

7-18-2008

# Cooke v. State Appellant's Brief 2 Dckt. 32447

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Cooke v. State Appellant's Brief 2 Dckt. 32447" (2008). *Idaho Supreme Court Records & Briefs*. 91.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/91](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/91)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

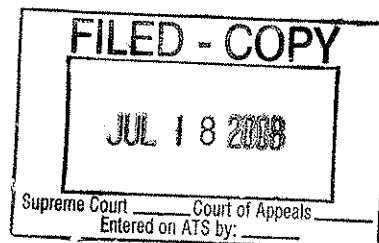
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 MAX RITCHIE COOKE, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

NOS. 32447 & 34820

APPELLANT'S BRIEF

\_\_\_\_\_  
**BRIEF OF APPELLANT**  
\_\_\_\_\_



\_\_\_\_\_  
**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**  
\_\_\_\_\_

**HONORABLE MICHAEL R. MCLAUGHLIN**  
District Judge  
\_\_\_\_\_

**MOLLY J. HUSKEY**  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

**SARA B. THOMAS**  
Chief, Appellate Unit  
I.S.B. # 5867

**SARAH E. TOMPKINS**  
Deputy State Appellate Public Defender  
I.S.B. # 7901  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEY FOR  
PLAINTIFF-RESPONDENT**

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	3
Trial .....	6
Post-Conviction .....	10
ISSUES PRESENTED ON APPEAL.....	16
ARGUMENT.....	17
I. The District Court At Trial Abused Its Discretion When It Permitted The State To Introduce Several Of Mr. Cooke's Prior Statements Into Evidence Despite The Fact That The Prejudice Of These Prior Bad Acts Substantially Outweighs Any Possible Probative Value Of This Evidence .....	17
II. The Prosecutor Committed Misconduct And Sought To Inflame The Passions And Prejudice Of The Jury Against Mr. Cooke When The State Argued Evidence Of Mr. Cooke's Prior Bad Acts As Demonstrating His Propensity To Commit The Crimes That He Was Accused Of In This Case.....	24
III. The Cumulative Effect Of The District Court's Error In Admitting The Prior Bad Acts Evidence And Of The Prosecutor's Improper Argument Regarding This Evidence Require Reversal Of Mr. Cooke's Convictions.....	27
IV. The District Court In Post-Conviction Misapprehended The Relevant Standard For Competence And Made Factual Findings Not Supported By Substantial Evidence When The Court Found That Ms. Cooke Was Competent To Testify At Trial And That Mr. Cooke Had Not Received Ineffective Assistance Of Counsel.....	28
A. Standard Of Review.....	28

B. The District Court Abused Its Discretion When It Ruled That Ms. Cooke’s Affidavit In Support Of Mr. Cooke’s Post-Conviction Petition Was Not Admissible Evidence .....	29
C. The District Court Erred When It Determined That Mr. Cooke Had Not Established That Ms. Cooke Was Not Competent To Be A Witness At His Trial.....	30
D. The District Court Erred When It Determined That Mr. Cooke Had Not Established That He Had Received Ineffective Assistance Of Counsel Based On The Failure Of His Trial Counsel To Seek To Have Ms. Cooke Excluded As A Witness Based On Her Lack Of Competency And On The Failure Of His Trial Counsel To Adequately Cross-Examine Ms. Cooke On Her Medical Records Demonstrating A Lack Of Competency .....	34
CONCLUSION .....	38
CERTIFICATE OF MAILING.....	39

## TABLE OF AUTHORITIES

### Cases

<i>Commonwealth v. Delbridge</i> , 855 A.2d 27 (Pa. 2003) .....	31
<i>Dunlap v. State</i> , 141 Idaho 50, 106 P.3d 376 (2004) .....	29
<i>English v. State</i> , 982 P.2d 139 (Wyo. 1999) .....	31
<i>State v. Cannady</i> , 137 Idaho 67, 44 P.3d 1122 (2002) .....	18
<i>State v. Cook</i> , 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007) .....	28
<i>State v. Ellsworth</i> , 709 A.2d 768 (N.H. 1998).....	21
<i>State v. Giles</i> , 115 Idaho 984, 772 P.2d 191 (1989) .....	32
<i>State v. Griffith</i> , 144 Idaho 356, 161 P.3d 675 (Ct. App. 2007).....	30
<i>State v. Iwakiri</i> , 106 Idaho 618, 682 P.2d 571 (1984) .....	30
<i>State v. Lilly</i> , 142 Idaho 70, 122 P.3d 1170 (Ct. App. 2005) .....	23, 37
<i>State v. Needs</i> , 99 Idaho 883, 591 P.2d 130 (1979) .....	22
<i>State v. Parrott</i> , 117 Idaho 272, 787 P.2d 258 (1990).....	35
<i>State v. Pole</i> , 139 Idaho 370, 79 P.3d 729 (Ct. App. 2003) .....	22
<i>State v. Sheahan</i> , 139 Idaho 267, 77 P.3d 956 (2003) .....	17
<i>State v. Stoddard</i> , 105 Idaho 533, 670 P.2d 1318 (Ct. App. 1983) .....	18
<i>State v. Tapia</i> , 127 Idaho 249, 899 P.2d 959 (1995).....	18
<i>Straub v. Smith</i> , 145 Idaho 65, 175 P.3d 754 (2007) .....	19
<i>U.S. v. U.S. Gypsum Co.</i> , 333 U.S. 364 (1948) .....	29

Statutes

I.C. § 18-4501(1).....22

I.C. § 19-4907 .....29

I.C. 18-903(c) .....22

Other Authorities

Point I.....36

Point IV (C) .....36

## STATEMENT OF THE CASE

### Nature of the Case

Supreme Court Case No. 32447, district court case number SP-OT-04-770D, (*hereinafter*, 32447) and Supreme Court Case No. 34820, district court case number H-03-279, (*hereinafter*, 34820) have been consolidated for appellate purposes. In 34820, Max Cooke was convicted of second degree kidnapping, aggravated battery, and assault, and appeals the judgment of conviction and his sentences for this offense. In 32447, Mr. Cooke filed a post-conviction action arising from his judgment of conviction in 34820.

Mr. Cooke was convicted by jury verdict of second degree kidnapping, aggravated battery, and assault. He received a unified sentence of 25 years, with 12 years fixed, for his conviction of second degree kidnapping; a sentence of 15 years, with 7 years fixed, for his conviction of aggravated battery; and a sentence of 90 days, with credit for 90 days served, for his conviction of assault.

Mr. Cooke filed a petition for post-conviction relief in which he alleged that he received ineffective assistance of counsel because his trial counsel failed to timely file a notice of appeal in his case. He further asserted that newly discovered evidence regarding Alison Cooke's<sup>1</sup> competence as a witness should have been discovered by his trial counsel and used during cross-examination, and that this newly discovered

---

<sup>1</sup> Alison Cooke is the alleged victim in this case. This Court may wish to note that Ms. Cooke appears to have gone by the name Alison Archuleta as of the date of Mr. Cooke's post-conviction evidentiary hearing. (9/26/07 Tr., p.32, L.23 – p.33, L.5.) However, because she is referred to as Alison Cooke throughout the remaining proceedings in this case, for ease of reference, she will be referred to as Ms. Cooke in this brief.

evidence on its own justified the vacation of Mr. Cooke's conviction and sentence in the interests of justice.

The district court originally summarily dismissed Mr. Cooke's post-conviction petition. On appeal, the State asked the Supreme Court to remand the case to the district court for a hearing and the Supreme Court granted the State's motion to remand the case. Upon remand, the district court found that Mr. Cooke had timely requested that his trial counsel file a notice of appeal, and that his trial counsel was ineffective for not doing so. Therefore, the district court vacated its prior judgment of conviction and re-entered an amended judgment of conviction so that Mr. Cooke could file his appeal. However, the district court found that Mr. Cooke had not established ineffective assistance of counsel, or that he was entitled to a new trial, based on the evidence and arguments presented regarding Ms. Cooke's competence.

