

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 05 2007

Luis Hernandez. Sr.,)
)
Plaintiff/Appellant)
)
vs.)
)
State of North Dakota,)
)
Defendant/Appellee)

STATE OF NORTH DAKOTA

Supreme Court No. 200770051
Cass Co. No. 06-C-02338

APPEAL FROM THE DISTRICT COURT,
CASS COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page No.</u>
Table of Contents.....	ii
Table of Authorities.....	iii
Statement of the Issues.....	1
Statement of the Case.....	2
Statement of the Facts.....	4
Legal Argument.....	5
1. The District Court erred in its denial of the Plaintiff/Appellant's application for Post Conviction Relief based on the Ineffective assistance of counsel.....	5
a. Defense Counsel Improperly Objected to past sexual history.....	5
b. Defense counsel failed to object to hearsay testimony under Crawford....	7
c. Defense counsel should have called the called the alleged victim and her mother as witnesses.....	9
d. Defense counsel "opened the door" allowing past sexual conduct into evidence.....	9
e. Defense counsel failed to object to prosecutorial misconduct.....	10
f. Because counsel's representation fell below an objective standard of reasonableness, there is a reasonable probability that. but for counsel's unprofessional errors, the result of the proceeding would have been different.....	11
2. The District Court erroneously held that the Plaintiff/Appellant did not preserve a claim for prosecutorial misconduct.	12
Conclusion.....	14
Certificate of Compliance.....	17
Certificate of Service.....	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<u>Burns v. Gammon</u> , 260 F.3d 892 (8th Cir. 2001).	8,11,12,13
<u>Chapman v. California</u> , 386 U.S. 18. 24. 87 S.Ct. 824, 828, <u>reh'g denied</u> . 386 U.S. 987, 87 S.Ct. 1283 (1967).....	14
<u>City of Mandan v. Baer</u> , 1998 ND 101, 578 N.W.2d 559.....	15
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004).....	4,7,8,9,14
<u>Heckelsmiller v. State</u> , 2004 ND 191.687 N.W.2d 454.....	7,10,11
<u>Roe v. Delo</u> , 160 F.3d 416, 419 (8th Cir. 1998).....	12
<u>Sanchez v. State</u> 569 S.E.2d 363 (S.C. 2002).....	16
<u>State v. Hatch</u> , 346 N.W.2d 268,(N.D. 1984).....	14
<u>State v. Hernandez</u> 2005 ND 214, 707 N.W.2d 449.....	3
<u>State v. Micko</u> , 393 N.W.2d 741 (N.D. 1986).....	5
<u>State v. Patten</u> , 353 N.W.2d 30 (N.D. 1984).....	5
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	5,15
<u>United States v. Emmert</u> , 9 F.3d 699, 701-02 (8th Cir. 1993).....	12
<u>United States v. Hylton</u> 294 F.3d 130 (D.C.Cir. 2002).....	6

STATEMENT OF THE ISSUES

1. The District Court erred in its denial of the Plaintiff/Appellant's application for Post Conviction Relief based on the Ineffective assistance of counsel.
 - a. Defense Counsel Improperly Objected to past sexual history
 - b. Defense counsel failed to object to hearsay testimony under Crawford.
 - c. Defense counsel should have called the alleged victim and her mother as witnesses.
 - d. Defense counsel "opened the door" allowing past sexual conduct into evidence.
 - e. Defense counsel failed to object to prosecutorial misconduct.
 - f. Because counsel's representation fell below an objective standard of reasonableness, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
2. The District Court erroneously held that the Plaintiff/Appellant did not preserve a claim for prosecutorial misconduct.

