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Cooke v. State Clerk's Record v. 1 Dckt. 32447

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32497

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

MAX RITCHIE COOKE,
PETITIONER-APPELLANT,

VS.

STATE OF IDAHO,
RESPONDENT.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

Hon MICHAEL R. MCLAUGHLIN, District Judge

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

32497

FILED - COPY
2 sub
Court of Appeals
2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT NO. 32447

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MICHAEL R. MCLAUGHLIN

STATE APPELLANT PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WARDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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REGISTER OF ACTIONS3

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**STATE'S RESPONSE AND MOTION TO DISMISS THE DEFENDANT'S AMENDED
PETITION FOR POST CONVICTION RELIEF, FILED JULY 1, 200571**

CASE NUMBER: SP-OT-04-00770*D MAX RITCHIE COOKE,
Plaintiff,
vs.
STATE OF IDAHO, Defendant.

FILING DATE: 10/05/2004 DATE CLOSED: 10/06/2005
SUBTYPE: OT CLASS SUBTYPE: SAME CANT FIND BAC CASE

CASE IS CLOSED
TOTAL SUBJECTS: 1
TOTAL PARTIES: 1

ASSIGNED JUDGE: MICHAEL MCLAUGHLIN

EXHIBITS NONE

TRANSACTIONS

DATE	RECEIPT	AMOUNT	DESCRIPTION
10/06/2004	0113822	.00	Miscellaneous Fees Use Miscellaneous Schedule!!!!
08/22/2005	0149596	8.00	For Making Copy of Any File or Record By The Clerk, per Page

ROAS

ENTRY DATE	CODE		CLASS DATE	USER ID
10/05/2004	NEWC	MOTION AND AFFIDAVIT FOR FEE WAIVER	10/08/2004	CCDWONCP
	PEIN	PETITION FOR POST CONVICTION RELIEF		CCDWONCP
	MOAF	MOTION & AFFIDAVIT IN SUPPORT OF APPOINTMENT		CCDWONCP
	CONT	OF COUNSEL		CCDWONCP
	MOIN	MOTION TO RELEASE PSI		CCDWONCP
10/06/2004	CERT	CERTIFICATE OF MAILING		CCDWONCP
10/18/2004	ORDR	ORDER FOR WAIVER OF FEES - DENIED		CCBROWKM
	ORDR	ORDER APPOINTING COUNSEL-PUBLIC DEFENDER		CCBROWKM
	ORDR	ORDER RELEASING PSI (H0300279)		CCBROWKM
11/12/2004	RSPS	RESPONSE TO PETITION (BOURNE FOR THE STATE)		CCCOLEMJ
11/23/2004	AFFD	AFFIDAVIT OF MAX RITCHIE COOKE		CCWATSCL
12/06/2004	AFFD	AFFIDAVIT OF TIMOTHY D MCMILLIN		CCTHOMCM
01/28/2005	RSPS	FURTHER STATS RSPS TO PETITION		CCMONGKJ
	AFFD	AFFD OF KARL SHURLIFF		CCMONGKJ
03/08/2005	ORDR	ORDER TO TRANSPORT 3/30/05 3PM		CCBROWKM
03/09/2005	HRSC	HEARING SCHEDULED - (03/30/2005) MICHAEL MCLAUGHLIN		CCHEATJL
03/30/2005	HRHD	HEARING HELD		CCBROWKM
04/06/2005	ORDR	ORDER DISMISSING PETITION		CCBROWKM
06/06/2005	AMEN	AMENDED PETN FOR POST CONVICTN RELIEF		CCMONGKJ
07/01/2005	AFFD	AFFD OF JANEL GARDNER		CCMONGKJ
	RSPS	ST'S RSPS & MOTN TO DISMISS DEF AMD PETN		CCMONGKJ
07/21/2005	ORDR	ORDER TO TRANSPORT (8/15/05 3PM)		CCBROWKM
08/15/2005	HRVC	HEARING VACATED		CCBROWKM
	HRSC	HEARING SCHEDULED - (08/16/2005) MICHAEL MCLAUGHLIN		CCBROWKM
08/16/2005	HRHD	HEARING HELD		CCBROWKM
08/17/2005	HRSC	HEARING SCHEDULED - MOTN TO DISMISS (09/28/2005) MICHAEL MCLAUGHLIN		CCMARTLG
	ORDR	ORDER TO TRANSPORT (9/28/05)		CCBROWKM
09/28/2005	HELD	MOTION HELD - MOTN TO DISMISS		CCBROWKM

CASE NUMBER: SP-OT-04-00770*D MAX RITCHIE COOKE,
Plaintiff,
vs.
STATE OF IDAHO, Defendant.

ROAS

ENTRY DATE	CODE		CLASS DATE	USER ID
10/06/2005	ORDR	ORDER DISMISSING PETITION FOR POST CONVICTION		CCBROWKM
	DPHR	DISPOSITION WITH HEARING	11/28/2005	CCBROWKM
	JDMT	JUDGMENT	11/28/2005	CCBROWKM
10/27/2005	NOTC	NOTICE OF APPEAL		CCTHIEBJ
10/31/2005	ORDR	ORDER APPOINTING APPELLATE PD ON APPEAL		CCBROWKM

TICKLERS NONE

PARTIES

PARTY: STATE OF IDAHO, SEND NOTICES: YES
ADDRESS:

ALIASES: NONE

ATTORNEYS: BOURNE, ROGER A (primary)

BONDS: NONE

WARRANTS: NONE

SUBJECTS

SUBJECT: COOKE, MAX RITCHIE SEND NOTICES: YES

ADDRESS:

ATTORNEYS: NONE

BONDS: NONE

HEARINGS: NONE

WARRANTS: NONE

VICTIMS: NONE

NO. _____ FILED _____
 A.M. _____ P.M. _____
OCT 05 2004
 J. DAVID NAVARRO, Clerk
 DEPUTY

MAX RITCHIE COOKE, #25564
 ICC, C-206-B
 PO BOX 70010
 Boise, Idaho 83707

Petitioner,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MAX RITCHIE COOKE,
 Petitioner,

v.

STATE OF IDAHO,
 Respondent.

)
) **SP OT 0400770D**
) Case No. Ho300279
)
) MOTION AND AFFIDAVIT FOR FEE
) WAIVER (PRISONER)
)
)
)
)
)

STATE OF IDAHO)
) ss.
 COUNTY OF ADA)

Petitioner asks to start or defend this case without paying fees and costs pursuant to Section 19-4904, Idaho Code, and swears under oath:

1. This is an action for Petition for Post Conviction Relief.

10

2. I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct. I understand that a false statement in this affidavit is perjury and I could be sent to prison for one (1) to fourteen (14) years. The waiver of payment does not prevent the court from latter order me to pay costs and fees.
3. I have attached to this affidavit a current statement of my inmate account, certified by a custodian of inmate accounts, that reflects the activity of the account over my period of incarceration or for the last twelve (12) months, whichever is less. I understand that I am not an indigent prisoner, and will be required to pay all or part of the court fees, if I have had any funds in my inmate account during the last twelve (1) months or the period of my incarceration, whichever is less.

IDENTIFICATION AND RESIDENCE:

Name: Max Ritchie Cooke Other Names I have used: Ritchie Wurtz

Address: PO BOX 70010, Boise, ID 83707

How long at that Address: year

Date and place of birth: 7-26-68

Education completed: (years): 12

Marital Status: Married

ASSETS:

List all real property (land and buildings) owned or being purchased by you.

None

Inmate Trust Account: \$ 0

Vehicles: 0

Bank Accounts: 0

Other: N/A

EXPENSES:

Per Month

Hygiene items, stamps, legal copies \$ 25

Restitution and unpaid fines \$ 0

Other: N/A

MISCELLANEOUS:

How much can you borrow? None

When did you file your last income tax return? 2002 Amount of Refund \$ unknown

PERSONAL REFERENCES (These persons must be able to verify information provided)

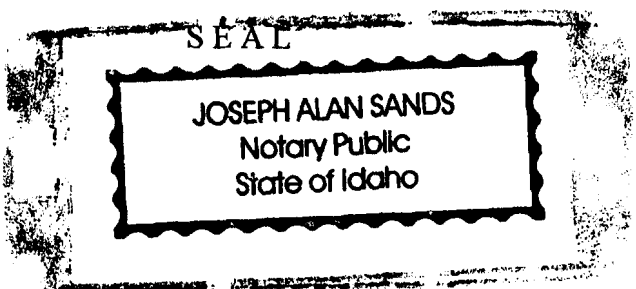
Ruth Cooke 4682 N. Hacienda Ave. Boise, ID 83703 208-461-9180 years known: 20

_____ years known: _____

Max Ritchie Cooke
Max Ritchie Cooke, Petitioner

SUBSCRIBED AND SWORN to before me this 30 day of Sept, 2004


Joseph Alan Sands
Notary Public of Idaho
My Commission Expires: 2010



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 01 day of OCT, 2004, I mailed a original of the MOTION AND AFFIDAVIT FOR FEE WAIVER (PRISONER) for the purposes filing with the court and of mailing a true and correct copy through the prison legal mail system via the U.S. mail system to:

