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Cooke v. State Appellant's Reply Brief Dckt. 32447

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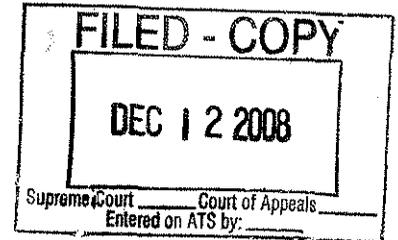
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

NOS. 34820 & 32447

REPLY BRIEF



REPLY 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

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

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

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.....	4
ISSUES PRESENTED ON APPEAL.....	6
ARGUMENT.....	7
I. Mr. Cooke’s Contentions Regarding The District Court’s Abuse Of Discretion In Admitting Prior Bad Acts Evidence Are Supported By Both Argument And Legal Authority.....	7
A. Introduction	7
B. Mr. Cooke’s Contentions Regarding The District Court’s Abuse Of Discretion In Admitting Prior Bad Acts Evidence Are Supported By Both Argument And Legal Authority	8
II. The State’s Response To Mr. Cooke’s Allegations Of Prosecutorial Misconduct Misapprehends The Nature Of The Assertion Of Error Being Raised.....	10
A. Introduction	10
B. The State’s Response To Mr. Cooke’s Allegations Of Prosecutorial Misconduct Misapprehends The Nature Of The Assertion Of Error Being Raised	11
III. The State Misapprehends The Nature Of Mr. Cooke’s Allegations, Made During His Post-Conviction Proceedings, Regarding Ms. Cooke’s Lack Of Competence As A Witness Due To Her Susceptibility To False Memory Prior To Trial; And Regarding His Trial Counsel’s Ineffectiveness For Failing To Investigate And Take Appropriate Action Regarding The Issue Of Her Lack Of Competence	13
A. Introduction	13

B. The State Misapprehends The Nature Of Mr. Cooke's Allegations Made During His Post-Conviction Proceedings Regarding Ms. Cooke's Lack Of Competence As A Witness Due To Her Susceptibility To False Memory Prior To Trial; And Regarding His Trial Counsel's Ineffectiveness For Failing To Investigate And Take Appropriate Action Regarding The Issue Of Her Lack Of Competence	14
CONCLUSION	18
CERTIFICATE OF MAILING	19

TABLE OF AUTHORITIES

Cases

<i>Berger v. U.S.</i> , 295 U.S. 78 (1935)	11
<i>Oregon v. Guzek</i> , 546 U.S. 517 (2006).....	12
<i>Spencer v. Texas</i> , 385 U.S. 554 (1967).....	12
<i>State v. Draiman</i> , 784 F.2d 248, 254 (7 th Cir. 1986).....	8
<i>State v. Ellsworth</i> , 709 A.2d 768, 772 (N.H. 1998).....	9
<i>State v. Giles</i> , 115 Idaho 984, 772 P.2d 191 (1989)	15
<i>State v. Greene</i> , 512 A.2d 330, 333, n.2 (Me. 1986).....	12
<i>State v. Guzek</i> , 86 P.3d 1106, 1121, n.18 (Or. 2004)	12
<i>State v. Hairston</i> , 133 Idaho 496, 988 P.2d 1170 (1999)	12
<i>State v. Hughes</i> , 938 P.2d 457 Ariz. 1997)	8
<i>State v. Osborne</i> , 130 Idaho 365, 941 P.2d 337 (Ct. App. 1997).....	17
<i>State v. Payne</i> , ___ Idaho ___, ___ P.3d ___, 2008 WL 2447447, *10 (2008)...	17
<i>State v. Phillips</i> , 144 Idaho 82, 156 P.3d 583 (Ct. App. 2007)	12
<i>State v. Tapia</i> , 127 Idaho 249, 899 P.2d 959 (1995).....	8
<i>State v. Wolfrum</i> , 145 Idaho 44, 175 P.3d 206 (Ct. App. 2007)	11
<i>U.S. v. Long</i> , 328 F.3d 655 (D.C. Cir. 2003)	8
<i>White v. Commonwealth</i> , 178 S.W.3d 470, 477 (Ky. 2005)	8

Rules

I.R.E. 105.....	12
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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's¹ competence as a witness should have been discovered by his trial counsel and used during cross-examination, and that this newly discovered

¹ 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 it permitted the State to introduce evidence of Mr. Cooke's prior bad acts in the form of alleged threats made by Mr. Cooke over a period of several months prior to the actions resulting in the charges at issue in this appeal. As a component of this claim, Mr. Cooke asserts that the district court lacked the necessary factual basis to conduct a proper balancing of whether the potential for prejudice of these statements substantially outweighed their probative value. Mr. Cooke also asserts that the prosecutor committed misconduct by arguing this evidence during closing arguments as proof of Mr. Cooke's bad character and propensity to commit crimes. Finally, he agrees 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.