STATEMENT OF THE CASE

This is a case wherein the Plaintiff/Appellant, Luis Hernandez Sr., (hereinafter referred to as Mr. Hernandez) was accused and ultimately convicted of a crime despite his continued assertion that he is innocent. Mr. Hernandez was accused, tried and convicted of Gross Sexual Imposition in Cass County District Court. Mr. Hernandez made a direct appeal of his conviction. This Court affirmed the conviction of Mr. Hernandez. Mr. Hernandez then made an application for post conviction relief claiming ineffective assistance of counsel and prosecutorial misconduct which was ultimately denied by the District Court. This is an appeal from the District Courts Memorandum Opinion and Order on Application for Post Conviction Relief. This Court's direct appeal summary is as follows:

State v. Henandez - 20050047

Case Summary

[¶¶1] Luis I. Hernandez, Sr., appeals from a judgment entered after a jury found him guilty of gross sexual imposition, and from an order denying his motions for a new trial. We hold the trial court did not abuse its discretion in allowing the State's handwriting expert to identify Hernandez as the author of a letter handwritten in Spanish, the court did not obviously err in permitting the jury to see an unredacted copy of an English translation of the letter, the court did not abuse its discretion in admitting testimony about Hernandez's prior sexual abuse of the complainant, and the court did not err in admitting testimony and a report that non-motile sperm was found in a swab taken from the complainant during an examination by an emergency room pediatrician. We affirm.

1

[¶¶2] The State charged Hernandez with gross sexual imposition under N.D.C.C. §§ 12.1-20-03 for allegedly engaging in a sexual act with the complainant, the twelve-year-old daughter of his former girlfriend. At trial, the State presented evidence that Hernandez picked up the complainant after school on May 22, 2003, and took her to a Fargo motel, where he engaged in sexual acts with her. The

complainant testified Hernandez ultimately drove her to her mother's home. where the complainant told her mother that Hernandez had raped her. The complainant's mother testified she found a letter handwritten in Spanish in the screen door of her house about a day or two after Hernandez was arrested. The letter was not addressed to a recipient and was not signed by its author. The State introduced an English translation of the letter, which stated "she went to the hotel with me and we had sex and that I didn't rape her" and "I don't deny that I got involved with her but she gave it to me voluntarily." The State also introduced expert testimony that identified Hernandez as the author of the handwritten letter.

[¶ 13] Hernandez claimed the complainant's mother manipulated her daughter to fabricate the prosecution against him. There was evidence that Hernandez and the complainant's mother had a stormy relationship over the previous ten years. They were never married, but they had a son together in 1994. According to Hernandez, the complainant's mother did not approve of his relationship with his current girlfriend, and in May 2003, his physical mobility was severely limited by a February 2003 automobile accident and a "halo" device he wore as part of his rehabilitation for a spinal cord injury. Hernandez testified he met his son, the complainant's mother, and the complainant at a Fargo motel on May 22, 2003. According to Hernandez, his son and the complainant went swimming in the motel pool, and the complainant's mother then tried to engage in sexual activity with him in the motel room. Hernandez testified the two children subsequently returned from swimming and then showered, and everyone left the motel together. He claimed he did not engage in any sexual activity with the complainant on May 22, 2003. A jury found Hernandez guilty of gross sexual imposition. The trial court denied Hernandez's motion and amended motion for a new trial. (See State v. Hernandez 2005 ND 214, 707 N.W.2d 449.

As previously stated this Court affirmed Mr. Hernandez's conviction and he subsequently filed a Petition for Post Conviction Relief. In addition to the petition for post conviction relief Mr. Hernandez filed several briefs, pro se, in support of his petition. An evidentiary hearing was held on November 11, 2006. Following the evidentiary hearing on his petition for post conviction relief the Hon. Judge Dawson ordered supplemental briefs, in lieu of closing arguments summarizing Mr. Hernandez's position. Mr. Hernandez filed his brief through counsel on November 29, 2006. The state filed their brief on December 7, 2006. On February 6, 2007 the District Court issued a Memorandum Opinion and Order on Application for Post Conviction Relief ultimately denying the relief requested by Mr. Hernandez. (App. 69-82)