On appeal in 34820, Mr. Cooke asserts that the district court at trial abused its discretion when, upon a 404(b) hearing, it permitted the State to introduce evidence of prior bad acts in the form of prior alleged threats made by Mr. Cooke that occurred over a period of several months prior to the actions resulting in the charges at issue in this appeal. Specifically, he asserts that the district court abused its discretion when it determined that the probative value of these statements was not substantially outweighed by the prejudice to the defendant.

Mr. Cooke also asserts that the prosecutor committed misconduct by arguing this evidence during closing arguments as proof of Mr. Cooke's criminal and character propensities; and that the cumulative effect of the erroneous admission of this evidence



and the prosecutor's improper arguments regarding this evidence deprived him of a fair trial.

Further, in 32447, Mr. Cooke asserts that the district court erred when it concluded that Mr. Cooke did not receive ineffective assistance of counsel, and was not entitled to a new trial, based on information regarding Ms. Cooke's competency as a witness. Specifically, the district court misapprehended the relevant standard for competence and made factual findings not supported by substantial evidence when the court found that Ms. Cooke was competent to testify at trial and that Mr. Cooke had not received ineffective assistance of counsel.

#### Statement of the Facts and Course of Proceedings

In late 2002 and January of 2003, Max Cooke and his then wife, Alison Cooke, were experiencing marital difficulties and were in the process of separation. (34820 Tr.<sup>2</sup>, p.316, Ls.7-19.) Mr. Cooke believed that his wife was being unfaithful, and had expressed this opinion to several people, including members of Ms. Cooke's family. (34820 Tr., 6.65, Ls.3-5; p.114, L.22 – p.115, L.1.) Mr. Cooke was often very angry when he made these remarks. (34820 Tr., p.115, Ls.2-5.)

During this period of intermittent separation, Ms. Cooke would frequently stay with her brother, Andrew Wanacott. (34820 Tr., p.68, L.18 – p.69, L.4.) Ms. Cooke was staying with her brother on the evening of January 17, 2003, and had decided on that evening to go out with some friends. (84820 Tr., p.73, Ls.17-25.) Mr. Cooke repeatedly

---

<sup>2</sup> Because there are multiple volumes of transcripts in this consolidated appeal, for ease of reference, citations to the transcript will be made either in reference to the Supreme Court case number for the transcript or to the date on which the transcribed hearing was held.

called Mr. Wanacott in an attempt to locate Ms. Cooke. (34820 Tr., p.74, Ls.1-8.) He also called Shane McCubbins, a friend of the Cooke's and the man with whom Mr. Cooke apparently thought Ms. Cooke was having an affair. (34820 Tr., p.296, L.13 – p.298, L.4.) Mr. Cooke's truck was seen parked one block from Mr. Wanacott's home that evening. (34820 Tr., p.84, Ls.8-17.)

When Ms. Cooke returned to her brother's home, she saw Mr. Cooke approach her truck. (34820 Tr., p.339, L.23 – p.340, L.7.) Mr. Cooke angrily confronted Ms. Cooke and got in her truck. (34820, P.340, L.8 – p.341, L.1.) The two then fought for Ms. Cooke's keys. (34820 Tr., p.341, Ls.1-6.) Mr. Cooke asserted that he did not want Ms. Cooke to drive because she had been drinking. (34820 Tr., p.413, L.12 – p.414, L.20.) He eventually got the keys to the truck and drove off with Ms. Cooke still inside the vehicle. (34820 Tr., p.341, Ls.7-10.)

During this time, Ms. Cooke stated that she attempted to get out of the truck while it was still moving, but Mr. Cooke kept locking the doors and physically resisted her efforts. (34820 Tr., p.341, L.11 – p.343, L.1.) He was also driving erratically and at a high rate of speed. (34820 Tr., p.342, L.8 – p.343, L.1.)

While Mr. Cooke was driving, the truck veered off the road, over a small wire fence, and through a field; eventually colliding with a large tree. (34820 Tr., p.180, L.10 – p.181, L.5.) Mr. Cooke testified that he left the road after he and Ms. Cooke were both reaching for her purse in the truck. (34820 Tr., p.417, L.20 – p.419, L.5.) An accident investigator testified that the tire marks over the field indicated that the truck may have, at one point, accelerated based on the fact that some of the soil on the tracks was "churned up." (34820 Tr., p.224, Ls.13-24.) He further testified that, based

on the estimated speed at the time the truck left the road, the driver would require between 280 and 700 feet in order to stop the vehicle. (34820 Tr., p.222, L.4 – 223, L.16.) According to Mr. Cooke, it was only a couple of seconds between the time the truck left the road and when it hit the tree. (34820 Tr., p.421, Ls.9-23.)

After the accident, Mr. Cooke called emergency services seeking medical assistance for himself and his wife. (34820 Tr., p.423, L.24 – p.425, L.8.) He also approached an adjacent home and asked one of the people living there to tell emergency services the address. (34820 Tr., p.148, L.14 – p.149, L.9.)

When law enforcement arrived on the scene, they questioned Mr. Cooke regarding the collision. (34820 Tr., p.160, Ls.6-18; p.162, L.19 – p.164, L.2.) Mr. Cooke initially gave inconsistent responses as to whether he or Ms. Cooke was driving the truck. (34820 Tr., p.251, L.19 – p.252, L.9.) He also claimed that the collision with the tree was the result of an argument between himself and Ms. Cooke during which she grabbed the steering wheel and pulled it. (34820 Tr., p.163, Ls.21-24.) Upon examining the road, police were unable to locate any marks that indicated that Ms. Cooke had grabbed the wheel and pulled it towards her to the right prior to the truck leaving the road. (34820 Tr., p.179, L.6 – p.180, L.3.) However, at least one officer acknowledged the possibility that Ms. Cooke could have yanked the steering wheel to the left. (34820 Tr., p.199, Ls.5-11.)

As a result of the collision, Ms. Cooke was unconscious for several days and had severe memory problems. (34820 Tr., p.76, L.16 – p.77, L.3.) She also underwent several surgeries for injuries to her head and leg, and suffered from extensive bruising on her body. (34820 Tr., p.78, L.19 – p.83, L.24.) Ms. Cooke also reported that

Mr. Cooke attempted to rape her at one point during the course of events occurring on the early morning hours of January 18, 2003. (34820 Tr., p.343, L.18 – p.347, L.3.)

### Trial

The State charged Mr. Cooke with first degree kidnapping, aggravated battery, and assault with intent to commit rape. (30187 R.<sup>3</sup>, pp.25-26.) In preparation for trial, the State filed a brief in support of the use of evidence of other crimes, wrongs, or acts pursuant to Idaho Criminal Rule 404(b) (*hereinafter*, Rule 404(b)). (34820 R., pp.13-18.) Specifically, the State indicated that it intended to introduce several threatening statements that Mr. Cooke was alleged to have made towards his wife and himself. (34820 R., pp.13-18.) The district court decided to admit all of the past statements Mr. Cooke had made to or regarding his wife, despite the fact that the district court did not know how many statements the State intended to introduce and despite the fact that some of these statements occurred as long as several weeks prior to the alleged incidents. (34820 Tr., p.12, L.12 – p.13, L.8.) The district court did so based on the conclusion that this information was relevant to show Mr. Cooke's intent. (34820 Tr., p.12, Ls.16-25.)

The State presented numerous witnesses that testified to past incidents in which Mr. Cooke was alleged to have made threats against Ms. Cooke. (34820

---

<sup>3</sup> Because there are multiple volumes of clerk's records on appeal in this consolidated appeal, citations to the clerk's record will be made with reference to the Supreme Court case number of the clerk's record. Additionally, the Supreme Court issued an order taking judicial notice of the Reporter's Transcript and Clerk's Record filed in Mr. Cooke's prior appeal in Supreme Court Case No. 30187. (34820 R., p.3.)

Tr., *generally*.) This included testimony from Ms. Cooke, along with her brother, her sister, and others. (34820 Tr., p.62, L.21 – p.127, L.14.)

Ms. Cooke testified about several incidents and statements that spanned a period of over seven weeks prior to the date that Mr. Cooke was alleged to have committed the offenses at issue in this appeal. (34820 Tr., p.319, L.19 – p.337, L.5.) These included personal threats against Ms. Cooke and threats to himself. (34820 Tr., p.319, L.19 – p.337, L.5.)