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300



Max Ritchie Cooke
Petitioner

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/20/2004 =

Doc No: 25564 Name: COOKE, MAX RITCHIE
Account: CHK Status: ACTIVE

ICC/UNIT E PRES FACIL
TIER-2 CELL-6

Transaction Dates: 01/01/2004-09/20/2004

Beginning Balance	Total Charges	Total Payments	Current Balance	===== TRANSACTIONS =====	
Date	Batch	Description	Ref Doc	Amount	Balance
	54.05	829.46	775.43	0.02	
01/12/2004	IC0243995-013	078-MET MAIL	64827	0.60DB	53.45
01/13/2004	HQ0244143-012	011-RCPT MO/CC	0087	25.00	78.45
01/14/2004	IC0244365-082	099-COMM SPL		37.30DB	41.15
01/15/2004	HQ0244416-014	011-RCPT MO/CC	0170	20.00	61.15
01/22/2004	IC0245037-071	099-COMM SPL		25.85DB	35.30
01/29/2004	HQ0245715-002	011-RCPT MO/CC	1659	80.00	115.30
01/29/2004	IC0245734-054	099-COMM SPL		19.27DB	96.03
02/04/2004	IC0246481-134	099-COMM SPL		11.80DB	84.23
02/05/2004	IC0246601-089	099-COMM SPL		11.80DB	72.43
02/05/2004	IC0246690-134	099-COMM SPL		-11.80DB	84.23
02/06/2004	IC0246781-134	099-COMM SPL		-11.80DB	96.03
02/09/2004	IC0246926-090	099-COMM SPL		11.80DB	84.23
02/11/2004	IC0247304-087	099-COMM SPL		28.55DB	55.68
02/24/2004	IC0248476-018	071-MED CO-PAY	43916	3.00DB	52.68
02/25/2004	IC0248624-075	099-COMM SPL		34.37DB	18.31
03/03/2004	HQ0249371-019	011-RCPT MO/CC	FEB/PAY	20.00	38.31
03/11/2004	IC0250374-084	099-COMM SPL		8.01DB	30.30
03/15/2004	IC0250638-021	071-MED CO-PAY	59172	3.00DB	27.30
03/17/2004	IC0250888-074	099-COMM SPL		8.28DB	19.02
03/25/2004	IC0251573-070	099-COMM SPL		7.63DB	11.39
04/01/2004	HQ0252332-026	011-RCPT MO/CC	MARCH/PAY	25.00	36.39
04/14/2004	IC0253749-002	078-MET MAIL	67338	0.60DB	35.79
04/21/2004	IC0254447-064	099-COMM SPL		8.04DB	27.75
04/27/2004	HQ0254860-002	011-RCPT MO/CC	1461	100.00	127.75
04/28/2004	IC0255182-060	099-COMM SPL		10.88DB	116.87
04/30/2004	HQ0255466-033	011-RCPT MO/CC	APRIL/PAY	25.00	141.87
04/30/2004	HQ0255507-030	011-RCPT MO/CC	APRIL/PAY	25.00	166.87
05/05/2004	IC0255952-089	099-COMM SPL		20.46DB	146.41
05/12/2004	IC0256512-076	099-COMM SPL		12.13DB	134.28
05/13/2004	IC0256530-001	078-MET MAIL	75269	0.37DB	133.91
05/13/2004	IC0256551-019	078-MET MAIL	60550	0.37DB	133.54
05/14/2004	HQ0256662-004	011-RCPT MO/CC	1844	160.00	293.54
05/19/2004	IC0257215-053	099-COMM SPL		219.77DB	73.77
05/26/2004	IC0257854-067	099-COMM SPL		64.66DB	9.11
06/03/2004	HQ0258720-028	011-RCPT MO/CC	MAY/WAGES	25.00	34.11
06/09/2004	IC0259414-085	099-COMM SPL		15.66DB	18.45
06/10/2004	IC0259523-018	071-MED CO-PAY	56436	3.00DB	15.45
06/16/2004	IC0260085-067	099-COMM SPL		9.54DB	5.91
06/16/2004	IC0260087-008	100-CR INM CMM		3.07	8.98

00009

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/20/2004 =

Doc No: 25564 Name: COOKE, MAX RITCHIE
 Account: CHK Status: ACTIVE

ICC/UNIT E PRES FACIL
 TIER-2 CELL-6

Transaction Dates: 01/01/2004-09/20/2004

Beginning Balance	Total Charges	Total Payments	Current Balance
54.05	829.46	775.43	0.02

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
06/18/2004	HQ0260281-016	011-RCPT MO/CC	4785	120.00	128.98
06/23/2004	IC0260796-016	078-MET MAIL	80047	0.37DB	128.61
06/23/2004	IC0260816-062	099-COMM SPL		15.44DB	113.17
06/24/2004	IC0260844-013	099-COMM SPL		106.36DB	6.81
06/30/2004	IC0261496-011	100-CR INM CMM		19.36	26.17
06/30/2004	IC0261531-054	099-COMM SPL		20.28DB	5.89
07/02/2004	HQ0261866-035	011-RCPT MO/CC	JUNE/WAGES	25.00	30.89
07/07/2004	IC0262269-091	099-COMM SPL		10.00DB	20.89
07/09/2004	IC0262642-013	078-7ET MAIL	77886	0.83DB	20.06
07/12/2004	IC0262807-026	070-PHOTO COPY	77250	0.50DB	19.56
07/14/2004	IC0263122-076	099-COMM SPL		16.14DB	3.42
07/15/2004	IC0263191-001	070-PHOTO COPY	76336	0.10DB	3.32
07/21/2004	IC0263769-063	099-COMM SPL		1.91DB	1.41
07/26/2004	HQ0264222-022	011-RCPT MO/CC	6264	40.00	41.41
07/28/2004	IC0264486-059	099-COMM SPL		36.95DB	4.46
08/03/2004	HQ0265176-002	011-RCPT MO/CC	JULY/WAGES	35.00	39.46
08/04/2004	IC0265354-068	099-COMM SPL		1.75DB	37.71
08/11/2004	IC0266323-073	099-COMM SPL		37.69DB	0.02
08/12/2004	HQ0266396-005	011-RCPT MO/CC	SOCCER	3.00	3.02
08/18/2004	IC0266923-019	078-MET MAIL	83601	0.83DB	2.19
09/07/2004	HQ0268851-018	011-RCPT MO/CC	8844	25.00	27.19
09/08/2004	IC0269137-071	099-COMM SPL		27.17DB	0.02

NO. _____ FILED _____
 A.M. _____ P.M. 1:20
OCT 05 2004
 J. DAVID NAVARRO, Clerk
 DEPUTY

MAX RITCHIE COOKE, #25564
 ICC, C-206-B
 PO BOX 70010
 Boise, Idaho 83707

Petitioner,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MAX RITCHIE COOKE,
 Petitioner,

v.

STATE OF IDAHO,
 Respondent.

)
) **SP OT 0400770D**
) Case No. H0300279
)
) PETITION FOR POST CONVICTION
) RELIEF
)
)
)
)

The petitioner alleges:

1. Petitioner is in the custody of the Idaho Correctional Center, PO Box 70010, Boise, Idaho, 83702.
2. Petitioner's judgment/sentence was imposed by the Fourth Judicial District Court, County of Ada, Michael McLaughlin, District Judge presiding.
3. The case numbers and the offenses for which the sentences were imposed:

PETITION FOR POST-CONVICTION RELEIF 1

a. Case Number: H0300279

Offenses Convicted of: Count I: Second Degree Kidnapping, Section 18-4507, Idaho Code; Count II: Aggravated Battery, Sections 18-903(c), and 18-4503 Idaho Code; Count III: Assault, Section 18-901(b), Idaho Code.

4. The date of which the sentences were imposed, and the terms of the sentences:

a. Date of sentence: August 20, 2003, with an Amended Judgment of conviction entered on October 10, 2004.

b. Terms of sentences:

Count I: Kidnapping: An aggregate term of twenty-five (25) years, with twelve (12) years fixed, followed by an indeterminate period of thirteen (13) years;

Count II: Aggravated Battery: An aggregate term of fifteen (15) years, with seven (7) years fixed, followed by an indeterminate period of eight (8) years;

Count III: Assault: A period of ninety (90) days of jail time.

5. Petitioner was found guilty by Jury Trial.

6. Petitioner filed a Direct Appeal on October 10, 2003 but was dismissed and a Remittitur was issued on December 18, ²⁰⁰³~~2004~~ for being filed to late.

7. Grounds on which petition for post conviction relief is based:

a. Petitioner hereby states the following claims on which he bases his application for post conviction relief, and is a preliminary statement of the claims on post conviction ion relief which petitioner intends to assert; this list of issues on post conviction may change upon petitioner's review of the record and appointment of Counsel.