STATEMENT OF THE FACTS

Mr. Hernandez was denied the effective assistance of counsel guaranteed all citizens of our country through the Sixth Amendment to the United States Constitution. Specifically counsel for Mr. Hernandez during his trial failed to object to the introduction of gonorrhea in the Prosecutions opening statement. (App. 4-5) Counsel improperly argued N.D.R.Ev.404(b) rather than the more relevant N.D.R.Ev.412 which would have effectively excluded all evidence of prior sexual conduct of the accused. (App.8-12) Counsel failed to request a continuance when the incubation period for gonorrhea was mentioned. (App. 4-5) Counsel failed to call the handwriting expert. (App.80) Counsel also failed to object to the destroying of the presumption of innocence. (App. 80) Counsel further failed to recall the alleged victim and her mother to cross examine them on the testimony entered pertaining to past sexual conduct thus failing to protect Mr. Hernandez's right to cross examination under Crawford v. Washington, 541 U.S. 36 (2004). Defense Counsel not only failed to make proper objections to the testimony regarding past sexual conduct under N.D.R.Ev.412, he essentially opened the door for the entry of such evidence. (App.8-12) Counsel unfortunately disregarded all testimony that was objectionable under Crawford during the direct examination of Dr. Jacob.

Mr. Hernandez's right to a fair trial was undermined by the misconduct of the prosecution. The Prosecution in this case disregarded N.D.R.Ev.412. The prosecution further destroyed the presumption of innocence and solicited improper testimony. Mr. Hernandez was erroneously denied these claims by the district court for failing to bring them up on appeal when in fact they were addressed on appeal through Mr. Hernandez's

discussion of ineffective assistance of counsel. (Ap.30-68).

LEGAL ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY DENIED MR. HERNANDEZ'S PETITION FOR POST CONVICTION RELIEF BASED ON THE INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has a right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. The Sixth Amendment is applied to the states through the Fourteenth Amendment, and by Article I, Section 12. of the North Dakota Constitution. As stated in Strickland v. Washington, 466 U.S. 668. 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), State v. Micko, 393 N.W.2d 741 (N.D. 1986), State v. Patten, 353 N.W.2d 30 (N.D. 1984), and in Ricehill and Wochlhoff. to establish ineffective assistance of counsel a defendant must show that Counsel's representation fell below an objective standard of reasonableness, that is representation was deficient, and that there is a reasonable probability that, but for Counsel's unprofessional errors, the result would have been different.

A. Counsel improperly objected to past sexual history.

Counsel failed to raise Rule 412 of the North Dakota Rules of Evidence when instances of past sexual history were brought up by prosecution. (T. 304) Counsel did file a motion in limine under Rule 404. N.D.R.Evid., which the Court granted. When alleged past instances of sexual conduct by the defendant were raised, Defense Counsel objected under the motion in limine, however, a more relevant objection was available under Rule 412. Under Rule 412 any evidence of past sexual conduct by the accused would have been absolutely barred unless the procedure found in the Rule had been followed.

N.D.R.Evid. 412(c).

**RULE 412. ADMISSIBILITY OF ALLEGED VICTIM'S SEXUAL
BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION IN
CRIMINAL PROCEEDING**

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions. In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) Procedure to Determine Admissibility.

- (1) A party intending to offer evidence under subdivision (b) must:
 - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
- (2) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Had counsel properly raised Rule 412, the Court would have had to sustain the objection because the procedure dictated by subsection (c) was not followed. Defense Counsel failed to hold the State to its burden. In United States v. Hylton 294 F.3d 130 (D.C.Cir. 2002), the Federal Court held that counsel's failure to object to testimony that

would have required a hearing, was ineffective assistance of counsel.

Counsel's failure to raise Kastigar was "simply inexcusable." *Id.* at 134. The court found that defense had nothing to lose in putting government to its burden and the possible benefit in excluding the co-conspirator testimony was significant. Prejudice found because the co-conspirator testimony greatly strengthened the government's case.