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, he contends that 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.

In response, the State asserts that the district court had adequate information to make its determination regarding the admissibility of the prior bad acts evidence in this case, and that the district court correctly found the prior threats to be admissible. Regarding the claims of prosecutorial misconduct, the State responds that Mr. Cooke "has failed to cite to any authority for the proposition that it is misconduct for a prosecutor to refer to evidence that has been admitted at trial, and therefore has failed to properly present this issue for review." (Respondent's Brief, p.18.) In addition, the State asserts that Mr. Cooke has failed to establish that any misconduct in this case rose to the level of a fundamental error.

The State further asserts that Mr. Cooke's allegations of error involving his post-conviction claims on Ms. Cooke's competence as a witness lack merit because the medical evidence did not state that Ms. Cooke would be permanently susceptible to false memories, nor did the medical evidence express an opinion on whether Ms. Cooke would be competent in the future. Regarding Mr. Cooke's ineffective assistance of counsel claims, the State asserts that the decisions of trial counsel regarding cross-examination of witnesses are always deemed tactical and, therefore,

cannot be “second-guessed” by this Court and that, in any case, the cross-examination of Ms. Cooke at trial made by trial counsel was sufficient to explore the issue of her competence.

This Reply Brief is necessary to clarify factual errors in the Appellant’s Brief and Respondent’s Brief; and the further clarify the nature of the allegations being raised on appeal and the legal standards attendant to these issues.

Statement of the Facts and Course of Proceedings

As an initial matter, Mr. Cooke wishes to clarify a misstatement of the record in this case that is contained in his Appellant’s Brief. The Appellant’s Brief indicates that the district court failed to give a limiting instruction regarding the appropriate consideration of testimony of witnesses at trial regarding prior threats and bad acts that Mr. Cooke was alleged to have made. (Appellant’s Brief, pp.26-27.) The State correctly notes in its Respondent’s Brief that the district court included a limiting instruction regarding the permissible use of this evidence in its jury instructions. (Respondent’s Brief, p.19; 34820 R., p.44.) Upon further review of the record, it is clear that this instruction was provided to the jury during trial at the close of testimony on June 11, 2003. (34820 Tr., p.302, L.18 – p.303, L.4.) As such, Mr. Cooke’s prior assertion that the district court failed to give a limiting instruction is in error.

Additionally, Mr. Cooke wishes to clarify that a portion of the statement of facts related in the Respondent’s Brief were affirmatively rejected by the jury’s verdict in this case. The Respondent’s Brief asserts that Mr. Cooke attempted to rape, and then “abandoned his apparent plan to rape,” Ms. Cooke. (Respondent’s Brief, p.2.) However, as was noted in the Appellant’s Brief, the jury rendered a verdict that clearly

deemed these facts not to be established. (Appellant's Brief, pp.23, 37.) The jury determined that Mr. Cooke was not guilty of first degree kidnapping and not guilty of assault with intent to commit rape. (30187 R., pp.39-40.) They were further instructed that the sole fact that would elevate the charge of second degree kidnapping, which the jury deemed to have been established, from first degree kidnapping was the aggravating facts of either the intent to commit rape or the intent to commit serious bodily injury upon Ms. Cooke. (34820 R., pp.47, 50.) The jury's verdicts reflect the fact that it considered and rejected, in two separate determinations, the allegation that Mr. Cooke had attempted to rape Ms. Cooke. See *State v. Lilly*, 142 Idaho 70, 74, 122 P.3d 1170, 1174 (Ct. App. 2005).