- b. Petitioner further states that the claims have violated his constitutional rights under the Idaho Constitutional Article 1, Section 13, and in and through Article 1 Section 3, and in and through Article 6, Clause 2 of the United States Constitution regarding petitioner's right to Due Process, Equal Protection of the Law, and right to Effective Assistance of Counsel, and have been abridged.
- c. Petitioner further request that respondent respond to all the claims listed pursuant to Section 19-4906(a), Idaho Code.

CLAIMS

Claim One: Petitioner's right to Due Process and Equal Protection of the Law was violated under Article 13, Section 1 of the Idaho Constitution and the Fourteenth Amendment of the United States Constitution.

Claim Two: Petitioner's right to effective assistance of counsel under Article 1 of the Idaho Constitution and the Sixth and Fourteenth Amendments of the United States Constitution was violated.

Claim Three: Petitioner's right to access to the courts was denied under Article 1, Section 13 of the Idaho Constitution and the First and Fourteenth Amendments of the United States Constitution.

Supporting Facts: Petitioner at this time files this Petition for Post Conviction Relief so that it is filed within the statutory time limits. Petitioner has just received his files from his former counsel of record and is also attempting to obtain a copy of the audio from all court proceedings in this matter so as to perfect a proper post conviction relief and will submit an Affidavit In Support and further documentation upon review of said mentioned records. Petitioner further supports this

petition for post conviction by the attached Affidavit of Facts In Support of Post-Conviction Petition.

8. Prior to this motion, what have you filed with respect to this conviction?

a. Petitioner's in State or Federal Court for Habeas Corpus? NONE

b. Any other petitions, motions, or application in any other Court? Yes

Petitioner filed a Untimely Appeal on October 10, 2004 and was dismissed on December 18, ²⁰⁰³2004.

9. Petitioner's application is further based upon the failure of counsel to adequately represent petitioner in the criminal matters in this case.

a. Petitioner cites ineffective assistance of counsel for petitioner alleges that but for counsel, Karl Shirliff, performance fell below a reasonable standard and counsel failed to effectively represent petitioner. The assumption of Due Process, Equal Protection and effective Assistance of counsel right has been undercut by counsel's errors and performance and support post sentence attack on the sentence in violation of State and Federal constitution and have been abridged.


RELIEF SOUGHT

10. Petitioner requests this court to grant the following relief and anticipates the production of other evidence will be completed at a reasonable time upon the review of the record and submission of an Affidavit In Support.

a. ORDER respondent to respond to said petition for post conviction relief pursuant to Section 19-4906(a);

- b. GRANT the petitioner the right to amend this petition upon review of the records and files that he has just obtained from former counsel of record and review of the trial audio disks;
- c. FIND and DECLARE that petitioner's Due Process and Equal Protection under the law was violated under Article 13, Section 1 of the Idaho Constitution and the Fourteenth Amendment of the United States Constitution;
- d. FIND and DECLARE that petitioner's right to access the courts was violated under Article 1, Section 13 of the Idaho Constitution and the First and Fourteenth Amendments of the united States Constitution;
- e. FIND and DECLARE that petitioner's right to effective assistance of counsel was violated under Article 1, Section 13 of the Idaho Constitution and the Sixth and Fourteenth Amendments under the United States Constitution;
- f. ORDER an evidentiary hearing be conducted in these matters before this court;
- g. ORDER a new trial to ensue based upon the information and facts that petitioner is to present to this trial court;
- h. GRANT petitioner any such other and further relief that this court may deem just and appropriate s predicated by the facts and the law.

Dated this 30 day of Sept, 2004.



Max Ritchie Cooke
Petitioner

AFFIDAVIT OF SUPPORTING FACTS

STATE OF IDAHO)
) ss.
County of ADA)

Max Ritchie Cooke, being first duly sworn on oath, deposes and says:

1. Affiant is the petitioner in this matter before this court;
2. Affiant has read and familiar with the contents of the matters set forth in the foregoing petition for post-conviction relief;
3. Affiant hired Karl Shirliff, Attorney at Law for representation in the trial;
4. Karl Shirliff informed affiant at the onset of representation that he would need \$3,000.00 to hire a accident reconstructionist and investigator to look into the criminal charges that affiant was facing before this court which affiant paid counsel a sum of \$5,000.00;
5. To the best of affiant's knowledge, Karl Shirliff at no time hired a accident reconstructionist or private investigator prior to the trial taking place;
6. Had Karl Shirliff hired the private investigator for investigation of the criminal charges in this case the outcome would have been different;
7. Affiant has obtained a copy of the records that former counsel Karl Shirliff had regarding this case and has discovered within the contents that counsel had a copy of the medical records of Alyson Cooke, affiant's former wife, showing that she was suffering from short term memory loss as well as the fact that she was in a coma for approximately fifteen (15) days;
8. Had Karl Shirliff made use of this discovery he could have shown that she was being treated for short term memory loss and could have shown the court through her medical records and with testimony from the treating physicians, Clay H. Ward, Ph.D. Neurological Specialist,

Roberto Barresi, MD, Christian Zimmerman, MD and James M. Johnston, MD, and had her testimony stricken from the record and discredited her as a witness for the state base upon such;

9. To date affiant's former wife Alyson Cooke does not fully remember the events that took place during the trial and can only recall small bits of information from it;
10. To date affiant's former wife Alyson Cooke can only recall the events that took place up to the point that affiant had impacted the tree in which resulted Alyson Cooke in suffering an injury to her brain and caused her to go into a coma for approximately fifteen (15) days;
11. Affiant further prior to the trial had made numerous attempts to contact counsel of record in order to communicate with him regarding preparing for the trial that was to take place and refused to take any of affiant's phone calls and would hang up on affiant when attempting to call counsel after he had been paid his fee;
12. Affiant had to rely on his brother Timothy McMillian to call counsel and ask that he get in touch with affiant so that he could discuss his case with counsel which did no good;
13. The only time that counsel came to see affiant was when he came to inquire about his \$5,000 fee so he could get started by getting the Accident Reconstructionist and Private Investigator;
14. Affiant further had requested that Counsel have certain key witnesses present for the trial who were Jan Shifflett, Chris Heone, Shawn Moloney and Ruth Cooke, and had explained to counsel what relevance they would have to the case
15. Affiant's counsel further failed to sit down with affiant and go over the discovery prior to the trial and it was not until halfway through the trial that counsel provided affiant with a copy of said discovery;

16. Upon affiant being found guilty by jury the Trial Court ordered that a Presentence Investigation Report (PSI) be prepared for sentencing purposes and was administered approximately July 2003.
17. Counsel did not come down to see affiant with the prepared PSI and mailed it to affiant. Upon receiving the PSI affiant attempted to contact counsel to inform him of the errors contained in the PSI and informed counsel that the PSI was virtually identical to the Police Reports. Counsel replied with the comment of , "Of course that's what they do" and had nothing to say afterwards.
18. Affiant informed counsel of the errors contained in the PSI which counsel informed affiant that there was nothing that could be done.
19. Affiant is aware that the Trial Court has sentencing procedures regarding the PSI which the Court must discuss the PSI with the parties pursuant to Section 20-220, Idaho Code, and Rule 32, Idaho Criminal Rule and must offer an aggravation and/or mitigation hearing to both parties pursuant to Section 19-2515(a) and counsel failed to state to the court what the errors were.
20. Affiant upon being sentenced requested that counsel file a Direct Appeal on behalf of the Affiant.
21. Affiant discovered that counsel had failed to file a Direct Appeal for him and then submitted an Idaho Department of Corrections (IDOC) Access To Courts Form to the Idaho Correctional Center (ICC) Resource Center and requested an Appeal Packet.
22. Affiant then filed out the packet and submitted another Access To Courts Form to the ICC Resource Center requesting a Notary and photo copies so that affiant could mail the packet

off to the court. Affiant further informed the ICC Paralegal on the Access To Courts form that he had a deadline of September 23, 2003 to have the packet mailed to the court.

23. Affiant was scheduled to see the ICC Paralegal at the Resource Center to have the Notice of Appeal and supporting Motions Notarized and mailed and patiently waited to have it done and then Paralegal Janel Gardner informed affiant that she did not have time to do the notary and copies that day and he would have to come in a different day.

24. Affiant informed Janel Gardner that it needed to be done that day due to the deadline which Janel Gardner then informed affiant that it was not due that day but in October of 2003 and informed affiant that he would have to come back another day to do it.

25. Affiant seeks the to have his right to challenge and appeal the judgment and conviction and a new trial based upon affiant's denial of effective assistance of trial counsel and returning the matter to the district Court for resentencing and a new trial.

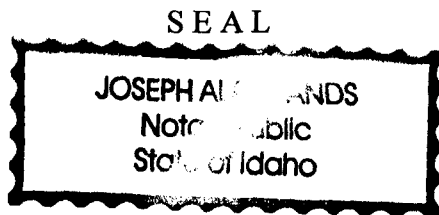
Dated this 30 day of Sept, 2004.

Max Ritchie Cooke
Max Ritchie Cooke
Petitioner

SUBSCRIBED AND SWORN To before me this 30 day of Sept, 2004.