Defense Counsel's failure to object to the admission of alleged past sexual conduct under Rule 412 prevented an appeal on the issue. (T. 78)(App. 8). Heckelsmiller v. State. 2004 ND191 at ¶12.687N.W.2d454. In Heckelsmiller the North Dakota Supreme Court held that Counsel's failure to make an offer of proof regarding intended testimony prevented a meaningful appeal on the issue. Likewise, in the present case, Defense Counsel's failure to hold the State to its burden prevented a meaningful appeal. The transcript clearly indicates that Rule 404(b) was discussed with counsel in chambers, however Rule 412 was never raised by defense counsel. (T.78)(App.8). Similar to Defense Counsel's failure to object pursuant to Rule 412, Defense Counsel also failed to object under Crawford, 541 U.S. 36 (2004), and prevented a meaningful appeal on the issue.

The District Court failed to recognize the damage done by Defense counsel's improper objections and rather accepted the blatant error as acceptable trial strategy. (App.69-82). Defense counsels failure to object under the proper rule was fatal and inexcusable.

B. Counsel failed to object to hearsay testimony under Crawford.

Defense Counsel failed to object to hearsay testimony offered by Dr. Jacob regarding the alleged victim's sexual history. (T. 304)(App.26). Dr. Jacob testified about

hearsay statements she obtained from the alleged victim regarding past sexual conduct by the accused. (T. 273)(App.17). This hearsay testimony was admitted into evidence without a proper hearsay objection from Defense Counsel. (T. 304)(App.26)

Had Defense Counsel objected to this hearsay testimony under Crawford, 541 U.S. 36 (2004), Dr. Jacob's hearsay testimony would have been prevented. Crawford is an absolute bar to testimonial hearsay offered by the prosecution unless the defense has had a prior opportunity to cross-examine the individual originally making the statement and the individual is unavailable. Id.

The State would have been barred under Crawford from offering hearsay testimony by Dr. Jacob regarding the alleged victim's sexual history. At the time of Dr. Jacob's hearsay testimony, the defense had not had the opportunity to cross-examine the alleged victim because the state's direct examination of the alleged victim did not include instances of past sexual history, effectively barring any cross-examination of the alleged victim regarding sexual history. In addition the alleged victim was available for testimony regarding sexual history and the State could have attempted to introduce sexual history evidence through direct examination of the alleged victim. The result of the Defense Counsel's failure to object under Crawford resulted in damaging testimony regarding alleged sexual conduct of the accused and the alleged victim. As previously stated, this sexual history was also barred under Rule 412.

Defense Counsel's failure to object to Dr. Jacob's hearsay testimony under Crawford prevented a meaningful appeal of the issue as stated in Heckelsmiller. "No sound trial strategy could include failing to make a constitutional objection..." Burns v.

Gammon, 260 F.3d 892 (8th Cir. 2001).

Despite Mr. Hernandez's legitimate assertion of Defense counsels lack of objection under Crawford the district court mentions nothing of the Crawford issues in her memorandum opinion. This oversight is inexcusable and cause for in the least this court to remand to the District Court with a direction to address the ignored Crawford issues.

C. **Defense Counsel should have called the alleged victim and her mother as witnesses.**

Had the previous arguments not succeeded in preventing testimony alleging past sexual indiscretions by the accused, Defense Counsel should have insisted on calling the alleged victim and her mother. In Crawford the Supreme Court held that a defendant's right to confrontation guarantee's the right to have testimony put through the "crucible of cross examination." Id. Mr. Hernandez had a Constitutional right to meaningfully test the alleged victim's statements of past sexual misconduct with cross examination, a right that Defense Counsel failed to protect. The District court again gave more weight to Defense counsels testimony of strategy than to Mr. Hernandez's right to cross examine the witness.