Ms. Cooke's brother, Andrew Wanacott, testified to incidents spanning several weeks prior to the alleged kidnapping, battery, and assault. (34820 Tr., p.62, L.21 – p.106, L.9.) He related that on Thanksgiving Day of 2002, he spoke to Mr. Cooke on the phone. (34820 Tr., p.63, L.21 – p.66, L.21.) During this phone conversation, Mr. Cooke accused Ms. Cooke of having an affair, and could be heard calling her offensive names. (34820 Tr., p.63, L.21 – p.66, L.21.) Counsel for Mr. Cooke objected to this line of questioning because it was irrelevant to the charges at issue, but the district court overruled this objection and permitted Mr. Wanacott to continue testifying about events that occurred seven weeks prior to January 17, 2003. (34820 Tr., p.66, L.25 – p.68, L.17.) Mr. Wanacott also related similar incidents during the later half of December 2002 and those occurring on the evening of January 17 and the early morning hours of January 18, 2003. (34820 Tr., p.68, L.18 – p.75, L.12.)

Christine Heavin, Ms. Cooke's sister, similarly testified about prior incidents between Mr. Cooke and Ms. Cooke over the course of several weeks. (34820 Tr., p.111, L.1 – p.120, L.10.) In particular, Ms. Heavin discussed statements allegedly made by Mr. Cooke seven weeks prior and over one month prior to the alleged

incidents at issue in his criminal trial. (34820 Tr., p.112, L.1 – p.117, L.5.) A neighbor of Mr. and Ms. Cooke also testified about threats Mr. Cooke made against himself and others. (34820 Tr., p.123, L.18 – p.127, L.20.) As with the testimony of Ms. Heavin, all of the threats that the neighbor alleged that Mr. Cooke had made occurred several weeks prior to the charges at issue in his trial. (34820 Tr., p.123, L.18 – p.127, L.20.)

Similarly, a friend and neighbor of Mr. and Ms. Cooke, Kathy Bosserman, testified regarding phone messages from Mr. Cooke that Ms. Cooke played for her in late November of 2002. (34820 Tr., p.271, L.12 – p.276, L.11.) This was also in the same time frame as the other witnesses who testified regarding Mr. Cooke's prior threats – approximately seven weeks before the alleged crimes at issue in this case. Ms. Bosserman also testified as to other threats that Mr. Cooke made to himself and to Ms. Cooke in the middle of December. (34820 Tr., p.276, L.16 – p.280, L.4.)

Finally, Mr. McCubbins also testified about Mr. Cooke's past statements. (34820 Tr., p.292, L.19 – p.296, L.1.) Although some of this testimony encompassed threats that Mr. Cooke allegedly made the night of the accident, other statements dated back several weeks. (34820 Tr., p.295, L.8 – p.298, L.4.)

Mr. Cooke testified at trial and denied that he had made the prior threats against Ms. Cooke. (34820 Tr., p.395, L.23 – p.396, L.9.) The State's cross-examination of Mr. Cooke focused heavily on these alleged past threats. (34820 Tr., p.430, L.18 – p.432, L.12.) The State also argued that these past threats were the type of statement one would say "to people that you hate, that you try and hurt [sic];" that these threats demonstrated that Mr. Cooke had a violent temper, and that they demonstrated that

Mr. Cooke's alleged crimes were the product of him carrying out his earlier threats. (34820 Tr., p.500, L.18 – p.505, L.24.)

The jury acquitted Mr. Cooke of first degree kidnapping and assault with intent to commit rape, but convicted him of second degree kidnapping, aggravated battery, and assault. (30187 R., pp.39-40.) Notably, the jury was instructed that in order to convict Mr. Cooke of kidnapping in the first degree, rather than kidnapping in the second degree, the jury had to specifically find that the "kidnapping was committed for the purpose of committing serious bodily injury and/or rape upon the person kidnapped." (34820 Tr., p.482, Ls.12-19; 34820 R., p.50.) The district court also instructed the jury that, in order to find Mr. Cooke guilty of assault with intent to commit rape, the jury was required to find that Mr. Cooke committed an assault upon Ms. Cooke with the intent to commit rape. (34820 Tr., p.485, Ls.3-8; 34820 R., p.57.) The court then instructed the jury that if they did not find that Mr. Cooke had committed assault with intent to commit rape, they were required to then deliberate as to whether Mr. Cooke had committed simple assault. (34820 Tr., p.485, Ls.21-25; 84820 R., p.59.) The jury rejected the charges of both first degree kidnapping and assault with intent to commit rape and instead found Mr. Cooke guilty of the lesser included offenses of second degree kidnapping and assault. (30187 R., pp.39-40.)

The district court imposed Mr. Cooke a unified sentence of 25 years, with 12 years fixed, for his conviction of second degree kidnapping; and to 15 years, with seven years fixed, for his conviction of aggravated battery. (34820 R., pp.80-82.) The district court ordered these sentences to run concurrently. (34820 R., pp.80-82.) Mr. Cooke

was also sentenced to 90 days, with credit for 90 days served, for his conviction for assault. (34820 R., pp.80-82.)

### Post-Conviction

Mr. Cooke timely filed a petition for post-conviction relief with the district court in which he asserted that he received ineffective assistance of counsel. (30187 R., p.62-65; 32447 R., pp.11-15.) Specifically, Mr. Cooke asserted that his trial counsel (1) failed to hire an accident reconstructionist as promised, despite the fact that Mr. Cooke had paid trial counsel a substantial sum to do so; (2) failed to obtain Ms. Cooke's medical records that demonstrated that she suffered from memory loss, and that the failure to do so prevented trial counsel from successfully excluding Ms. Cooke's testimony or from adequately cross-examining her; (3) failed to communicate with Mr. Cooke prior to trial; (4) failed to investigate witnesses who could have testified on Mr. Cooke's behalf; (5) failed to provide Mr. Cooke with materials obtained through discovery and consult with Mr. Cooke regarding those materials; (6) failed to consult with Mr. Cooke regarding the Presentence Investigation Report (*hereinafter*, PSI) and failed to seek to correct errors contained within this report; and (7) that trial counsel failed to file a timely notice of appeal of Mr. Cooke's judgment of conviction, despite the fact that Mr. Cooke had requested that trial counsel do so. (32447 R., pp.16-19.)

In response, the State requested that the district court dismiss the petition because Mr. Cooke had not presented a genuine issue of material fact in support of his claims and had not otherwise demonstrated that he had received ineffective assistance from his trial counsel. (32447 R., pp.34-38.) The State also supplemented its response to Mr. Cooke's petition with an affidavit from Mr. Cooke's trial counsel disputing



Mr. Cooke's allegations. (32447 R., pp.39-41.) The district court granted the State's motion to dismiss, but granted Mr. Cooke leave to file an amended petition for post-conviction relief. (32447 Tr., pp.45-46.)

In his amended petition for post-conviction relief, Mr. Cooke limited his claims of ineffective assistance of counsel to the failure of trial counsel to timely file an appeal of Mr. Cooke's judgment of conviction and that trial counsel failed to effectively investigate evidence regarding Ms. Cooke's lack of competence as a witness and to cross-examine Ms. Cooke in light of evidence that she was not a competent witness. (32447 R., pp.47-49.) He further claimed that there was evidence of material facts that were not previously presented or heard at trial that demonstrate that Ms. Cooke was not a competent and reliable witness, and that this evidence required vacation of Mr. Cooke's conviction and sentence in the interests of justice. (32447 R., pp.47-49.) In support of his amended petition, Mr. Cooke attached an affidavit from Ms. Cooke in which she averred that, according to her best recollection, she was never kidnapped by Mr. Cooke and that the collision with the tree was an accident. (32447 R., pp.54-58.) She further averred that she was induced to testify against her will, had no memory of her testimony at trial, and did not believe that she was a competent witness. (32447 Tr., pp.54-57.)