Joseph Alan Sands
NOTARY PUBLIC FOR IDAHO

My Commission Expires on: 2010



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 01 day of OCT, 2004, I mailed a original of the PETITION FOR POST-CONVICTION RELEIF for the purposes filing with the court and of mailing a true and correct copy through the prison legal mail system via the U.S. mail system to:

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300



Max Ritchie Cooke
Petitioner

NO. _____ FILED _____
 A.M. _____ P.M. _____
 OCT 05 2004
 J. DAVID NAVARRO, Clerk
 By _____ DEPUTY

MAX RITCHIE COOKE, #25564
 ICC, C-206-B
 PO BOX 70010
 Boise, Idaho 83707

Petitioner,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SP OT 0400770D

MAX RITCHIE COOKE,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

)
) Case No. H0300279
)
) MOTION AND AFFIDAVIT IN
) SUPPORT FOR APPOINTMENT
) OF COUNSEL
)
)
)
)

COMES NOW, Max Ritchie Cooke, Petitioner in the above entitled matter and moves this Honorable Court to grant Petitioner's Motion for Appointment of counsel pursuant to Idaho Code 19-4904, and the reasons more fully set forth herein and in the Affidavit In Support For Appointment Of Counsel.

1. Petitioner is currently incarcerated within the Idaho Department of Corrections under the care custody and control of Warden Glen Turner of the Idaho Correctional Center, Boise, Idaho 83707.

WHEREFORE, Petitioner respectfully prays that this Honorable Court issue it's Order granting Petitioner's Motion for Appointment of Counsel to represent his interest, or in the alternative grant any such relief to which it may appear the Petitioner is entitled to:

DATED this 30 day of Sept., 2004

M. Ritchie Cooke

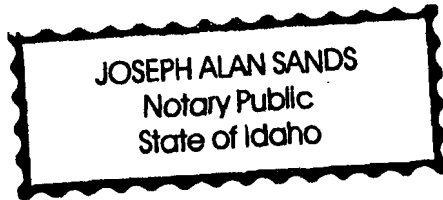
Max Ritchie Cooke, Petitioner

SUBSCRIBED AND SWORN To before me this 30 day of Sept., 2004.

Joseph Alan Sands
Notary Public for Idaho

Commission expires: 2010


S E A L



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 1 day of OCT, _____, 2004, I mailed a original of the MOTIN AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL for the purposes filing with the court and of mailing a true and correct copy through the prison legal mail system via the U.S. mail system to:

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300



Max Ritchie Cooke
Petitioner

NO. _____
 A.M. _____ P.M. 1:00
OCT 05 2004
 J. DAVID NAVARRO, Clerk
 BY [Signature]
 DEPUTY

MAX RITCHIE COOKE, #25564
 ICC, C-206-B
 PO BOX 70010
 Boise, Idaho 83707

Petitioner,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MAX RITCHIE COOKE,	)	SP OT 0400770D
	)	Case No. <u>H0300279</u>
Petitioner,)	
	)	MOTION TO RELEASE PSI
v.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW, Max Ritchie Cooke, Petitioner, hereby moves this Court for its Order releasing the Presentence Investigation compiled in *State of Idaho vs. Max Ritchie Cooke*, Case Number H0300279.

This motion is made on the basis the undersigned needs said report to familiarize himself with what was reported and the merits of this post-conviction relief case that is pending before this Court.

MOTION TO RELESE PSI - 1

Petitioner has made allegations that there were errors in the report that was utilized for sentencing, and that trial counsel was ineffective in representing petitioner during the sentencing phase of the above referenced case.

WHEREFORE, PREMISES CONSIDERED, Petitioner moves this Honorable Court to issue its order releasing the presentence report to petitioner so that it may be utilized in the pending petition for post-conviction relief and for such other relief as the Court may deem proper.

Respectfully submitted this 01 day of Oct., 2004.

M. Ritchie Coole

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 01 day of OCT, 2004, I mailed a original of the MOTION TO RELEASE PRESENTENCE INVESTIGATION REPORT for the purposes filing with the court and of mailing a true and correct copy through the prison legal mail system via the U.S. mail system to:

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO BOX 70010
Boise, Idaho 83707

NO. _____
P.M. 3

OCT 18 2004

J. DAVID HAWKINS
[Signature]
CLERK

Petitioner,

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SP OT 0400770D

MAX RITCHIE COOKE,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

)
) Case No. No 300279
)
) ORDER FOR WAIVER OF FEES
) (PRISONER)

Having reviewed the Petitioner's Motion and Affidavit for fee Waiver,
THIS COURT HEREBY ORDERS a full waiver of fees and costs pursuant to Section 19-4904,
Idaho Code, and may proceed with the pending Petition for Post Conviction Relief in this case.

DATED This ____ day of _____, 2004.

*Denial -
therefore no
fee is associated
with this Petition.
Judge Wiley
10/15/04*

Michael McLaughlin, District Judge

HB

CLERKS CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ___ day of _____, 2004, I mailed a original of the ORDER FOR WAIVER OF PREPAID FEES (PRISONER) to the following as indicated below:

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO Box 70010
Boise, Idaho, 83707

U.S. Mail

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300

U.S. Mail
 Fax
 Hand Delivered

CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk

FILED 3 P.M.

OCT 18 2004

J. DAVID HAVARDO
CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

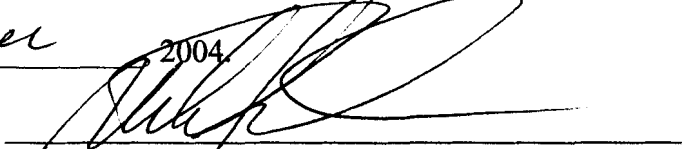
SP OT 0400770D

MAX RITCHIE COOKE,
Petitioner,
v.
STATE OF IDAHO,
Respondent.

)
) Case No. HO300279
)
) ORDER APPOINTING COUNSEL
)
)
)
)
)
)
)

The matter having come before the Court on the Petitioner's Motion and Affidavit In Support for Appointment of Counsel, and good cause appearing therefore;

IT IS HEREBY ORDERED, that ADA County Public Defender, ~~Attorney at Law~~, is appointed to represent the Petitioner in the matters of the Petition for Post-Conviction Relief which is filed before this Court.

DATED this 15 day of October, 2004.

McLaughlin, District Judge

JP

CLERKS CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of October, 2004, I mailed a original of the ORDER APPOINTING COUNSEL to the following as indicated below:

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO Box 70010
Boise, Idaho, 83707

U.S. Mail

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300

U.S. Mail
 Fax
 Hand Delivered

Ada Co. Public Defender
Counsel for Petitioner
(and all Paperwork today)

U.S. Mail
 Fax
 Hand Delivered

CLERK OF THE DISTRICT COURT

By: Kurt M Brown
Deputy Clerk

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO BOX 70010
Boise, Idaho 83707

FILED
A.M. P.M. 3
OCT 18 2004
J. DAVID HAWKINS
Clerk

Petitioner,

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SP OT 0400770D

MAX RITCHIE COOKE,

Petitioner,

v.

STATE OF IDAHO,


Respondent.

)
) Case No. H0300279
)
) ORDER RELEASING PRESENTENCE
) REPORT
)
)
)
)
)
)

The matter having come before the Court on the Petitioner's Motion to Release Presentence Report, and good cause appearing therefore;

IT IS HEREBY ORDERED, the Presentence Investigation Department shall release the presentence investigation report in the case of *State of Idaho v. Max Ritchie Cook*, Case Number H0300279 to Petitioner for the use in the petition for post conviction relief case that is pending before this court.

DATED this 15 day of October, 2004.



Michael McLaughlin, District Judge

KB

CLERKS CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of October, 2004, I mailed a original of the ORDER RELEASE PRESENTENCE REPORT to the following as indicated below:

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO Box 70010
Boise, Idaho, 83707

U.S. Mail

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702-7300

U.S. Mail
 Fax
 Hand Delivered

PS1 - Interdepartmental mail

CLERK OF THE DISTRICT COURT

By: Kristin M Bauer
Deputy Clerk

NO. _____ FILED 2:20
A.M. _____ P.M.

NOV 17 2004

J. DAVID BAVARRE
by _____ DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Idaho State Bar # 2127
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
)
_____)

Case No. SPOT0400770D

**RESPONSE TO PETITION FOR
POST-CONVICTION RELIEF
AND STATE'S MOTION TO
DISMISS**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's response to the Defendant, Max Ritchie Cooke's petition for post conviction relief as follows.

The State admits that the petitioner is in the custody of the Idaho Department of Corrections pursuant to a judgment and sentence pronounced by the Honorable Michael McLaughlin, District Judge, of the Fourth Judicial District, in Ada County, Idaho. The State admits that the petitioner stands convicted in Ada County case number H0300279 of second

MC

degree kidnapping, aggravated battery and misdemeanor assault. The State admits that the petitioner has been sentenced to an aggregate term of 24 years with 12 years fixed for the crime of kidnapping; to a concurrent 15 year sentence with 7 years fixed for the crime of aggravated battery; and a concurrent 90 day jail sentence for the assault. The State admits that the petitioner pled not guilty, but that a jury found proof beyond a reasonable doubt that he committed the crimes charged and returned guilty verdicts against him.