D. **Defense Counsel "opened the door" allowing past sexual conduct into evidence.**

In spite of procuring a motion in limine to prevent evidence of past sexual conduct, Defense Counsel "opened the door" for testimony of past sexual conduct. On page 64 of the Trial Transcript, Defense Counsel asks the alleged victim a question regarding when she told her mother about the alleged misconduct; that question elicited

testimony of past sexual conduct. On page 288 of the Trial Transcript, Defense Counsel asked Dr. Jacob about the incubation period for Gonorrhea, further opening the door for testimony regarding past sexual conduct. At the post conviction relief evidentiary hearing, Defense Counsel testified that he understood that there was an incubation period for Gonorrhea. therefore any question regarding an incubation time would undoubtedly elicit testimony about past sexual conduct, thus further "opening the door." The bottom line is Defense Counsel, as the court indicated, opened the door for past sexual misconduct. there by depriving the defendant of his due process rights under the rules of evidence and the Sixth amendment to the United States Constitution.

E. Defense Counsel failed to object to prosecutorial misconduct.

The State continually attempted to circumvent the Rule 412 by introducing evidence of past sexual misconduct without a hearing. Defense Counsel's failure to object to the State's continuous effort to introduce past sexual misconduct prevented a meaningful appeal on the issue. Heckelsmiller v. State. at ¶12.

As soon as the prosecution began closing statements the prosecutor started referring to the victim and asking the jury to consider her plight and "what ought a 12 year-old girl to be thinking about." (T.816) The beginning of closing argument went on to align the Jury's sympathies with the alleged victim. (T.816) The prosecution. in rebuttal to the defense's closing argument, again aligns the Jury to the prosecution when the prosecutor states:

"When I grew up and went to school, I learned there were five physical senses. But I think that short changes us by one. The sixth sense, the one you all have and the one that I want to apply to what you have heard in this court room over the past week, is common sense. (T. 883).

During the improper comments by the prosecution, Defense Counsel failed to object. The Eighth Circuit stated "that improper comments made by the prosecutor during closing arguments were "constitutionally defective such that any reasonable counsel would have objected under the circumstances." Burns, 260 F.3d 892 (8th Cir. 2001).

F. Because counsel's representation fell below an objective standard of reasonableness, there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different.

Under the Strickland test, the petitioner has the burden of showing prejudice. The Strickland Court defined "prejudice" as the result of the proceeding would have been different. The Eighth Circuit has analyzed this issue and determined that counsel's failure to protect a constitutional right such as appeal or confrontation, constitutes prejudice. Burns, 260 F.3d 892 (8th Cir. 2001).

The North Dakota Supreme Court evaluated this issue in Heckelsmiller,^{¶12} and determined that the defendant was prejudiced when counsel failed to protect the record in order to have a constitutionally guaranteed appeal. The Eighth Circuit holds a similar position as stated in Burns, holding that counsel's failure to object to prosecutor's improper statements and protect the defendant's right to confrontation resulted in an ineffective appeal.

In not making the constitutional objection, Burns' counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment, Strickland, 466 U.S. at 687, and Burns can establish deficient performance.

Burns can also establish prejudice, both at trial and later on appeal. At trial, the failure of trial counsel to elicit a cautionary instruction from the judge allowed the jury to consider counsel's argument without riposte. A cautionary instruction would have lessened, if not eliminated, the prejudice to Burns. See, e.g., *United States v. Emmert*, 9 F.3d 699, 701-02 (8th Cir. 1993) (defendant not prejudiced by improper prosecutorial comment on witness veracity during closing argument where district court gave appropriate cautionary instructions).