In addition, Mr. Cooke also attached one of Ms. Cooke's medical records, which Ms. Cooke verified as accurate. (32447 R., pp.55, 59-61.) The medical records specifically indicated the treating physician's opinion that Ms. Cooke suffered from "very severe problems with confusion, disorientation, and severe memory impairments," and that she was still in a state of "posttraumatic amnesia." (32447 R., p.60.) The report went on to conclude:

I do not believe that the patient is competent or even appropriate for a police or forensic evaluation or interview at this time. She does not have any recall of events leading up to the accident and is still very much in posttraumatic amnesia. My impression is that **her information will likely be misleading and she is at risk for developing new memories or false memories rather than accurately recalling what happened prior to the impact.**

(32447 R., p.60) (emphasis added.)

The State again moved to dismiss Mr. Cooke's amended post-conviction petition. (32447 R., pp.71-74.) The district court granted this motion and summarily dismissed Mr. Cooke's post-conviction petition without holding an evidentiary hearing on the underlying merits of Mr. Cooke's claims. (32447 R., pp.85-88.)

Mr. Cooke appealed the district court's dismissal of his post-conviction petition. (32447 R., pp.89-91.) Upon the filing of Mr. Cooke's Appellant's Brief, the State filed a motion with the Supreme Court to remand Mr. Cooke's case to the district court for reconsideration of the two claims of Ms. Cooke's competency and an evidentiary hearing on Mr. Cooke's claim that his attorney was ineffective for failing to timely file a notice of appeal. (*See generally* Motion for Remand and Statement in Support Thereof, filed December 28, 2006.) The Supreme Court granted this motion and remanded Mr. Cooke's case to the district court. (Order Granting Motion for Remand, dated February 2, 2007.)

The district court held an evidentiary hearing on Mr. Cooke's post-conviction claims. (*See generally* 9/26/07 Tr.) At that hearing, Mr. Cooke discussed his conversations with trial counsel regarding the issue of Ms. Cooke's competency to testify. (9/26/07 Tr., p.8, Ls.6-22.) According to Mr. Cooke's testimony, his trial counsel did not address specifically the concerns raised by Mr. Cooke, but instead stated that

counsel's intent was to put her on the stand and "see how it goes from there." (9/26/07 Tr., p.8, Ls.11-16.)

Ms. Cooke also testified at the evidentiary hearing regarding her capacity as a witness at Mr. Cooke's trial. (9/26/07 Tr., p.32, L.23 – p.64, L.11.) Ms. Cooke testified that she did not remember actually testifying at trial, and that the head trauma she received as a result of the accident at issue in this case left her with an impaired memory. (9/26/07 Tr., p.40, Ls.1-19.) She further stated that her best recollection of events was what she submitted in her letter accompanying her affidavit: that she was *not kidnapped* and that the collision in the early morning hours of January 18, 2003 was an accident. (9/26/07 Tr., p.53, Ls.10-17; 32447 R., pp.56-58.) Under cross-examination, Ms. Cooke stated that she did understand her oath to tell the truth and attempted to answer questions at trial as accurately as she could. (9/26/07 Tr., p.55, L.17 – p.56, L.5.)

Mr. Cooke's trial counsel also testified at the evidentiary hearing. (9/26/07 Tr., p.74, L.11 – p.102, L.25.) Trial counsel testified that he did not remember whether or not the medical record for Ms. Cooke that was attached to her affidavit was among the discovery materials that he was provided in preparation for trial. (9/26/07 Tr., p.80, L.5 – p.81, L.12.) Counsel also admitted that he had not filed any motions in limine at trial or otherwise seek to have Ms. Cooke excluded as a witness based on her lack of competency. (9/26/08 Tr., p.81, L.16 – p.82, L.1.) Trial counsel also admitted that he failed to cross-examine Ms. Cooke on past medical treatment she had received, to call any medical experts, or to object at trial to Ms. Cooke's testimony based upon her competency. (9/26/07 Tr., p.85, Ls.6-19.) Under cross-examination, Mr. Cooke's trial

counsel asserted that he didn't think there was a reason to exclude Ms. Cooke as a witness due to her lack of competency. (9/26/07 Tr., p.96, L.20 – p.97, L.9.)

The district court entered findings of fact and conclusions of law on Mr. Cooke's claims of ineffective assistance of counsel. (Augment, Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel (*hereinafter, Findings*)<sup>4</sup>, pp.1-6.) The district court found that Mr. Cooke had established ineffective assistance of counsel based on the failure to timely file a notice of appeal. (Augment, Findings, pp.4-6.) As a result, the district court vacated the prior judgment and conviction and re-entered the judgment so that Mr. Cooke could timely file this current appeal. (Augment, Findings, pp.4-6; 34820 R., p.81.)

However, the district court found that Ms. Cooke had an accurate recall of events at the time of trial and that she was competent as a witness. (Augment, Findings, p.2.) Additional findings by the district court in support of this conclusion included findings that there was "no medical evidence before the Court that demonstrates that at the time of [Ms. Cooke's] testimony, she was not competent to testify;" that the letter from Ms. Cooke's treating physician did not relate to Ms. Cooke's condition on the date of trial several months later; and that Mr. Cooke did not establish what medical testimony should have been presented at trial regarding Ms. Cooke's mental condition and memory issues. Based on these findings, the district court concluded that Mr. Cooke was not entitled to a new trial based on the newly discovered evidence regarding

---

<sup>4</sup> The district court's findings of fact and conclusions of law on Mr. Cooke's post-conviction petition were augmented into the record for this appeal through Mr. Cooke's motion to augment the record filed with the Supreme Court on December 5, 2007.

Ms. Cooke's competency and that Mr. Cooke had also not established that his trial counsel was ineffective for failing to investigate and present evidence to the jury regarding Ms. Cooke's competency.

Mr. Cooke timely appeals from the district court's second amended judgment of conviction and from the district court's partial denial of his post-conviction petition.

## ISSUES

1. Did the district court at trial abuse its discretion when it permitted the State to introduce several of Mr. Cooke's prior statements into evidence despite the fact that the prejudice of these prior bad acts outweighs any possible probative value of this evidence?
2. Did the prosecutor commit misconduct and seek to inflame the passions and prejudice of the jury against Mr. Cooke when the State argued evidence of Mr. Cooke's prior bad acts as demonstrating his propensity to commit the crimes that he was accused of in this case?
3. Does the cumulative effect of the district court's error in admitting the prior bad acts evidence and of the prosecutor's improper argument regarding this evidence require reversal of Mr. Cooke's convictions?
4. Did the district court misapprehend the relevant standard for competence and make factual findings not supported by substantial evidence when the court found that Ms. Cooke was competent to testify at trial and that Mr. Cooke had not received ineffective assistance of counsel?

## ARGUMENT

### I.

#### The District Court At Trial Abused Its Discretion When It Permitted The State To Introduce Several Of Mr. Cooke's Prior Statements Into Evidence Despite The Fact That The Prejudice Of These Prior Bad Acts Substantially Outweighs Any Possible Probative Value Of This Evidence

Mr. Cooke asserts that the district court abused its discretion when it determined that the probative value for his alleged prior threats made towards Ms. Cooke and himself outweighed the potential prejudice of these statements. Reviewing the record as a whole, it is clear that Mr. Cooke's alleged prior bad acts were as prominent a focus in his trial as the actual crimes he was alleged to have committed. The State presented numerous witnesses testifying to these alleged incidents. But the district court at the Rule 404(b) hearing was without any knowledge of how many of the State's witnesses would be presenting this evidence or how many of Mr. Cooke's past threats each of these witnesses would present. As such, the district court was without a proper legal or factual basis upon which to conclude that the probative value of these allegations was not substantially outweighed by the danger of unfair prejudice to Mr. Cooke. The district court therefore abused its discretion when it admitted evidence of Mr. Cooke's prior bad acts in the form of prior threats against Ms. Cooke and himself.

In order to determine whether evidence of a defendant's prior bad acts are admissible under Rule 404(b), a two-tier test is employed. *State v. Sheahan*, 139 Idaho 267, 275, 77 P.3d 956, 964 (2003). First, the district court must find that the evidence is material to a disputed issue in the case. *Id.* Second, the district court must find that the probative value of the evidence is not substantially outweighed by the danger of unfair

prejudice to the defendant. *Id.* It is the second prong of the analysis that is at issue for this Court.

Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254, 899 P.2d 959, 964 (1995). This Court reviews the issue of whether the probative value of prior bad acts evidence is substantially outweighed by the prejudice of such evidence for an abuse of the district court's discretion. See, e.g., *State v. Cannady*, 137 Idaho 67, 72, 44 P.3d 1122, 1127 (2002).

While the district court's calculus of whether the probative value of evidence is substantially outweighed by its prejudice is reviewed for an abuse of discretion, this discretion is not without limits. As noted by the court in *Stoddard*:

This is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that [the] accused is a bad man and hence probably committed the crime, must be excluded. *The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial.* Discretion implies not only leeway but responsibility. A decision clearly wrong on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion.

*State v. Stoddard*, 105 Idaho 533, 537, 670 P.2d 1318, 1322 (Ct. App. 1983) (quoting MCCORMICK, HANDBOOK OF THE LAW ON EVIDENCE § 190 (Cleary ed. 1972)).

Additionally, as with all matters of discretion on the part of the district court, the court's determination of whether the probative value of the evidence is outweighed by



its potential prejudice must comport with applicable legal standards. See, e.g., *Straub v. Smith*, 145 Idaho 65, 70, 175 P.3d 754, 759 (2007) (finding an abuse of discretion when the district court's action was not consistent with applicable legal standards).

In this case, the district court abused its discretion when it determined that the potential prejudice to Mr. Cooke in admitting the prior threats that he was alleged to have made did not substantially outweigh the probative value of these statements. The district court could not have properly weighed the potential prejudice to Mr. Cooke of these statements, as the court is required by applicable legal standards to do, because the court was without necessary information about how many witnesses would testify to these statements, how many statements each witness would testify to, and the specific contents of these statements. (34820 Tr., p.6, L.4 – p.15, L.25; 34820 R., pp.14-18.)

The absence of this information precluded the district court from being able to weigh the potential prejudice to Mr. Cooke for several reasons. First, without knowing what specific threats would be testified to, the district court could not evaluate the degree to which that individual threat held any probative value to Mr. Cooke's state of mind on the night in question. Second, without knowing the nature of the specific threat that would be testified to, the district court also could not adequately calculate the degree to which that threat may have posed unwarranted prejudice to Mr. Cooke that would merit exclusion. Merely indicating that a statement is a "threat" is not sufficient to impart the necessary information regarding the prejudicial potential of a remark, as this term is quite broad and encompasses statements that may be entirely innocuous (as in

an indication of a future intent to take an action) as well as those that may be deeply inflammatory (as in an expression of intent to do harm).

The district court also lacked necessary information regarding how many of these statements the State was seeking to admit, and how many witnesses would be testifying to these statements. This was admitted on the record by the district court when the court stated that it didn't know how many statements were involved. (34820 Tr., p.13, L.3.) Each individual statement presented to the jury posed a danger that the jury would improperly consider that statement as evidence of Mr. Cooke's character or propensities. As such, a proper calculus of the overall prejudice to Mr. Cooke required the district court to know the volume of prior bad acts evidence that the jury would be hearing. Moreover, while the fact that these prior bad acts were continually brought to the jury's attention by several witnesses increased the potential for prejudice, the cumulative nature of this material correspondingly reduced its probative value for the State. In order to properly weigh probativeness and prejudice in this case, the district court needed to have some idea of the volume of this material. To attempt to weigh the potential for prejudice and the probative value of these statements without this necessary factual predicate was an abuse of the district court's discretion.

Even assuming, *arguendo*, that the district court could adequately assess the overall prejudice to Mr. Cooke without knowing how many statements the State was seeking admission for, the probativeness of the majority of these statements was low, and was substantially outweighed by the potential for prejudice. Most of the witnesses testifying regarding Mr. Cooke's prior alleged threats testified to statements made seven weeks prior to the charges at issue. (34820 Tr., p.62, L.21 – p.66, L.21, p.123, L.18 –

p.127, L.20, p.271, L.12 – p.276, L.11, p.295, L.8 – p.298, L.4, p.319, L.19 – p.337, L.5.) Given that these statements were far removed in time from the charges at issue in this appeal, any potential relevance for Mr. Cooke's state of mind many weeks later is, at best, attenuated. See, e.g., *State v. Ellsworth*, 709 A.2d 768, 772 (N.H. 1998) (holding that passage of time between prior bad acts and current offense attenuates the relevance of prior bad acts evidence). This attenuation serves to make any potential relevance of these prior bad acts much lower for purposes of Mr. Cooke's intent; and further demonstrates that the danger of prejudice to Mr. Cooke substantially outweighed the very limited probative value of these statements.

The erroneous admission of these threats was also not harmless. In its opening remarks, the State made these threats the central focus of its argument, making them the very first piece of information that was presented to the jury. (34820 Tr., p.44, Ls.1-24.) As such, these prior bad acts became the frame through which the jury was called upon to view the subsequent evidence in the case.

The prejudicial nature of this evidence becomes even more apparent in the State's closing arguments. In discussing the aggravated battery charge with the jury, the State discussed at length testimony regarding prior threats made by Mr. Cooke and an alleged incident of domestic violence against Ms. Cooke. (34820 Tr., p.500, L.18 – p.505, L.24.) However, rather than limiting its remarks to the potential relevance this evidence may have had for Mr. Cooke's intent on January 18, 2003, which was the basis for the admission of this evidence, the prosecutor argued that this evidence demonstrated Mr. Cooke's personal propensity to commit the crimes charged. (34820 Tr., p.500, L.18 – p.505, L.24.) See Point II *infra*. This is precisely the type of

prejudicial inference that the prohibition against prior bad acts evidence is intended to prevent. *See, e.g., State v. Needs*, 99 Idaho 883, 892, 591 P.2d 130, 139 (1979).

Moreover, the State's case against Mr. Cooke was not overwhelming, such that it would tend to obviate any potential prejudice that might otherwise arise from the improper admission of these prior bad acts. The primary source of the State's evidence regarding what happened on late January 17 and early January 18, 2003 was Ms. Cooke. (34820 Tr., p.313, L.6 – p.388, L.15.) In particular, Ms. Cooke was the only witness for the State that could produce any direct evidence regarding Mr. Cooke's behavior, her own state of mind and resistance to remaining in the truck, and other key facts that indicated both Mr. Cooke's intent and whether Ms. Cooke was present against her will in the vehicle. (34820 Tr., p.313, L.6 – p.388, L.15.) The specific intent to cause bodily harm is an essential element of the State's allegation that Mr. Cooke committed an aggravated battery. (R., pp.25-26.) *See also* I.C. 18-903(c); *State v. Pole*, 139 Idaho 370, 375, 79 P.3d 729, 734 (Ct. App. 2003). Likewise, kidnapping requires the specific intent to unlawfully cause another to be secretly confined or imprisoned, sent out of state, or in any way kept or detained against that person's will. I.C. § 18-4501(1). Proof that another was seized or confined against his or her will is also required. I.C. § 18-4501(1).

While Ms. Cooke was the only witness for the State who could address these essential elements to the State's case, her testimony was contradicted by her own prior statements to law enforcement officers and by Mr. Cooke's testimony. (34820 Tr., p.313, L.6 – p.388, L.15, p.357, L.13 – p.358, L.6, p.362, L.5 – p.363, L.8, p.371, L.4 – p.373, L.11, p.382, L.24 – p.383, L.14.) As she acknowledged, Ms. Cooke's

memory and recall was impacted by her head injuries that resulted from the crash. (34820 Tr., p.317, L.24 – p.318, L.11.) Moreover, the fact that the jury considered and rejected the allegation that Mr. Cooke had attempted to rape Ms. Cooke, as was her testimony at trial, indicates that the jury did not entirely accept Ms. Cooke's version of events. (34820 Tr., p.343, L.18 – p.347, L.3.), see also *State v. Lilly*, 142 Idaho 70, 74, 122 P.3d 1170, 1174 (Ct. App. 2005).