The remaining statement of the facts and course of proceedings were previously articulated in Mr. Cooke's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Are Mr. Cooke's contentions regarding the district court's abuse of discretion in admitting prior bad acts evidence supported by both argument and legal authority?
2. Does the State's response to Mr. Cooke's allegations of prosecutorial misconduct misapprehend the nature of the assertion of error being raised, and has Mr. Cooke shown that the alleged misconduct rises to the level of a fundamental error?
3. Does the State misapprehend the nature of Mr. Cooke's allegations made during his post-conviction proceedings regarding Ms. Cooke's lack of competence as a witness due to her susceptibility to false memory prior to trial, and regarding his trial counsel's ineffectiveness for failing to investigate and take appropriate action regarding the issue of her lack of competence?

ARGUMENTS

I.

Mr. Cooke's Contentions Regarding The District Court's Abuse Of Discretion In Admitting Prior Bad Acts Evidence Are Supported By Both Argument And Legal Authority

A. Introduction

Mr. Cooke has asserted on appeal that the district court abused its discretion in permitting the State to introduce prior bad acts evidence in the form of prior statements and threats that Mr. Cooke was alleged to have made even though the prejudicial effect of these statements substantially outweighed their probative value if any. As a component of his abuse of discretion claim, he further asserts that the district court could not properly weigh either the probative value of this evidence or its potential for prejudice because the district court lacked necessary information regarding the substance, timing, and volume of the past threats that the State was seeking to introduce.

The State asserts that there is not a legal or factual basis for Mr. Cooke's assertion in this case. (Respondent's Brief, pp.12-14.) However, the legal standards governing prior bad act evidence, the statements of the district court, and the application of the law to the facts of this case support Mr. Cooke's contention that the district court abused its discretion in admitting these statements.

B. Mr. Cooke's Contentions Regarding The District Court's Abuse Of Discretion In Admitting Prior Bad Acts Evidence Are Supported By Both Argument And Legal Authority

Mr. Cooke's assertions regarding the district court's abuse of discretion in admitting the prior bad acts evidence in this case is supported both by legal authority and argument. Moreover, the district court's own concessions regarding its lack of information belies the State's assertion that the court possessed sufficient information to make an informed decision regarding the admissibility of this evidence in light of the applicable legal standards.

As was noted in the Appellant's Brief, it is well established that a district court, in considering whether to admit prior bad acts evidence under I.R.E. 404(b), must consider whether the probative value of the evidence that the State seeks to have admitted at trial is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, potential to mislead the jury, or needless presentation of cumulative evidence. See *State v. Tapia*, 127 Idaho 249, 254, 899 P.2d 959, 964 (1995).

Courts have also recognized that, "the government cannot be permitted to 'flood the courtroom' with other-crimes evidence on the excuse that the crime was one of specific intent." See *State v. Draiman*, 784 F.2d 248, 254 (7th Cir. 1986). Other courts have similarly noted that reversal of a defendant's conviction may be appropriate "where the sheer volume and presentation of otherwise admissible [Rule 404(b)] evidence was error." See *White v. Commonwealth*, 178 S.W.3d 470, 477 (Ky. 2005); see also *U.S. v. Long*, 328 F.3d 655, 664 (D.C. Cir. 2003); *State v. Hughes*, 938 P.2d 457, 466 Ariz. 1997) (finding an abuse of discretion in admitting prior bad acts evidence where the case was "saturated with improper references to defendant's bad character" and

prosecutor in closing recounted every allegation of prior bad acts as well as “descriptions of defendant’s threatening personality”). Because it is a case-specific determination as to whether the volume of Rule 404(b) evidence will result in undue prejudice, the gate-keeping function regarding these issues rests with the district court. See *Long*, 328 F.3d at 664. A trial court does not abuse its discretion in admitting a large volume of such prior bad acts evidence where the court individually reviews each piece of evidence that the State seeks to admit and evaluates the probative value and potential for prejudice of that evidence on a piece-by-piece basis and taking the evidence together as a whole. *Id.* Here, no such individualized evaluation ever occurred. (34820 Tr., p.6, L.4 – p.15, L.25.)

In addition, the gate-keeping function of the district court in considering whether to admit prior bad acts evidence includes an examination of the timing of the prior bad acts in order to determine whether any relevance has been attenuated through the passage of time. See *State v. Ellsworth*, 709 A.2d 768, 772 (N.H. 1998); Appellant’s Brief, p.21.