The State denies every other ground upon which the defendant relies for support of his petition for post-conviction relief.

Specifically, the State denies that the convictions and sentences entered against the petitioner were obtained in violation of any law of the United States, or of Idaho, and further denies that the convictions and sentences were taken in violation of any amendment to the United States Constitution or in violation of any article of the Constitution of the State of Idaho, or of the Idaho Code or the Idaho Criminal Rules.

The State will respond to the specifics of the petitioner's ineffective assistance of counsel claims. However, before doing that, a review of the current state of the law on ineffective assistance of counsel claims and the burden of proof is in order. The Idaho Supreme Court has stated the standard for judging ineffective assistance of counsel claims in Pratt v. State, 134 Idaho 581 (Sup. Ct. 2000) as follows:

The benchmark for judging a claim of ineffective assistance of counsel is "when a counsel's conduct so undermined the proper functioning of the adversarial process, that the trial cannot be relied on as having produced a just result." State v. Matthews, 133 Idaho 300 (S.Ct. 1999), cert. denied, 2000 WL 198035 (2000) (quoting, Strickland vs. Washington, 455 U.S. 668 (1984)). The test for evaluating whether a criminal defendant has received the effective assistance of counsel is two-pronged and requires the petitioner to establish: (1) Counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) The petitioner was prejudiced as a result of that deficient conduct. Ray v. State, 133

Idaho 96 (1999). (Citing Strickland, 455 U.S. at 687). In assessing the reasonableness of attorney performance, counsel is “presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* At 329-30 (citing Strickland, 466 U.S. at 690). In addition strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other short comings capable of objective review. Giles v. State, 125 Idaho 921 (1994), cert. denied, 513 U.S. 1130 (1995).

The Idaho Court of Appeals further defined “prejudiced” as it relates to an ineffective assistance of counsel claim in Goodwin vs. State, 138 Idaho 269 (Ct.App.2002) The court stated:

To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. Hassett v. State, 127 Idaho 313, 316, (Ct.App.1995); Russell v. State, 118 Idaho 65 (Ct.App.1990); Davis v. State, 116 Idaho 401 (Ct.App.1989). To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. Aragon v. State, 114 Idaho 758 (1988); Russell, *supra*. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different. Aragon supra, and Russell supra.

In other words it is not good enough for a petitioner to merely point out that trial counsel conducted the trial differently than the petitioner would have done. It is not even good enough to point out that trial counsel committed a mistake in the law or the facts. The petitioner must establish that trial counsel’s representation fell below an objective standard of reasonableness and that the outcome of the trial would have been different but for the deficient performance.

The court is not required to accept either the petitioner’s mere conclusory allegations, unsupported by admissible evidence of the petitioner’s conclusions of law. Roman v. State, 125 Idaho 736 (Ct.App.1987); Baruth v. Gardner, 110 Idaho 156 (Ct.App.1986). The Goodwin supra court went on to say that a petition for post conviction relief differs from a complain in a civil

action because the petition must contain more than “a short and plain statement of the claim” that would be sufficient for a civil complaint under I.R.C.P. 8(a)(1):

Rather, an application for post conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. *Idaho Code §17-4903*. In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal.

Idaho Code §19-4906 authorized summary disposition of an application for post conviction relief, either pursuant to motion of a party or upon the courts own initiative. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact, which, if resolved in the applicant’s favor, would entitle the applicant the requested relief. If such a factual issue was presented, an evidence hearing must be conducted. *Citations omitted*.

The State denies that the petitioner has proven that trial counsel was ineffective for any reason. A bald assertion is not a claim that relief can be based on. The petitioner has not shown that trial counsel’s performance was outside professional norms nor has he shown how the outcome of the trial would have been different had counsel done the things that the petitioner suggests.

For instance, the petitioner has not alleged what an accident reconstructionist would have testified to that is different than the facts the jury heard.

The petitioner has not alleged what Clay H. Ward, Ph.D. would have said about Alyson Cooke’s memory that is different than what Allyson Cooke said about her memory.


The petitioner has not alleged what the named witness would have testified to that was relevant to the case. He has not alleged how the testimony of any of the witnesses would have changed the outcome. He has not claimed that there was any issue in the case that an appellate court would have ruled on in his favor that would have changed the outcome of the trial.

The petitioner's claims about discovery and the presentence report fall into the same category. There is no claim there were mistakes in the presentence report that were of substance nor that there was incorrect information in the discovery material. The petitioner has put no genuine issue of material fact before the court as required by Idaho Code §19-4906.

For those reasons, the State moves this Court to dismiss the petition without hearing.

RESPECTFULLY SUBMITTED this 10th day of November 2004.

GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing Response To Petition For Post-Conviction Relief And State's Motion To Dismiss was delivered to the Ada County Public Defender, 200 W Front Street, Room 1107, Boise, Idaho 83702, through the Interoffice Mail, this 10th day of November 2004.



NO. _____
FILED _____
A.M. _____ P.M. 2:25

JAN 28 2005

J. DAVID MACAPRO, Clerk
By J. David Macapro
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX R. COOKE,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
)
)
)
)
)

Case No. SPOT0400770D

**FURTHER STATE'S RESPONSE
TO PETITION FOR POST-
CONVICTION RELIEF**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before the Court the State's further response to the defendant's Petition for Post-Conviction Relief. The State has earlier responded to the petition, but makes this supplemental response based upon affidavits and other information forwarded by the petitioner since the State's original response.

The State reaffirms its admissions and denials in the original response and further denies the allegations relating to the defendant's claim that trial counsel was ineffective by not filing a timely appeal.

The State further denies that trial counsel was ineffective for failing to employ an accident reconstructionist or for not calling specified witnesses. The State denies all other claims which the defendant relies upon as a basis for the allegations made in his Petition for Post-Conviction Relief.

Specifically, trial counsel, Karl Shurtliff, has set out in the attached affidavit to the effect that the petitioner did not desire an appeal until the original appeal time had run. At the point where the petitioner requested an appeal, Mr. Shurtliff filed an appeal and requested the Court to appoint the public defender to pursue the appeal. This issue is more fully set out in the attached affidavit of Karl Shurtliff.

As to the accident reconstructionist, Karl Shurtliff did employ an accident reconstructionist and paid him as shown by the bill from Clyde Lookhart, which is attached to Karl Shurtliff's affidavit and made a part of this response by reference.


Finally, Karl Shurtliff advises that he represented the defendant in a competent manner and did everything for the defendant that was reasonable and proper given the evidence and circumstances of the case. Mr. Shurtliff advises that he believes that the medical professionals referred to in the defendant's petition would not have added any information that was not cumulative to what the jury learned in the case. Mr. Shurtliff does not recall discussing those witnesses with the defendant. Mr. Shurtliff does not recall the witnesses named by the defendant in his petition except Ruth Cooke, who was a character witness. Mr. Shurtliff's recollections of those issues is more fully set out in his attached affidavit.

It appears to the State that the defendant did not request an appeal. The defendant has not claimed an appealable issue. The defendant has not claimed what the named witnesses would have said nor how he believes the outcome would have been different. No genuine issue of fact is before the Court. The petition should be dismissed.

For the reasons set out above, the State moves this Court to dismiss the defendant's Petition for Post-Conviction Relief.

RESPECTFULLY SUBMITTED this 27th day of January 2005.

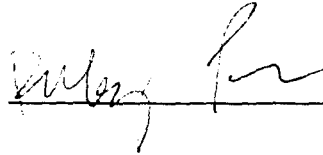
GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to the Ada County Public Defender, 200 West Front Street, Room 1107, Boise, Idaho 83702 through the Interoffice Mail, this 21 day of January 2005.