The district court at the 404(b) hearing did not know how many witnesses would present the prior bad acts evidence offered by the State or how many of Mr. Cooke's past threats each of these witnesses would present. As such, the district court was without a proper legal or factual basis upon which to conclude that the probative value of these allegations was not substantially outweighed by the danger of unfair prejudice to Mr. Cooke. The probative value of these statements was low in light of the volume of witnesses presenting duplicative information and the attenuation of these statements to Mr. Cooke's intent given the passage of time. The potential for prejudice of these statements was very high given the high volume of prior alleged threats presented and the fact that, with each repetition of these alleged prior bad acts, the jury could be improperly induced to infer criminal propensity. The district court therefore abused its discretion when it permitted a blanket admission for the State to introduce Mr. Cooke's prior bad acts in the form of past threats.

## II.

### The Prosecutor Committed Misconduct And Sought To Inflame The Passions And Prejudice Of The Jury Against Mr. Cooke When The State Argued Evidence Of Mr. Cooke's Prior Bad Acts As Demonstrating His Propensity To Commit The Crimes That He Was Accused Of In This Case

The prosecutor committed misconduct when he argued that the alleged prior bad acts of Mr. Cooke were evidence of his criminal propensity to commit the offenses at issue in this appeal, thereby improperly seeking to inflame the passions and prejudice of the jury against Mr. Cooke. Mr. Cooke did not object to the prosecutor's remarks during closing arguments. (34820 Tr., p.500, L.18 – p.505, L.24.) Nevertheless, Mr. Cooke's claim of prosecutorial misconduct is justiciable as a fundamental error because the prosecutor's remarks constituted an appeal that was intended to inflame the passions and prejudice of the jury.

Prosecutorial misconduct rises to the level of fundamental error if the prosecutor's statements are calculated to arouse the passion or prejudice of the jury against the defendant or if the prosecutor's remarks are so inflammatory that the jurors may be influenced to determine guilt on factors outside of the evidence. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969. Fundamental error is not established if the resulting prejudice from the remarks could have been remedied by a curative instruction from the district court to disregard the remarks. *Id.*

As previously noted, the district court ruled that evidence of Mr. Cooke's prior bad acts (in the form of threats that he was alleged to have made several weeks prior) was admissible in order to show intent. (34820 Tr., p.12, Ls. 16-25.) Despite the fact that this evidence was deemed admissible only for the limited purpose of demonstrating intent on the night in question, the prosecutor argued this evidence in closing remarks

for a clearly improper purpose – to show propensity to commit the acts charged in this case. (Tr., p.500, L.18 – p.505, L.24.) The prosecutor’s argument was clearly designed to inflame the passions and prejudice of the jury so as to induce them to find Mr. Cooke guilty based on prior bad acts, rather than on the basis of the actual crimes alleged.

The prosecutor first discussed Mr. Cooke’s alleged prior threats several weeks earlier as:

terrible words spoken, the kinds of things you would never say to somebody that you love. You don’t say them to people you don’t love. You don’t say them to people you don’t like. You say those kinds of things to people that you hate, that you try and hurt. [sic]

(34820 Tr., p.500, Ls.21-25.)

The State proceeded to iterate the testimony presented by several witnesses regarding prior alleged threats by Mr. Cooke towards Ms. Cooke and himself. (34820 Tr., p.501, L.1 – p.505, L.24.) The State characterized Mr. Cooke as “verbally abusive,” and further focused on uncharged allegations of domestic abuse. (34820 Tr., p.502, Ls.4-19.) The State did not make any attempt to link these allegations to Mr. Cooke’s then-existing state of mind or intent on the night in question, but argued to the jury that, “That’s the kind of physical abuse that was Alison’s reality in November and December, and it comes from other sources besides Alison.” (34820 Tr., p.502, Ls.17-19.) These comments, along with subsequent remarks alleging “mental abuse” of Ms. Cooke, improperly shifted the focus away from Mr. Cooke’s state of mind regarding the actual crimes charged. (34820 Tr., p.501, L.1 – p.503, L.6.) Instead, the prosecutor was appealing to the jury’s sense of outrage at Mr. Cooke’s past uncharged behavior towards Ms. Cooke, and clearly seemed to be urging the jury to find Mr. Cooke guilty on this improper basis.

The prosecutor made further improper arguments that these prior bad acts showed that Mr. Cooke had, "some kind of temper," and that therefore the jury should disbelieve his account of events. (34820 Tr., p.504, L.17 – p.505, L.24.) These statements were an improper appeal to the passion and prejudice of the jury because these remarks called upon the jury to view Mr. Cooke as a man driven by his anger towards Ms. Cooke and further urged the jury to disregard Mr. Cooke's version of events because this version was inconsistent with a man who had such a character. *See also Sheahan*, 139 Idaho at 276, 77 P.3d at 965 (discussing potential prejudice to the defendant from jury improperly considering evidence as showing conformity with a violent character). This is exactly the inference that is forbidden under Rule 404(b).

It is also likely that the jury operated under the belief, based upon the State's closing argument, that they could consider evidence of Mr. Cooke's prior bad acts to show his propensity to commit the crimes charged because the district court did not provide any instructions to the jury as to the limited relevance of this evidence.<sup>5</sup> (34820 Tr., p.34, L.20 – p.43, L.23, p.479, L.18 – p.491, L.21.) The prosecutor and Mr. Cooke during closing arguments presented the jury with contradicting statements regarding how they should and could consider the evidence of Mr. Cooke's prior bad acts. (34820 Tr., p.500, L.18 – p.505, L.24, p.518, L.18 – p.519, L.3.) Without a statement of the law from the district court that would resolve this issue, it is entirely probable that the jury

---

<sup>5</sup> It is apparent from the record that Mr. Cooke's defense counsel was under the mistaken impression that the district court had instructed the jury that the prior bad acts evidence was only admissible to demonstrate Mr. Cooke's intent on the night in question. (34820 Tr., p.518, Ls.23-25.) However, a review of the record shows that the district court made no such instruction to the jury either in its pre-evidentiary or its post-evidentiary jury instructions. (34820 Tr., p.34, L.20 – p.43, L.23; p.479, L.18 – p.491, L.21.)



believed that it was entitled to consider the prior bad acts that Mr. Cooke was alleged to have committed as evidence that he acted in conformity with those prior acts.

The prosecutor in this case made improper appeals to the passions and prejudice of the jury, and encouraged the jury to base its decision on improper considerations, when the prosecutor argued that Mr. Cooke's prior bad acts showed his propensity to commit the offenses at issue in this case. This misconduct was highly prejudicial because the State's argument urged the jury to make the very conclusions that render prior bad acts evidence generally inadmissible. Moreover, even if the jury were instructed to disregard the State's remarks, based upon the inflammatory nature of the State's argument, the jury would not be likely to be able to do so. Finally, even if the district court ordered the jury to disregard those remarks, the jury was still without guidance from the court as to how this evidence could properly be considered, and therefore would likely engage in exactly the type of inappropriate consideration of the evidence that the prosecutor in this case had urged them to engage in.

### III.

#### The Cumulative Effect Of The District Court's Error In Admitting The Prior Bad Acts Evidence And Of The Prosecutor's Improper Argument Regarding This Evidence Require Reversal Of Mr. Cooke's Convictions

Even if this Court determines that the district court's error in admitting the prior bad acts evidence against Mr. Cooke, and the prosecutor's misconduct in arguing this evidence to the jury as evidence of criminal propensity, are harmless when taken individually, the joint operation of these errors demonstrate that Mr. Cooke was denied a fair trial.

"[T]he cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself may be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process." *State v. Cook*, 144 Idaho 784, 791, 171 P.3d 1282, 1289 (Ct. App. 2007).

Here, the prejudice from the district court's error in improperly admitting numerous allegations of prior bad acts was exponentially increased by the prosecution's closing arguments that induced the jury to consider these prior threats for the very purpose for which they were generally inadmissible: to show Mr. Cooke's propensity to commit the crimes charged. The jury was bombarded with evidence of Mr. Cooke's prior bad acts, then invited to apply this evidence as proof of Mr. Cooke's character and propensities.

In light of the fact that these two errors operated in conjunction to multiply the prejudice against Mr. Cooke from their improper admission and use at trial, the record in this case shows that Mr. Cooke was denied his right to a fair trial.