With these legal standards in mind, the district court itself noted that it lacked the essential information to make an adequate legal determination regarding whether the probative value of the evidence the State sought to admit was substantially outweighed by the danger of unfair prejudice, confusion of issues, potential to mislead the jury, or needless presentation of cumulative evidence. As was noted in the Appellant’s Brief, the district court admitted as much on the record in this case. (Appellant’s Brief, p.20.)

The district court stated:

Clearly, any threats made to Alison Cooke are relevant, and I believe their probative value outweighs their prejudicial effect in this case. So, *those*

statements made over a period of time – you have indicated somewhere three to six months prior to this. Again, I don't know how many this involves, but, certainly, threats that he made to her that he was going to kill her or himself, or both, are relevant. And I can't find that the prejudicial effect outweighs the probative value.

(34820 Tr., p.12, L.23 – p.13, L.8 (emphasis added).)

The district court had no knowledge of the volume of the material that the State was seeking admission of, nor did it have a clear idea of the timing of these statements. In light of this, the district court was without necessary information to make an informed legal determination regarding the scope and extent of admissibility of these prior bad acts. Therefore, Mr. Cooke's arguments regarding the district court's abuse of discretion in admitting the prior bad acts evidence in this case are supported both legally and factually. The State's assertion to the contrary is in error.

II.

The State's Response To Mr. Cooke's Allegations Of Prosecutorial Misconduct Misapprehends The Nature Of The Assertion Of Error Being Raised

A. Introduction

The State, in its Respondent's Brief, characterizes Mr. Cooke's allegation of prosecutorial misconduct as proposing that, "it is misconduct for a prosecutor to refer to evidence that has been admitted at trial," and further asserts that Mr. Cooke has failed to cite any authority for that proposition. (Respondent's Brief, p.18.) This characterization fails to grasp the claim that Mr. Cooke is actually making. Mr. Cooke's actual assertion is that it was misconduct for the prosecutor, in closing remarks, to urge the jury to apply evidence of Mr. Cooke's prior bad acts, that were admitted for the limited purpose of showing intent, for the impermissible purpose of showing propensity

and further committed misconduct by urging the jury to seek to punish Mr. Cooke for several prior uncharged allegations of misconduct. (Appellant's Brief, pp.24-27.)

B. The State's Response To Mr. Cooke's Allegations Of Prosecutorial Misconduct Misapprehends The Nature Of The Assertion Of Error Being Raised

As previously noted, The State characterizes Mr. Cooke's assertion of prosecutorial misconduct as proposing that, "it is misconduct for a prosecutor to refer to evidence that has been admitted at trial," and further asserts that Mr. Cooke has failed to cite any authority for that proposition. (Respondent's Brief, p.18.) This is a misapprehension of Mr. Cooke's claim.

What Mr. Cooke has actually asserted in his Appellant's Brief is that the prosecutor committed misconduct by arguing that evidence, admitted for a limited purpose, should be considered by the jury for purposes for which such evidence cannot be lawfully considered. (Appellant's Brief, pp.24-28.) More specifically, the prosecutor in this case argued evidence of Mr. Cooke's prior threats and uncharged allegations of prior domestic violence were proof of Mr. Cooke's violent propensities, and the need to punish him for these prior and uncharged harms that the State alleged he inflicted on his wife. (Appellant's Brief, pp.24-28.)

Mr. Cooke acknowledges the considerable latitude afforded to both parties in arguing reasonable inferences from the evidence at trial. *See, e.g., State v. Wolfrum*, 145 Idaho 44, 49, 175 P.3d 206, 211 (Ct. App. 2007). However, "while the prosecutor may strike hard blows, he is not at liberty to strike foul ones." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Accordingly, a prosecutor should not be permitted to make closing

arguments that encourage the jury to apply evidence in a manner that is inconsistent with the law, the rules of evidence, or with the rulings of the district court.²

The very existence of and purpose of limiting instructions regarding evidence admitted for a limited purpose is to clarify that there are some purposes for which this evidence should not be used. See, e.g., I.R.E. 105; *Spencer v. Texas*, 385 U.S. 554, 561 (1967); *State v. Greene*, 512 A.2d 330, 333, n.2 (Me. 1986); *State v. Guzek*, 86 P.3d 1106, 1121, n.18 (Or. 2004) (overruled on other grounds by *Oregon v. Guzek*, 546 U.S. 517 (2006)). Moreover, the purpose of closing arguments is to “sharpen and clarify the issues for resolution by the trier of fact in a criminal case,” and to enlighten the jury as to how to interpret the evidence. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). It stands to reason, then, that argument by a prosecutor that encourages the jury to disregard the limitations placed on the admissibility of evidence and to consider the evidence for an improper purpose cannot stand as proper closing argument.