Further, trial counsel's failure to make a constitutional argument concerning the prosecutor's remarks started a chain reaction of burdensome review by the Missouri appellate courts and this court. *Combs*, 205 F.3d at 286. Because trial counsel did not make the constitutional objection, the Missouri Court of Appeals and this court reviewed the prosecutorial misconduct claim only for plain error to determine whether the comments had "a decisive effect" on the outcome of the trial. *State v. Burns*, 759 S.W.2d 288, 294 (Mo. Ct. App. 1988); *Burns I*, 173 F.3d at 1096. Plain error review is much more onerous for both the direct appeal defendant and the habeas corpus petitioner than is review for a defendant or petitioner pursuing a properly preserved prosecutorial misconduct claim. See *Roe v. Delo*, 160 F.3d 416, 419 (8th Cir. 1998) (courts recognize "more rigorous" plain error standard is appropriate where federal constitutional error has not been properly preserved). Counsel's performance thus prejudiced Burns at trial, on direct appeal, and on collateral review. But for counsel's unprofessional errors, the result of either the trial or the later appeals would likely have been different, and Burns can therefore establish that counsel's deficient performance prejudiced his defense. *Pryor*, 103 F.3d at 713.

Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001).

II. THE DISTRICT COURT ERRONEOUSLY HELD THAT MR. HERNANDEZ DID NOT PRESERVE A CLAIM FOR PROSECUTORIAL MISCONDUCT.

The District court stated in its memorandum opinion that Mr. Hernandez did not raise any prosecutorial misconduct issues to the North Dakota Supreme Court in his direct appeal when in fact he made several references to misconduct of the prosecution in his appellate brief. (App. 30-68) In his appellate brief Mr. Hernandez makes the

following statements: “However, the state *purposely* raised the issue by asking the treating physician:” (App.36)(emphasis added). “The *state stepped blatantly* through the trial judges bar on presenting prior uncharged conduct by raising the gonorrhea issue.”(App.36)(emphasis added). “The state permitted the destruction of potentially exculpatory evidence.” (App.57) Throughout Mr. Hernandez’s appellant brief he discusses the states conduct and introduction of evidence that should not have been allowed. The District court erred by not addressing the issue of prosecutorial misconduct.

The Prosecution made improper prosecutorial comments and elicited inadmissible testimony and additionally the prosecution destroyed Mr. Hernandez’s Constitutional right to the presumption of innocence.

A defendant is presumed innocent until found by you otherwise. I want to give you an example of what that means. If I picked up a pitcher of water and I went back to the bailiff at the end of the room, in front of all of you, and I bashed him on the head with that bottle of water, I’m presumed innocent.

(T. 838).

This statement destroys Mr. Hernandez’s Constitutional right to the presumption of innocence by demonstrating an accused is actually guilty of the charge. Defense Counsel did not object to this statement and under Burns v. Gammon 260 F.3d 892 (8th Cir. 2001) this is Prosecutorial Misconduct.

CONCLUSION

This case is not the usual post conviction relief petition. As demonstrated from the record, there were serious Constitutional rights that were not protected by Defense Counsel. By the trial courts own ruling, Defense Counsel "opened the door" for past sexual conduct to be admitted. Upon "opening the door," Defense Counsel failed to preserve Mr. Hernandez's right to confrontation as guaranteed by the Sixth Amendment and reinforced by the United States Supreme Court in Crawford, six months prior to trial.

Defense Counsel's failure to object to this Constitutional violation means that a proper record for a meaningful appeal was denied. Had counsel correctly objected to hearsay testimony from Dr. Jacob, regarding sexual history, the court would have either allowed the testimony or barred the testimony, either way Counsel would have preserved an appeal on the issue. Had Defense Counsel preserved the Crawford hearsay issues for appeal, it would be nearly impossible for the appellate Court to uphold the conviction. The North Dakota Supreme Court would have to find this constitutional violation was harmless beyond a reasonable doubt.

[¶10] ... "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24. 87 S.Ct. 824, 828. reh'g denied. 386 U.S. 987. 87 S.Ct. 1283 (1967) (holding a reviewing court must declare error harmless beyond a reasonable doubt before a federal constitutional error can be held harmless). See also Ash, 526 N.W.2d at 481; State v. Hatch, 346 N.W.2d 268, 278 (N.D. 1984) (stating error is harmless "where it can be determined beyond a reasonable doubt that [the] substantial rights of the defendant are not affected . . .").