Session: McLaughlin033005
Session Date: 2005/03/30
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 15:14

Courtroom: CR507

Clerk(s):
Brown, Kristin

State Attorneys:
Armstrong, Shelley
Bourne, Roger
Bratcher, Kimberlee
Darrington, Shane
Dunn, Shawna

Public Defender(s):
DeAngelo, Michael
Odessey, Ed
Smethers, Dave
Steveley, Craig

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case Number: SPOT0400770D
Plaintiff: Cooke
Plaintiff Attorney:
Defendant: State of Idaho
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender: DeAngelo, Michael

2005/03/30

15:24:10 - Operator
Recording:

15:24:10 - New case
State of Idaho

15:24:23 - State Attorney: Bourne, Roger
present

15:24:40 - Public Defender: DeAngelo, Michael
present

15:24:52 - Plaintiff: Cooke
Max Ritchie Cooke present in custody

15:25:17 - Judge: McLaughlin, Michael R.
time set for motion to dismiss petition, has reviewed file

15:25:34 - State Attorney: Bourne, Roger
argues as to State's response to petition, dismiss

15:27:58 - Public Defender: DeAngelo, Michael
response to State

15:29:55 - Public Defender: DeAngelo, Michael
continues to Court

15:34:06 - State Attorney: Bourne, Roger
response to defense comments

15:36:17 - Judge: McLaughlin, Michael R.
upon review of petition, will find that petitioner has not s
ubmitted type of

15:36:34 - Judge: McLaughlin, Michael R.
affidavits necessary to create inferences that counsel was i
neffective, or

15:36:59 - Judge: McLaughlin, Michael R.
basis for an appeal - case in different posture, continues

15:37:47 - Judge: McLaughlin, Michael R.
will dismiss petitin, but will give until 6/6/05 to file ame
nded petition

15:38:13 - Operator
Stop recording:

GREG H. BOWER
Ada County Prosecuting Attorney

RECEIVED
APR 05 2005
Ada County Clerk

FILED
APR 06 2005
P.M. 4
J. DAVID NAVARRO, CLERK
DEPUTY

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
)
)
)

Case No. SPOT0400770D
ORDER DISMISSING PETITION

THE STATE'S MOTION TO DISMISS came before the Court on March 30, 2005, for argument. After argument, and the Court being otherwise fully informed, this Court finds that the petition contains only assertions without a factual basis alleged. The petitioner has not shown that trial counsels' actions were unreasonable. There is no genuine issue of material fact alleged in the petition that would justify a hearing under Idaho Code §19-4906(c). Therefore, the State's Motion to Dismiss the Petition for Post Conviction Relief is granted and the petition is dismissed. The petitioner is given until June 6, 2005, to file an amended petition for post conviction relief.

b

IT IS SO ORDERED this 6 day of April 2005.



MICHAEL MCLAUGHLIN
District Court Judge

NO. _____
A.M. 9:05 P.M. _____

JUN 06 2005

By J. David Navarro CLERK
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)	
	)	Case No. SP OT 04 00770 D
Petitioner,)	
	)	<u>AMENDED</u> PETITION FOR POST
vs.	)	CONVICTION RELIEF
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW, MAX RITCHIE COOKE, Petitioner above-named, and by and through his attorney the Ada County Public Defender's office, handling attorney MICHAEL DeANGELO, who pursuant to Idaho Code § 19-4901, brings before this Honorable Court this amended petition for post conviction relief and accompanying affidavits in support thereof.

THE PETITIONER ALLEGES

1) The petitioner is currently housed at the Idaho Correctional Center in Ada County, Idaho.

2) A judgment of conviction was entered against the petitioner after a guilty verdict in case number H0300279 on June 12, 2003, for Count I: KIDNAPPING, SECOND DEGREE, FELONY, I.C. § 18-4503; Count II: AGGRAVATED BATTERY, FELONY, I.C. §§ 18-903(c), 907(a); and Count III: ASSAULT, MISDEMEANOR, I.C. § 18-901.

3) The petitioner was represented by Karl Shurtliff, Esq.

4) The petitioner was sentenced on August 20, 2003, with an amended judgment of conviction entered on October 10, 2004, to:

- Count I - twelve (12) years fixed, thirteen (13) years indeterminate for an aggregate term of twenty-five (25) years.
- Count II - seven (7) years fixed, eight (8) years indeterminate, for an aggregate term of fifteen (15) years.
- Count III - ninety (90) days jail.
- All sentences to run concurrently.

5) After sentencing, the petitioner directed his attorney to file an appeal.

6) Despite the aforementioned proceedings and the petitioner's request that his attorney file an appeal, an appeal was not filed in a timely manner.

PROCEEDINGS

7) The petitioner filed a pro se petition for post conviction relief and supporting affidavit on October 5, 2004, which was dismissed by the Court on April 6, 2005, with leave to file an amended petition by June 6, 2005.

8) This court entered an ORDER for appointment of counsel.

9) Appointed counsel hereby filed this amended petition for post conviction relief.

CLAIMS FOR RELIEF

10) That, pursuant to Idaho Code § 19-4901(a)(4), there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction and sentence in the interests of justice. In support, the petitioner relies upon the attached affidavit of Alison Cooke of May 25, 2005, her letter of July 22, 2004, the medical report of Clay H. Ward, PhD., and the prior petition filed herein including its exhibits and attachments. These materials clearly show that Dr. Ward would have testified that Alison Cooke was not a competent and reliable witness and at risk for false memories. Had Alison Cooke been properly cross-examined, her testimony would have confirmed that and provided the jury with her best recollection that the defendant did not kidnap her and did not mean to hurt her.

Therefore, the petitioner has shown a reasonable doubt as to the reliability of the finding of guilt, which in the exercise of due diligence by the competent and effective assistance of counsel, rather than counsel's failure to utilize Dr. Ward as a witness and properly cross-examine Alison Cooke, could not have been presented earlier.

11) That, pursuant to Idaho Code § 19-4901(a)(1), the petitioner was denied the effective assistance of counsel required by the Sixth Amendment to the United States Constitution and Article I, section 13, of the Idaho Constitution, as described above and by the failure of his attorney to file a timely direct appeal when requested to do so by the petitioner, thereby depriving the petitioner of his right to appeal from his judgment of conviction. In support, the petitioner relies upon the attached affidavits of Max Ritchie Cooke of July 7, 2004, and of Timothy McMillen of December 1, 2004, and the prior petition filed herein including its exhibits and attachments. These materials clearly indicate that the petitioner made a timely request for his attorney to file an appeal but Mr. Shurtliff did not do it. Although the petitioner was incarcerated, he made substantial efforts to file his own appeal, but the Idaho Correctional Center paralegal did not do it.

Therefore, the petitioner has show that he made reasonable efforts to appeal his judgment of conviction.

RELIEF REQUESTED

12) The petitioner requests the court for its ORDER vacating the verdicts of guilty and the judgment of conviction and grant the petitioner a new trial.

In the alternative, the petitioner requests the court for its ORDER vacating the judgment of conviction and re-entering the judgment so as to allow the petitioner time to perfect a timely appeal.

Or, for such further relief as the court deems just and reasonable.

DATED, this 15th day of Wednesday, June 01, 2005.



MICHAEL DeANGELO
Attorney for Petitioner

CERTIFICATE OF VERIFICATION

I, MAX RITCHIE COOKE, the petitioner named in the above action, first being duly sworn upon my oath, depose and say that I have read the foregoing amended petition and the documents, affidavits, and exhibits attached to this amended petition are hereby sworn to be true and correct to the best of my information, knowledge, and belief.

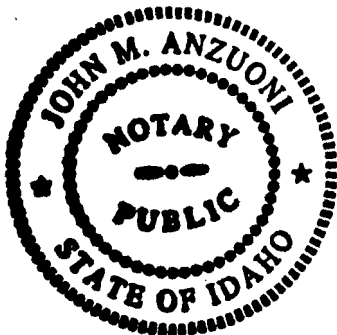
DATED, this 3 day of June 2005.

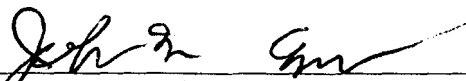


MAX RITCHIE COOKE
Petitioner

STATE OF IDAHO)
) ss.
County of Ada)

I, John Anzuoni, a notary public, do hereby certify that on this 3rd day of June 2005, personally appeared before me MAX RITCHIE COOKE who, being by me first duly sworn, declared that he is the petitioner named in the above action, that he signed the foregoing document as the petitioner in the above action, and that the statements therein contained are true.





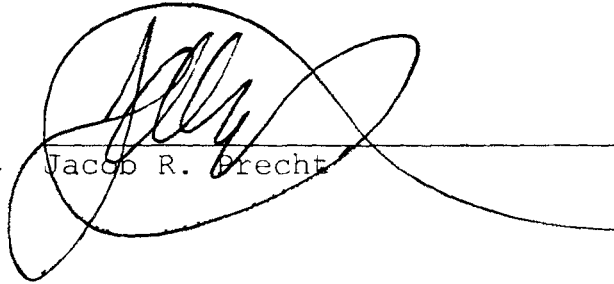
John Anzuoni
Notary Public
Residing at Boise, Idaho
My Commission Expires 8/2008

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 6th day of June 2005, I mailed a true and correct copy of the foregoing to:

ROGER BOURNE
DEPUTY PROSECUTOR
ATTORNEY FOR RESPONDENT
ADA COUNTY PROSECUTOR'S OFFICE

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	FACSIMILE
<input checked="" type="checkbox"/>	INTERDEPARTMENTAL MAIL



Jacob R. Precht

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)	
	)	Case No. SP OT 04 00770 D
Petitioner,)	
	)	AFFIDAVIT OF ALISON COOKE
vs.)	
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	
)	

I, Alison K. Cooke, after first being duly sworn, do attest to the following:

1) That I was a witness in the underlying criminal case (H0300279) involving my former husband Max Ritchie Cooke.

2) That the letter dated July 22, 2004, attached hereto as "Exhibit A," is a true and correct copy of my letter that details my best recollection as to what happened in the accident of January 18, 2003.