In this case, the prosecutor committed misconduct by encouraging the jury to consider the evidence of Mr. Cooke’s prior bad acts as evidence of his violent propensities and further encouraged the jury to consider uncharged past harms alleged to have been done to Ms. Cooke when considering Mr. Cooke’s guilt on the charged offenses. (Appellant’s Brief, pp.24-28.) While the prosecutor may generally make argument regarding admissible evidence and reasonable inferences therefrom, this latitude does not permit a prosecutor to encourage the jury to apply the evidence in a

² See *State v. Hairston*, 133 Idaho 496, 507-508, 988 P.2d 1170, 1181-1182 (1999).

manner contrary to the law or to a ruling of the district court regarding admissibility of that evidence.

III.

The State Misapprehends The Nature Of Mr. Cooke's Allegations, Made During His Post-Conviction Proceedings, Regarding Ms. Cooke's Lack Of Competence As A Witness Due To Her Susceptibility To False Memory Prior To Trial; And Regarding His Trial Counsel's Ineffectiveness For Failing To Investigate And Take Appropriate Action Regarding The Issue Of Her Lack Of Competence

A. Introduction

In it's Respondent's Brief, the State asserts that Mr. Cooke's claims regarding Ms. Cooke's lack of competence are not well taken because the medical evidence presented did not indicate that Ms. Cooke's susceptibility to false memory persisted through her testimony at trial and, therefore, there was no evidence that she was incompetent as a witness at trial. (Respondent's Brief, p.26.) The State further asserts that Mr. Cooke has not demonstrated that his trial counsel was ineffective for failing to pursue issues related to Ms. Cooke's competence as a witness because Mr. Cooke didn't establish that Ms. Cooke was incompetent, and because "counsel's cross-examination strategy is a tactical decision that will not be second-guessed." (Respondent's Brief, p.27.)

The State's arguments misapprehend the nature of the basis for Mr. Cooke's claim that Ms. Cooke was not competent to testify. It is irrelevant as to whether Ms. Cooke's condition of being susceptible to false memory would have been reduced or eliminated over time if, during the period where she was at high risk to develop false memory, she received information from others regarding the substance of her testimony

at trial and her memory was altered as a result. In such cases, the witness is no longer competent to testify because the witness lacks the ability to meaningfully discern what is the product of his or her independent recall and what is an artifact of the information that he or she received.

Moreover, the record in this case demonstrates that Ms. Cooke was provided with information from outside sources that could have altered her memory and rendered her perceived recall unreliable. And there is at least one documented instance in this record where she stated as much.

Finally, the State's assertion that the failure to adequately investigate or cross-examine witnesses is never second guessed is not an accurate statement of the law. While decisions regarding cross-examination are normally within the purview of strategic or tactical decisions, there is no legitimate basis to explain the failure of trial counsel to investigate or cross-examine Ms. Cooke regarding her susceptibility to false memory. Since such cross-examination would go to the reliability of matters that Ms. Cooke testified she did remember, such cross-examination would cast additional doubt on her testimony at trial.

B. The State Misapprehends The Nature Of Mr. Cooke's Allegations Made During His Post-Conviction Proceedings Regarding Ms. Cooke's Lack Of Competence As A Witness Due To Her Susceptibility To False Memory Prior To Trial; And Regarding His Trial Counsel's Ineffectiveness For Failing To Investigate And Take Appropriate Action Regarding The Issue Of Her Lack Of Competence

In his Amended Petition for Post-Conviction Relief, Mr. Cooke asserted that the evidence he presented in support of his petition demonstrated that Ms. Cooke was not a competent witness to testify at his trial because she was at risk for false memories. (R., p.49.) He also alleged that his trial counsel was ineffective for failing to investigate

the issue of Ms. Cooke's potential lack of competence through calling her physician as a witness and by failing to cross-examine Ms. Cooke on the issue of false memory. (32447 R., p.50.)