City of Mandan v. Baer, 1998 ND 101, 578 N.W.2d 559

In the present case, the substantial rights of Mr. Hernandez were affected by Defense Counsel's failure to object under Crawford. Mr. Hernandez had the constitutional right to put the alleged victim's allegations through the "crucible of cross examination." Defense Counsel's errors of allowing hearsay testimony of past sexual misconduct were clearly not harmless beyond a reasonable doubt. This testimony substantially bolstered the alleged victim's case. This testimony was untested by the rules of cross examination and the rules dictated by the North Dakota Rules of Criminal Procedure. Evidence of past sexual misconduct is so disruptive to a trial that Rule 412 bars such evidence without a separate hearing.

Defense Counsel failed to object under Rule 412 when instances of past sexual misconduct were alleged, starting with the prosecutors opening statement and concluding with the prosecutors closing statements. The prosecution continually tried to present testimony about past sexual misconduct and Defense Counsel failed to exclude this testimony. Defense Counsel failed to protect the presumption of innocence. Defense Counsel failed to protect the record for appeal.

Under Strickland, 466 U.S. 668 Defense Counsel's performance (1) fell below a reasonable standard by not protecting the procedural rights of the defendant under Rule 412 nor protecting his Constitutional rights under the Sixth Amendment. (2) Mr. Hernandez was prejudiced by Defense Counsel's inaction because testimony bolstering a largely "he said, she said" trial was allowed into evidence. The Capital Defense Network

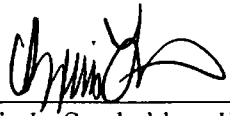
(CDN) summarized this concept by discussing a decision by the South Carolina Supreme Court.

Counsel ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony. The six year old alleged victim testified about the alleged assault. Her mother and father also testified and included hearsay statements from the victim concerning details of the assault and the identity of the perpetrator. Counsel testified that he did not object to this hearsay because it did not alter the victim's testimony and that some of the statements were different. Counsel's conduct was deficient because while limited corroborative testimony is allowed in criminal sexual conduct cases the corroborative evidence is limited to the time and place of the assault and can not include details or particulars or the identity of the perpetrator. Thus, the mother's and father's testimony was clearly inadmissible. Prejudice found because improper corroboration testimony that is cumulative to the victims testimony cannot be harmless. "[I]t is precisely this cumulative fact which enhances the devastating impact of improper corroboration." Counsel's conduct was also deficient in failing to object to the testimony of a police officer concerning the alleged victim's statement and actions with anatomically correct dolls. Counsel's alleged strategy to allow this testimony was to show that the victim's statements were vague. "Because the officer's testimony regarding the dolls corroborated the victim's testimony at trial, counsel's strategy was not reasonable given to the judicial effect this testimony had."

Sanchez v. State 569 S.E.2d 363 (S.C. 2002).

The District court erred in denying Mr. Hernandez's Petition for Post Conviction Relief based on ineffective assistance of counsel. There is simply no explanation or trial strategy that accounts for the Defense Counsel's deficiencies in this trial. The District Court should have considered Mr. Hernandez's claim of prosecutorial misconduct. As such, Mr. Hernandez asks this Court to reverse and remand to the District court instructing the Court to consider prosecutorial misconduct and granting him a new trial.

Dated this 4th day of April, 2007

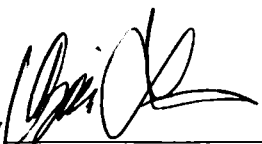
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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Plaintiff/Appellee. and Cross Appellant, in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, including words in the table of contents, table of authorities. signature block, certificate of service and certificate of compliance totals 5.057.

Dated this 4th day of April, 2007


By 

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CERTIFICATE OF SERVICE

I do hereby Certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was on the 5th day of April, 2007. delivered by U.S. Postal Service to:

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Courthouse
P.O. Box 2806
Fargo N.D. 58108-2806

By 

Bonnie L. Storbakken