support Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Deborah Grove in Support Verified Petition for Post Conviction Relief
- 09/07/2012 Affidavit of Jack Grove in Support Verified Petition for post Conviction Relief
- 09/19/2012 Request for Judicial Notice

- 10/01/2012 Affidavit of Karen Stamper in Support of Verified Petition for Post Conviction Relief
- 10/01/2012 Affidavit of Craig Stamper in Support of Verified Petition for Post Conviction Relief
- 10/05/2012 Motion for Summary Disposition and Dismissal and to Set for Hearing
- 10/10/2012 Objection to State's Motion for Summary Disposition and Motion for a More Definite Statement
- 10/15/2012 Order Granting Request for Judicial Notice
- 10/15/2012 Order Granting Motion to Declare Petitioner a Needy Person
- 10/15/2012 Petitioner's Motion for Summary Disposition
- 11/28/2012 Affidavit of Eric Fredericksen
- 11/28/2012 Affidavit of Diane Walker
- 12/10/2012 Affidavit of Dennis Benjamin
- 12/13/2012 Affidavit of Jonathan L. Arden MD
- 12/18/2012 Brief in Support of Motion for Summary Disposition---State
- 01/02/2013 Amended Verified Petition for Post Conviction Relief
- 02/06/2013 Answer and Amended Motion for Summary Disposition and Dismissal and to set for hearing
- 02/11/2013 Petitioner's Renewed Motion or Summary Disposition
- 03/15/2013 Petitioner's Brief Filed in Response to State's Motion for Summary Disposition and in Support of Petitioner's Motion
- 04/01/2013 Reply Brief in Support of State's Motion for Summary Disposition and Response to Petitioner's Brief in Support of Petitioner's Motion for Summary disposition
- 04/12/2013 Affidavit of Andrew Parnes
- 04/12/2013 Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Disposition
- 04/12/2013 2nd Affidavit of Dennis Benjamin
- 05/03/2013 Affidavit of Stacey Grove in Opposition to State's Motion for Summary Disposition
- 05/08/2013 Motion to Strike---State
- 05/08/2013 Objection to State's Motion to Strike--Petitioner
- 07/11/2013 Opinion & Order on Motions for Summary Disposition
- 08/09/2013 Motion for Reconsideration---Petitioner
- 08/09/2013 Memorandum in Support of Motion for Reconsideration---Petitioner
- 09/03/2013 Petitioner's Reply Memorandum in Support of Motion for Reconsideration
- 11/21/2013 Opinion & Order on Petitioner's Motion for Reconsideration---DENIED
- 04/09/2015 2nd Motion for Reconsideration
- 04/09/2015 Memorandum in Support of 2nd Motion for Reconsideration
- 04/16/2015 Memorandum in Opposition to Motion for Reconsideration---Respondent
- 04/24/2015 Petitioner's Closing Argument
- 05/14/2015 Respondent's Post Evidentiary Hearing Closing Argument (original)
- 05/15/2015 Petitioner's Rebuttal to Respondent's Closing Argument

3 • NOTICE OF APPEAL

• 08/25/2015 Findings Of Fact And Conclusions Of Law and Order; Order Denying Motion to Reconsider
• 08/25/2015 Final Judgment

7. The Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

• All Exhibits offered or admitted at evidentiary hearing.

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

• Nancy Towler, Nez Perce County Courthouse, P.O. Box 896, Lewiston, ID 83501

(b) That the Appellant has been found to be indigent and is exempted from paying the estimated cost for the preparation of the transcript on appeal.

(c) That the Appellant has been found to be indigent and is exempted from paying the estimated fee for the preparation of the record on appeal.

(d) That Appellant is exempt from paying the appellate filing fee because there is no filing fee for post-conviction petitions.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

Dated this 26th day of August, 2015.

Deborah Whipple
Attorneys for Stacey Grove

Dennis Benjamin

CERTIFICATE OF SERVICE

I CERTIFY that on August 26, 2015, I caused a true and correct copy of the foregoing document to be: mailed to:

- Nancy Towler, Official Court Reporter, Nez Perce County Courthouse, P.O. Box 896, Lewiston, ID 83501

- Jessica Lorello and Kenneth Jorgensen, Deputy Attorneys General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010

- Clerk of the Supreme Court, P.O. Box 83720, Boise, ID 83720-0101

Dated this 26th day of August, 2015.