Attached to this petition was a medical report from Dr. Clay Ward, who treated Ms. Cooke for her injuries after the crash, that contained the following conclusions regarding Ms. Cooke's condition:

I do not believe that the patient is competent or even appropriate for a police or forensic evaluation 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, unreliable, *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.)

That Ms. Cooke's condition of being at risk for developing false memory may have changed over time is of no accord if, at the time she was at risk, her memory was altered as a result information she had received from outside sources that she then conflated as her own memory. As was noted by 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) (emphasis added).

As such, the State's argument that Ms. Cooke may not have been as susceptible to false memory at the time she testified is irrelevant. The central consideration

regarding her competence as a witness is whether she had received false memories during the time when she was susceptible. (See Appellant's Brief, pp.30-34.) The district court failed to consider this critical issue, and the record in this case supports the conclusion that Ms. Cooke's memory had been modified by information she had received from outside sources during the period of time that she was at risk for developing false memories.

At one point during Mr. Cooke's hearing on his post-conviction petition, during questioning from Mr. Cooke's counsel, Ms. Cooke admitted that she had no recollection of the ditch that she and Mr. Cooke went over in his truck. (9/26/07 Tr., p.63, Ls.19-21.) But she then testified that she did form a recollection of the ditch "from looking at the accident scene afterwards." (9/26/07 Tr., p.63, L.22 – p.64, L.2.) This statement is a clear indication that Ms. Cooke had gaps in her memory that had been filled, prior to trial, by subsequent information that was received from an outside source.

Moreover, Ms. Cooke was surrounded by friends and family members for the entire time of her hospitalization, and appears to have asked questions regarding what had happened to her. (34820 Tr., p.76, L.1 – p.78, L.5, p.128, Ls.1-14.) Ms. Cooke also testified at trial that, after she woke up and her family was around her, she started to "find out where [she] hurt and what was the matter with [her]," and that when she woke up she was *unaware of the origin* of one of her injuries, and that her knowledge was "[j]ust what people have told [her]." (34820 Tr., p.351, Ls.2-10, p.354, Ls.5-10.) All of this information from the record, when coupled with the medical evidence in this case, demonstrates that Ms. Cooke's recall was likely tainted with information that was

suggested to her by outside sources, rather than being the product of her own perceptions.

Additionally, the State misstates case law regarding claims of ineffective assistance of counsel that are based on the allegation of inadequate investigation and/or cross-examination. In its Respondent's Brief, the State asserts that "counsel's cross-examination strategy is a tactical decision that will not be second-guessed." (Respondent's Brief, p.27.) However, the cases relied on by the State for this proposition do not stand for so broad and unrestricted a holding. Upon review of these cases, what they actually hold is that such decisions will be deemed tactical unless that decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of review. *State v. Payne*, ___ Idaho ___, ___ P.3d ___, 2008 WL 2447447, *10 (2008) (decision of what witnesses to call is an area that Court will not second guess without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation); *State v. Osborne*, 130 Idaho 365, 372-373, 941 P.2d 337, 344-345 (Ct. App. 1997). In this case, Mr. Cooke's assertions regarding his trial counsel's failure to seek to have Ms. Cooke deemed incompetent as a witness or to cross-examine her regarding the issue of false memory are very clearly linked to Mr. Cooke's assertion of inadequate preparation by trial counsel. As such, they can properly be examined by this Court.

Finally, the State's assertion that trial counsel did cross-examine Ms. Cooke regarding her "ability to remember details" and the holes in her memory does not address the core concerns that are implicated by false memory. As noted by Mr. Cooke in his Appellant's Brief, 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 Ms. Cooke testified that she did recall.

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 district court's order denying him post-conviction relief.

DATED this 12th day of December, 2008.


SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of December, 2008, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

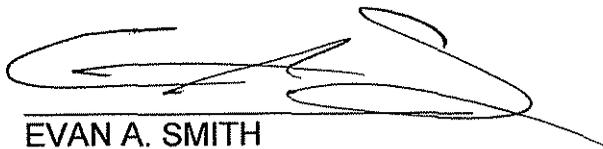
MAX RITCHIE COOKE
INMATE #25564
ICC
PO BOX 70010
BOISE ID 83707

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
P.O. BOX 83720
BOISE, ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

SET/eas