3) That the medical report of Clay H. Ward, PhD, attached hereto as "Exhibit B," is a true and correct copy of his medical report diagnosing my injuries, including his opinion that:

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, unreliable, and she is at risk for developing new memories or false memories rather than accurately recalling what happened prior to the impact.

4) That I testified at the above petitioner's jury trial on June 12, 2003, although I did not want to, and that Dr. Ward's opinion of my memory state was still correct at that time, and I was not mentally competent to understand what was going on at that time.

DATED, this 25 day of May 2005.

Alison K. Cooke

**Alison K. Cooke
Affiant**

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED and SWORN to before me, a Notary Public, in and for the state of Idaho, this 25 day of May 2005.



Donna J. Waters

Notary Public
Residing At Bain
My Commission Expires 8-3-10

2A109630C

EXHIBIT AI

To Whom it May Concern:

7/22/04

This is a true statement from Alison K. Cooke from what I remember of the accident that happened on January 18th, 2003.

I was staying at the time the accident happened, I was driving to my brothers house early in the morning at about 2:15 am. I remember pulling into my brothers subdivision and seeing my husbands truck parked a block away from where I was staying. I knew right then there was going to be an encounter that I was not ready for.

I pulled up to my brothers house and saw Ritchie walking out of the back area by a tree and turned my truck off. Ritchie approached the truck and told me to roll down the window. I rolled down the window and he began asking me where I have been and what I had been doing. We began to argue. I then told him I was not going to fight this early in the morning outside of my brothers house. He then asked to get into the truck. I moved over and let him in the truck. We then began fighting again. The fight was about where I had been and that I was suppose to pick up our son [REDACTED] at 8:00 pm that night so Ritchie could go snowmobile riding in the morning. I mentioned to him that I thought I was suppose to pick [REDACTED] up at 8:00 am the next day.

Ritchie then told me to let him drive us home so he could take me back home to show [REDACTED] what a worthless mother I had become. I then remember Ritchie starting the truck and driving off. I remember him driving very fast and not stopping at any stop signs.

I then began yelling at him to slow down and to pull over and to let me drive. He said no, that I had been drinking and he was going to take me home to show our son what a bad mother I had become.

The next thing I remember is that it felt as if we hit a huge bump in the road which made both of us hit the top of the roof of the pick-up and to come down hard. I saw Ritchie hit his face on the steering wheel. I can remember the sound of the trucks engine and how the truck went out of control. I remember screaming and yelling Ritchie's name.

1.

From the desk of: My Cooke accohe@stein-ab.com

00056

EXHIBIT AZ

Then I remember seeing a tree in front of us with a huge crash sound. I still can remember the sound and the smell. I remember Ritchie trying to calm me down and talk to me. I felt that the passenger door was opened from the crash and then Ritchie trying to help me. I was kicking at the dash board because my leg at that time and point was pined under the dash. Ritchie kept telling me to calm down and to quit moving and he was going to go and get help.

I remember hearing people coming back to the truck saying and Ritchie's voice saying "she is over here". I then must have blacked out because the next thing I remember is kicking my way out of the truck onto the ground and then I could hear more voices of some that I knew. It was the Meridian Paramedics. I knew them because at that time I was working for the City of Meridian. I can remember them telling me to calm down.

That is all that I remember from the wreck and that I have no memory of the trial that took place. I am not sure of even how I could have been able to testify with the injuries that I sustained in the automobile wreck. From the medical records that I have read they state that I was not a good candidate to a witness for the trial because of the brain injury that I sustained as well as the memory loss. I was still at that time unable to live on my own and also was in physical therapy every other day. For both mental and physical purposes. I was being taught how to live again. Not with the help of others just with my family.

Some of my injuries where a compound fracture leg, collapsed lung, broken jaw, many broken ribs and a brain injury. Which I am still recovering from as well as the other injuries that I had sustained that night. I was in a coma for two weeks and kept in ICU for almost a month and released on February 21, 2003.

Though I don't remember being in the hospital, I seldom have flashbacks of the last couple of days that I was there.

I know that Ritchie would never mean to hurt either of us on purpose. I believe that he had lost control of the truck for some reason and with that could not regain control which lead to the horrible crash, a horrible out come from a horrible crash now takes place.

2.

From the desk of Ally Cooke accake@stein-ab.com

00057

EXHIBIT A3

I will say that I miss the life we had and even though we where going through some hard times we may have been able to work everything out. Now with all that has happened I will never know what could have been or what can be

Ritchie & I have two children together one of which we have given up for adoption but do still have contact with. She will be 13 years old in March.

Our son's name is [REDACTED] and he is the pride and joy of both our lives. He is 7 years old. [REDACTED] misses his dad so much that everyday is a struggle for him. They where best friends, and now he is gone. [REDACTED] is still to young to understand all of what happened and does not like to talk about what all happened but I can see it in his eyes. Eye's of a hurting child that no one can ever fix. Which hurts my heart daily. I know that Ritchie was a huge part of his life, our life and can not and will not be replaced...

I personally feel that I was not kidnapped. I do remember telling everyone involved that I didn't see how they could charge him with a kidnapping because I feel and know that I was not.

I hope this letter helps in reconsidering Ritchie's sentence on the kidnapping charge.

Sincerely,



Alison K. Cooke
3300 N Lakeharbor Ln A-101
Boise, ID 83703
208-703-1978

3.

From the desk of Ally Cooke acooke@netm-nh.com

00058

EXHIBIT B1



**Saint Alphonsus
Regional Medical Center**

1055 N. Curtis Rd. • Boise, Idaho 83706 • (208) 367-2121

**Medical Information Services
Department**

Patient: **COOKE, ALISON K**

MR #: 251268

Visit #: 301800264

Date of Birth: 07/05/1972

Hosp. Serv.: ER - IPA

Room/Bed: 008 - 1

Admit: 01/18/2003

Disch:

Dict. MD: CLAY H. WARD, PhD

Att. MD:

Job Number: 1089254

Version: 1

Page 1 of 3

CONSULTATION

REFERRING PHYSICIAN: Roberto Baressi, MD

HISTORY OF PRESENT ILLNESS: The patient is apparently a 30-year-old woman who was involved in a motor vehicle accident on January 18, 2003. The accident resulted in a severe traumatic brain injury with decreased level of consciousness and a Glasgow coma scale of 3T. Cranial CT scan indicated that she had multiple areas of petechial hemorrhage including hemorrhage at the midbrain. Neurosurgical consultation was provided by Dr. Zimmerman. Her trauma care was provided by Dr. Barresi and with orthopedic consult by Dr. Johnson. She did undergo an open reduction internal fixation of her right tibia fractures. ventriculostomy was also performed by Dr. Zimmerman for monitoring of intracranial pressure.

The details of the accident appear to be very suspicious based on the medical records. Apparently she was a passenger in the vehicle with her spouse the driver. According to the medical records and the sheriff's report, the car apparently went across a ditch and approximately 250 feet before impacting a tree. The family members indicated that the car left the highway and made a straight bee line towards the tree. They are unsure about what actually happened but my understanding is that the patient was separated at the time of the accident. She was living with her brother.

The patient does have a history of several medical problems including gastroesophageal reflux disease, reactive airway disease, possible Crohn's disease and depression. She has been on Effexor in the past for depression. She reportedly has an occasional history of alcohol and tobacco use. She was not positive for any alcohol use or illegal drug use at the time of the accident.

The patient is currently alert but disoriented and easily confused. She also fatigues very easily. She was oriented to herself and she did know the name of the hospital being Saint Alphonsus, since family members have repeatedly told her she was at Saint Alphonsus. She was not oriented to city, month, day of the month, or year. She stated that it was December 8, 2002. She was able to give a fairly reliable biographical history. She states she was living in Meridian prior to the accident. She reported a 12th grade education. She stated that she was working as a utility biller for the City of Meridian. She reported that she has two sons. The oldest son has apparently been adopted to another family and then she has a six-year-old son who is currently living with his father. When asked about her marital status the patient gave a nonverbal gesture of being so so married.

The patient is currently able to read simple statements and follow simple commands. She is able to perform very simple calculations such as 15 + 7. She was able to spell the word world forwards but was incorrect in

00059

EXHIBIT B2

Patient: COOKE, ALISON K
MR #: 251268
Visit #: 301800264
Date of Birth: 07/05/1972

Hosp. Serv.: ER - IPA
Room/Ded: G00 - 1
Admit: 01/18/2003
Disch.

Dict. MD: CLAY H WARD, PhD
Att. MD:

Job Number: 1089254 Version: 1 Page 2 of 3

CONSULTATION

83 spelling it backwards and then perseverated by spelling it back forward. She was able to self-correct to
84 eventually spell it correctly backwards. She has difficulty with more complex calculation skills such as 5 x
85 13. She has difficult with serial 3's or serial 7's. She still appears to be in posttraumatic amnesia and has
86 severe deficits with memory. Reasoning is very concrete but still in the severe range of impairment. She
87 only remembers information for a few minutes.