Dennis Benjamin

FILED

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PATTY O. WEEKS

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STACEY GROVE, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-12-01798 **ORDER APPOINTING STATE APPELLATE PUBLIC DEFENDER**

The Court, having considered Petitioner's motion for an order appointing the Office of the State Appellate Public Defender to represent him on appeal and good cause appearing, HEREBY ORDERS that Dennis Benjamin and Deborah Whipple of Nevin, Benjamin, McKay & Bartlett LLP are withdrawn as attorneys of record and hereby appoints the State Appellate Public Defender to represent Mr. Grove from the final order and judgment entered in this case on August 25, 2015.

DATED this 1st day of September 2015.

Hon. Carl Kerrick
District Judge

TO: Clerk of the Court
Idaho Supreme Court
P.O. Box 83720
Boise, ID 83720-0101

DOCKET NO. 43537

(Stacey Grove,
(
(vs.
(
(
(State of Idaho.

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on September 28, 2015, I, Nancy K. Towler, C.S.R., lodged an electronic transcript of 434 pages in length for the above-referenced appeal with the District Court Clerk of the County of Nez Perce in the Second Judicial District.

Included therein: Hearing, December 18, 2012;
Hearing, February 12, 2013;
Oral Argument, April 30, 2013;
Oral Argument, October 28, 2013;
Evidentiary Hearing, March 24-25, 2015; and
Oral Argument, May 29, 2015.

I also filed an electronic copy with the Supreme Court of the State of Idaho on the same date.

Nancy K. Towler
Nancy K. Towler, C.S.R. #623

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY GROVE, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	SUPREME COURT NO. 43537 CERTIFICATE OF EXHIBITS

I, Patty O. Weeks, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, do hereby certify that the following is a list of the exhibits offered or admitted and which have been lodged with the Supreme Court or retained as indicated.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Court this 10th day of November 2015.

PATTY O. WEEKS, Clerk

By _____ Deputy

CERTIFICATE OF EXHIBITS

Second Judicial District Court - Nez Perce County

Exhibit Summary

Case: CV-2012-0001798

Stacey Lewis Grove, Plaintiff vs State Of Idaho, Defendant

Sorted by Exhibit Number

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
1	State's exhibit #1 CD---sentencing exhibits ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault Lorello, Jessica M	- copy of disc sent	
2	Petitioner's exhibit A, B & C CD---contains all 3 exhibits and is attached to the Petition for Post Conviction Relief filed in CV12-1798 can not be returned because of being attached to petition. ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	IN FILE Benjamin, Dennis	- copy of disc sent	
3	Petitioner's exhibit D juror seating chart ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault-Large Chai Benjamin, Dennis	- Photograph included on disc	
4	Petitioner's exhibit E newspaper clipping St Joseph Recognizes Excellence--Ken Loetscher ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault Benjamin, Dennis	- Photo copy included on disc	
5	Petitioner's exhibit F Reichard Autopsy Report ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault Benjamin, Dennis	- Photo copy included on disc	
6	Petitioner's exhibit G CD---Dr. Arden powerpoint ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault Benjamin, Dennis	- copy of disc sent	
7	Petitioner's exhibit H letter to Judge Kerrick dated August 2008 ADMITTED AT EVIDENTIARY HEARING 3-24-15	Admitted Assigned to:	Exhibit Vault Benjamin, Dennis	- Photo copy included on disc	
8	Petitioner's exhibit I letter to Dan Spickler from Scott Chapman dated 4-23-08 ADMITTED AT EVIDENTIARY HEARING 3-25-15	Admitted Assigned to:	Exhibit Vault Benjamin, Dennis	- Photo copy included on disc	

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY GROVE, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	SUPREME COURT NO. 43537 CLERK'S CERTIFICATE

I, Patty O. Weeks, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That all documents, x-rays, charts, and pictures offered or admitted as exhibits in the above-entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record. The above exhibits will be retained

in the possession of the undersigned, as required by Rule 31 of the Idaho Appellate Rules.

2. That the following will be submitted as confidential exhibits to the record:

Affidavit of Dennis Benjamin-Exhibits B1, B2, B3, B4, B5, B6 filed December 10, 2012

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 10th day of November 2015.

PATTY O. WEEKS, Clerk

By _____
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACEY GROVE,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

SUPREME COURT NO. 43537

CERTIFICATE OF SERVICE

I, Patty O. Weeks, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the Clerk's Record and Reporter's Transcript were placed in the United States mail and addressed to Lawrence G. Wasden, Attorney General, P. O. Box 83720, Boise, Idaho 83720-0010 and Sara B. Thomas, SAPD, PO Box 2816, Boise, ID 83701 this 25th day of November, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 25th day of November, 2015.

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY EX OFFICIO AUDITOR AND RECORDER STATE OF IDAHO