#### IV.

The District Court In Post-Conviction Misapprehended The Relevant Standard For Competence And Made Factual Findings Not Supported By Substantial Evidence When The Court Found That Ms. Cooke Was Competent To Testify At Trial And That Mr. Cooke Had Not Received Ineffective Assistance Of Counsel

##### A. Standard Of Review

Post-conviction actions are civil in nature, and therefore the defendant must establish by a preponderance of the evidence the allegations upon which the request for post-conviction relief is based. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382

(2004). When reviewing the district court's decision denying post-conviction relief after an evidentiary hearing, this Court will not disturb the district court's factual findings unless they are clearly erroneous. *Id.* When reviewing mixed questions of law and fact, this Court defers to the factual findings of the district court unless those findings are clearly erroneous, but this Court exercises free review of the application of the relevant law to the facts. *Id.* "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

B. The District Court Abused Its Discretion When It Ruled That Ms. Cooke's Affidavit In Support Of Mr. Cooke's Post-Conviction Petition Was Not Admissible Evidence

Mr. Cooke asserts that the district court abused its discretion when it determined that the affidavit provided by Ms. Cooke in support of Mr. Cooke's post-conviction petition was not admissible as evidence in his evidentiary hearing because that affidavit constituted hearsay. The district court erroneously ruled that Ms. Cooke's affidavit that was submitted by Mr. Cooke in support of his amended post-conviction petition could not be considered by the district court because the affidavit contained hearsay. (9/26/07 Tr., p.38, Ls.17-20; 32447 R., pp.54-55.) This ruling was an abuse of discretion because, by statute, affidavits made in support of the allegations contained within a post-conviction petition are specifically permitted to be considered as evidence in a post-conviction evidentiary hearing despite the fact that these affidavits might otherwise be considered inadmissible hearsay. See I.C. § 19-4907. Therefore, this

evidence was properly before the district court, its exclusion was error, and its contents can be considered in support of Mr. Cooke's post-conviction claims.

C. The District Court Erred When It Determined That Mr. Cooke Had Not Established That Ms. Cooke Was Not Competent To Be A Witness At His Trial

Initially Mr. Cooke asserts that the district court entered clearly erroneous findings of fact, and misapplied those facts to the relevant law, when it determined that the new evidence presented regarding Ms. Cooke's lack of competence as a witness did not warrant a new trial. As a component of this claim, Mr. Cooke disputes the district court's findings of fact that Ms. Cooke's recollection of events was accurate at the time of trial, that she was a competent witness, that there was not medical evidence indicating her incompetence to testify at trial, and that the medical evidence did not relate to Ms. Cooke's competence on the date of trial; and he asserts that these findings are clearly erroneous. Mr. Cooke further asserts that the district court failed to correctly apply these facts to the law regarding false memory as it relates to witness competency.

The competence of witnesses is governed by I.R.E. 601, which states that a witness is competent unless, *inter alia*, that person is "incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." *See also State v. Griffith*, 144 Idaho 356, 362, 161 P.3d 675, 681 (Ct. App. 2007).

A witness who has incurred false memories regarding an event is not competent to testify regarding those matters tainted by false memory. *See State v. Iwakiri*, 106 Idaho 618, 625-626, 682 P.2d 571, 578-579 (1984). If a witness' memory appears to have been altered as a result of cuing or confabulation, and the resulting recall of memories may therefore be unreliable, then a finding that the witness is incompetent is

proper. *Id.* While the ruling in *Iwakiri* was made in reference to hypnotically induced testimony, the underlying concern as that established by Mr. Cooke is identical: the potential to modify the witness' memory. Moreover, the Court in *Iwakiri* specifically noted that the potential for a witness to be incompetent to testify due to false memory is not limited to the context of hypnosis, but may arise out of other contexts as well. *Id.* This is in accord with other jurisdictions that likewise have held that the potential for taint or false memory can render a witness incompetent to testify. See, e.g., *Commonwealth v. Delbridge*, 855 A.2d 27, 40 (Pa. 2003) (holding that an "allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility"); *English v. State*, 982 P.2d 139, 145-147 (Wyo. 1999) (holding that the issue of the ability to independently recall events and potential taint of memory of a child witness is an issue of that witness' competency).

Here, Mr. Cooke presented new evidence that demonstrated that Ms. Cooke's testimony was not her true, personal recollection of events, and that this difference was more likely than not an artifact of false memory. Specifically, Mr. Cooke presented Ms. Cooke's medical records stating that Ms. Cooke was not competent for any police evaluations or interviews based specifically on the medical finding that her information would be misleading and unreliable due to Ms. Cooke being at high risk to develop **"new or false memories rather than accurately recalling what happened prior to the impact."** (32447 R., p.60.) Coupled with this medical evidence was Ms. Cooke's statement of what her actual, personal recollection was. (32447 R., p.56-58.) This account mirrored almost exactly Mr. Cooke's testimony at trial, and refuted the account of events that Ms. Cooke presented at trial. (32447 R., pp.56-58.) Finally, Ms. Cooke

asserted that she was not a willing participant in her testimony at trial and was induced to testify; and that her mental condition (including her incompetency due to her susceptibility to developing false memories) persisted through the time of Mr. Cooke's trial. (32447 R., p.55.) Finally, Ms. Cooke testified to at least one instance in which her memory of events was the product of subsequent viewing of the State's evidence. (9/26/07 Tr., p.63, L.19 – p.64, L.1.) Ms. Cooke testified that she recalled Mr. Cooke's truck hitting a bump, but only developed any memory of what had caused the bump "from looking at the accident scene afterwards." (9/26/07 Tr., p.63, Ls.16-24.) Taken together, this information demonstrated that it was more likely than not that Ms. Cooke was not competent to testify at trial, and that her testimony was the artifact of new or false memory.

This information does not merely raise issues of the credibility of Ms. Cooke's testimony, but establishes by a preponderance of the evidence that she lacked competency as a witness. Unlike a merely faulty memory, which may be the proper subject of cross-examination, the danger with false or tainted memory is that the witness will actually believe that the memory is his or her own, when in fact it is an artifact of suggestion. This was noted in the concurrence in *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989):

Even adults' memory can be tainted to the point that their actual testimony is deemed too unreliable to be admitted without offending due process. Examples include the tainted identification resulting from an unduly suggestive lineup or the effect of hypnosis ... Once this tainting of memory has occurred, the problem is irremediable. That memory is, from then on, as real to the child as any other. This "confabulation" is precisely the problem with hypnotically enhanced memory discussed by this Court in *Iwakiri*.

*Id.* at 990-91, 772 P.2d at 197-98 (internal citations omitted).

As such, the witness is rendered incapable of testifying truthfully, because the witness cannot in fact distinguish between authentic and false memory.

The district court based its conclusions regarding competency largely on Ms. Cooke's testimony at the evidentiary hearing that "her recollection was accurate and that she testified truthfully at the time of the trial." (Augment, Findings, p.3.) The factual finding that Ms. Cooke testified that her recollection at trial was accurate is not supported by a reading of the entire record of Ms. Cooke's testimony. Both in her letter in support of Mr. Cooke's post-conviction petition and throughout her testimony at the evidentiary hearing, Ms. Cooke repeatedly stated that she had either a vague recollection or no recollection at all of what she testified to at trial. (9/26/07 Tr., p.40, Ls.1-5, p.42, Ls.13-15, p.43, Ls.6-19)

Regarding the court's factual finding that Ms. Cooke stated at the evidentiary hearing that she testified truthfully at trial, this finding is not supported by substantial evidence and further does not refute Mr. Cooke's assertion that Ms. Cooke was not competent as a witness. Ms. Cooke, at best, gave contradictory accounts of whether the events that she testified to at trial were, in fact, her own recollection. (9/26/07 Tr., p.40, L.20 – p.41, L.9, p.55, L.17 – p.56, L.5; 32447 R., p.54.) While Ms. Cooke clearly attempted to recall events to the best of her ability, this does not address whether the information testified to was, in fact, the product of Ms. Cooke's own independent recall. As noted by the concurrence in *Giles*, any new or false memories that Ms. Cooke received would be as real to her as any other. *Giles*, 115 Idaho at 991, 772 P.2d at198.

In light of this, the district court's factual findings that Ms. Cooke was competent to testify at trial and testified to her own accurate memory, that the medical evidence of her susceptibility to false memory was not relevant to her state of competency at trial, and that there was not medical evidence indicating her incompetence to testify at trial are clearly erroneous. The likelihood that Ms. Cooke's memory was tainted by new or false memories, as established by her medical records and her own statements, would have persisted throughout the trial.

The crucial issue for the district court to resolve with regard to Ms. Cooke's competency as a witness was whether she had retained an independent recollection of events that was not the artifact of suggestion or new or false memories. The fact that Ms. Cooke may have believed herself at trial to be providing a true account from her *independent recollection does not disprove Mr. Cooke's evidence demonstrating that, more likely than not, Ms. Cooke was testifying from tainted memory.* As such, the district court erred when it determined that Mr. Cooke had not established that he was entitled to a new trial based on new evidence that Ms. Cooke was incompetent to testify as a witness at his trial.

D. The District Court Erred When It Determined That Mr. Cooke Had Not Established That He Had Received Ineffective Assistance Of Counsel Based On The Failure Of His Trial Counsel To Seek To Have Ms. Cooke Excluded As A Witness Based On Her Lack Of Competency And On The Failure Of His Trial Counsel To Adequately Cross-Examine Ms. Cooke On Her Medical Records Demonstrating A Lack Of Competency

In order to establish that a defendant has been denied his or her constitutional right to effective assistance of counsel, a defendant must demonstrate two things: (1) that counsel's performance was deficient; and (2) that the defendant was prejudiced by



this deficiency. See, e.g., *State v. Parrott*, 117 Idaho 272, 275, 787 P.2d 258, 261 (1990). To establish deficient performance, the defendant must establish that counsel's representation fell below an objective standard of reasonableness. *Id.* A defendant can establish the prejudice prong of the analysis by showing that, but for counsel's unprofessional errors, the result of the proceeding would likely have been different. *Id.*

Here, Mr. Cooke asserts two bases upon which his trial counsel was ineffective: the failure to seek to have Ms. Cooke's testimony excluded due to her lack of competence as a witness, and the failure to adequately investigate the medical evidence regarding her incompetency and cross-examine her on that basis. Because Mr. Cooke's claims are largely based on the failure of trial counsel to make a thorough investigation of the evidence, he must show that proper investigation and preparation would have uncovered admissible evidence and that this evidence would cast doubt on Ms. Cooke's trial testimony. See e.g., *Parrott*, 117 Idaho at 275, 787 P.2d at 261.

As an initial matter, the district court made an erroneous factual finding that Mr. Cooke had not presented medical evidence regarding Ms. Cooke's memory that would support his claims of ineffective assistance. (Augment, Findings, p.3.) This finding is clearly refuted in the record, as Mr. Cooke's amended post-conviction petition clearly asserts that the medical report attached to the petition, which was generated by Dr. Clay Ward who was one of Ms. Cooke's treating physicians, was the medical evidence that Mr. Cooke was relying on in his claims. (32447 R., pp.49-50, 59-61.) This evidence went directly to Ms. Cooke's competency as a witness at trial, since the report concluded that Ms. Cooke was at a high risk to develop new or false memories based upon her traumatic brain injury, and because the ability to independently recall

the relevant events is central to the overall legal standard for witness competency. (32447 R., pp.59-60.) *see also* Point IV (C), *supra*.

As previously noted, Ms. Cooke's medical records, coupled with her own admissions that she suffered from the same mental condition that was described therein at the time of trial, provide direct evidence that Ms. Cooke was not competent to be a witness at trial. *See* Point IV (C), *supra*. Mr. Cooke's trial counsel was provided this material in discovery, but had no personal recollection of reviewing it and did not call Dr. Ward as a witness for trial. (9/26/07 Tr., p.80, L.5 – p.81, L.15.) Trial counsel further did not file a motion in limine seeking to have Ms. Cooke declared incompetent to testify as a witness. (9/26/07 Tr., p.81, L.16 – p.82, L.1.) This failure to take any action regarding clear evidence of Ms. Cooke's incompetence falls below an objective standard of reasonableness.

It is clear that, had Ms. Cooke been excluded as a witness, the result in this case would have been different. Ms. Cooke's testimony was central to the State's case. As noted above, Ms. Cooke was the primary source of the State's evidence regarding what happened on late January 17 and early January 18, 2003. (34820 Tr., p.313, L.6 – p.388, L.15.) *See* Point I, *supra*. She was the only witness for the State that could produce any direct evidence regarding Mr. Cooke's behavior, her own state of mind and resistance to remaining in the truck, and other key facts that indicated both Mr. Cooke's intent and whether Ms. Cooke was present against her will in the vehicle. (34820 Tr., p.313, L.6 – p.388, L.15.)

Ms. Cooke's testimony was the only source of evidence for most of the key elements that the State had to prove at trial. *See* Point I, *supra*. In light of this, without

her testimony, the State could not have proved, beyond a reasonable doubt, that Mr. Cooke committed aggravated battery or kidnapping.

Moreover, even if trial counsel could not have successfully excluded Ms. Cooke as a witness based on her lack of competency, the failure to cross-examine Ms. Cooke on the basis of the medical report constituted ineffective assistance of counsel.

In this case, the crux of the factual dispute was between Mr. and Ms. Cooke's competing accounts of events. Therefore, the relative credibility and reliability of these accounts was crucial to the jury's determination. Ms. Cooke already admitted in her affidavit and letter that her testimony at trial was not the product of her own best recollection. (32447 R., pp.54-58.) Ms. Cooke's testimony at trial was contradicted by her own prior statements to law enforcement. (34820 Tr., p.313, L.6 – p.388, L.15, p.357, L.13 – p.358, L.6, p.362, L.5 – p.363, L.8, p.371, L.4 – p.373, L.11, p.382, L.24 – p.383, L.14.) Additionally, the jury considered and rejected Ms. Cooke's allegation that Mr. Cooke had attempted to rape her, which indicates that the jury did not entirely accept Ms. Cooke's version of events. (34820 Tr., p.343, L.18 – p.347, L.3.) See *State v. Lilly*, 142 Idaho 70, 74, 122 P.3d 1170, 1174 (Ct. App. 2005).

While trial counsel cross-examined Ms. Cooke regarding various holes in her memory, the medical report indicating that she was at high risk to develop new or false memories would have addressed an additional issue: the reliability of those facts that Ms. Cooke testified that she did recall. Given the fact that credibility was the central and determining factor in this case, and the fact that the jury already demonstrated its doubts of Ms. Cooke's testimony, the result of this trial would have been different had Mr. Cooke's trial counsel appropriately reviewed and investigated Ms. Cooke's medical

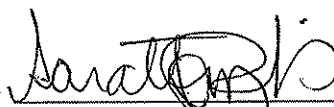
records, and cross-examined Ms. Cooke about the conclusion contained therein regarding her competency.

Therefore, the district court erred when it determined that Mr. Cooke had not established that he had received ineffective assistance at trial.

CONCLUSION

Mr. Cooke respectfully requests that this Court vacate his judgment of conviction and sentence and remand his case for a new trial. Alternatively, he asks that this court vacate the order denying him post-conviction relief.

DATED this 18<sup>th</sup> day of July, 2008.



SARAH E. TOMPKINS

Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18<sup>th</sup> day of July, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

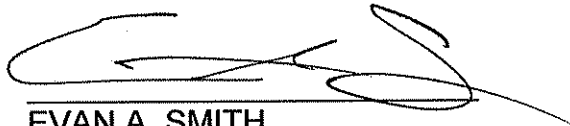
MAX RITCHIE COOKE  
INMATE #25564  
ICC  
PO BOX 70010  
BOISE ID 83707

MICHAEL R MCLAUGHLIN  
DISTRICT COURT JUDGE  
ADA COUNTY DISTRICT COURT  
200 W FRONT ST  
BOISE ID 83702

ADA COUNTY PUBLIC DEFENDER'S OFFICE  
200 W FRONT ST DEPARTMENT 17  
BOISE ID 83702

STATEHOUSE MAIL

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH  
Administrative Assistant

SET/eas