- 88
- 89 **DIAGNOSTIC IMPRESSIONS:**
- 90 1. CLOSED HEAD INJURY, SEVERE WITH EVIDENCE
 - 91 OF AXONAL BRAIN INJURY.
 - 92 2. COGNITIVE DISORDER, SEVERE, SECONDARY TO
 - 93 NUMBER ONE.
 - 94 3. DEPRESSION, REPORTEDLY RECURRENT.
 - 95 4. MARITAL DISCORD.

96 **SUMMARY AND RECOMMENDATIONS:** The patient is a 30-year-old female who is about five days
97 status post traumatic brain injury that appears to have evidence of diffuse axonal injury. She is clearly
98 improving rapidly but is still demonstrating very severe problems with confusion, disorientation and severe
99 memory impairments. She is currently still in posttraumatic amnesia. She does appear to have a history of
100 depression and family members state that some of her statements have been negative and consistent with
101 worry. She is not overly agitated at this time but she still is perseverative and impulsive. Her insight is very
102 poor. The patient appears to be a very good candidate for inpatient traumatic brain injury rehabilitation. I
103 recommend rehabilitation consult to initiate this process. I also recommend that speech therapy be involved
104 in initiating cognitive rehabilitation activities. Given her history of depression and some of the events
105 surrounding this accident, I do believe it would be appropriate to restart her Effexor when medically
106 appropriate. This will be monitored throughout her hospitalization.

107
108 I do not believe that the patient is competent or even appropriate for a police or forensic evaluation or
109 interview at this time. She does not have any recall of events leading up to the accident and is still very
110 much in posttraumatic amnesia. My impression is that her information will likely be misleading, unreliable,
111 and she is at risk for developing new memories or false memories rather than accurately recalling what
112 happened prior to the impact.

113
114 Neuropsychology followup will be provided. At this point she appears to be improving as expected from a
115 neurocognitive standpoint.

116
117
118
119 CHW : stw
120 D/D: 01/23/2003 16:02
121 T/D: 01/23/2003 17:05
122 J#: 1089254
123 T#: 14708074

CLAY H. WARD, PhD

00060

EXHIBIT B3

Patient: COOKE, ALISON K
MR #: 251268
Visit #: 301800264
Date of Birth: [REDACTED]

Hosp. Serv.: ER - IPA
Room/Bed: 808 - 1
Admit: 01/18/2003
Disch:

Dict. MD: CLAY H WARD, PhD
Att. MD:

Job Number: 1089254

Version: 1

Page 3 of 3

CONSULTATION

CC:

ROBERTO BARRESI, MD
CHRISTIAN ZIMMERMAN, MD
JAMES M. JOHNSTON, MD

00061

AFFIDAVIT OF

Max Ritchie Cook

STATE OF IDAHO)
))ss
County of Ada)

MAX RICHIE COOK, after being duly sworn upon his oath, deposes and says as follows:

Affiant went to the Idaho Correctional Center (ICC) Paralegal to get Affiants Direct Appeal Packet notarized. This occurred on September 30th, 2003. At that time, Gardener, the Notary who was also the Paralegal at that time, stated that she (Gardener) did not have the time to do it on the 30th and she told the Affiant to return the next week. Affiant notified Gardener that he was sure that he was running out of time to file the Appeal. Gardener asked Affiant when he had been sentenced. Affiant informed Gardener that Affiant had been sentenced on August 21, 2003. Gardener checked her calender and stated that Affiant had plenty of time to file and to return the following week. She further informed the Affiant that the Statute of Limitations day count **did not** include weekends which the Affiant found later to be untrue.

Affiant followed Gardeners' instructions and returned the following week. The appeal packet was notarized at that time as well as copies. It was at that point that Gardener informed the affiant that she had "put her foot in her mouth" and that weekends were counted to determine filing dates. Gardeners' mistake time-barred the appeal. Gardener then informed the affiant that she would "write a letter to the Court" explaining that it was her fault that the appeal was late. From that point on, the affiant made numerous attempts to obtain the promised letter from Gardener. She would not talk to the affiant despite the affiants' requests that she do so. The only statement that was made by Gardener was that the "letter was in the mail" which, of course, it was not!

As a result of Gardeners' misinformation and incompetence, Affiants' Appeal was denied as time-barred.

Further your affiant sayeth naught.

DATED This 7 day of July, 2004

M. Ritchie Cook
Plaintiff/Petitioner

SUBSCRIBED AND SWORN TO before me on this 7th day of July, 2004

JANEL GARDNER
Notary Public
State of Idaho

Janel Gardner
Notary Public for Idaho
Residing at Boise
Commission expires 9/16/08

AFFIDAVIT OF

Max Ritchie Cook

STATE OF IDAHO)
)
) ss
County of Ada)

MAX RITCHIE COOK, after being duly sworn upon his oath, deposes and says as follows:

On the day I was sentenced, I asked my attorney to file an appeal. My primary concern was that my attorney had informed me, in great confidence, that I would get 1 to 5 years. I received 12 to 25. He then told me "Don't worry, there is light at the end of the tunnel" and that he would "take care of it." I reiterated my wish to appeal based not only on the sentence but the fact that quite a few things that he said he would do that had not been done in reference to my trial. My attorney had requested funds at the start of the ordeal in order to hire a Private Investigator and a Crash reconstruction specialist as both were needed. The funds were advanced but the investigator and crash specialist were not. His rationale for hiring both parties, he informed me, was to avoid me "getting hung" as was certain would happen without the experts input. He was adamant that he would not take the case without the experts.

My attorney also informed me that the witnesses for the State would be "lying" and would make up whatever they had to to "hang" me. I did find that to be true.

Despite my constant reminders that I wanted an appeal to be filed, my attorney failed to do so; I put a packet together myself. I called the attorney from Jail while awaiting transport to prison and I called him from In-Processing at prison; he hung up on me. My family tried to contact him as well. He hung up on them also. He never visited or contacted me in reference to an appeal. I also asked for a detailed billing in my case. He refuses to provide one.

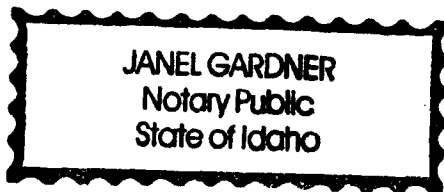
Due to the failures of both my attorney and the ICC Paralegal, my right to appeal has been denied to me.

Further your affiant sayeth naught.

DATED This 7 day of July, 2004

Max Cook
Plaintiff/Petitioner

SUBSCRIBED AND SWORN to before me on this 7th day of July, 2004



Janel Gardner
Notary Public for Idaho

Residing at 444/15 Davis

Commission expires 7/10/08

NO. _____ COPY
FILED
AM. _____

DEC 06 2004

MAX RITCHIE COOKE, #25564
ICC, C-206-B
PO BOX 70010
Boise, Idaho 83707

J. DAVID NAVARRO, Clerk
By C. THOMAS
DEPUTY

Petitioner,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MAX RITCHIE COOKE,)
)
Petitioner,)
)
v.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

) Case No. SP OT 0400770D
)
) **AFFIDAVIT OF:**
) **TIMOTHY D. MCMILLIN**
)
)
)
)
)
)

STATE OF IDAHO)
) ss.
County of Ada)

Timothy D. McMillin, being first duly sworn on oath, deposes and says:

1. Affiant is the brother of the Petitioner in the above-entitled case;
2. Affiant was asked by the Petitioner to find an attorney for representation in the underlying criminal case that the petitioner is currently serving and is the basis of this Petition for Post-Conviction Relief;

AFFIDAVIT OF TIMOTHY D. MCMILLIN - 1

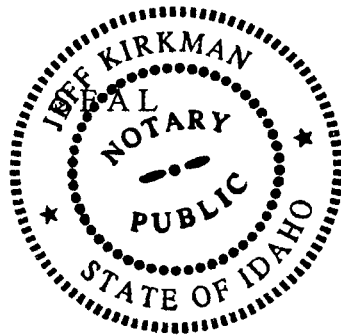
3. Affiant was referred by a friend to seek the counsel of Karl Shurtliff, Attorney at Law for representing the petitioner upon his arrest and being held in the Ada County Jail;
4. Affiant contacted Petitioner's former counsel Karl Shurtliff by phone and made an appointment to see him regarding representing the Petitioner;
5. Affiant at the appointment with Karl Shurtliff explained what the Petitioner's case involved with what information he had available to him;
6. Affiant was told by Karl Shurtliff that he would need a retainer of Five Thousand (\$5,000) dollars for representation and that would cover the Three Thousand (\$3,000) dollar expenses for an investigator and accident reconstructionist;
7. Affiant at that time gave Karl Shurtliff about Three Hundred (\$300) to Four Hundred (\$400) dollars as a down payment, and then retained the remaining balance to total Five Thousand Six Hundred (\$5,600) dollars that I paid him;
8. Affiant on numerous occasions received phone calls from the Petitioner while he was in the Ada County Jail requesting Affiant to call his attorney, Karl Shurtliff;
9. Affiant would call Karl Shurtliff and inform him that the Petitioner needed to see him as soon as possible and was told by Karl Shurtliff that "I will go and see him in a few days";
10. Affiant also made numerous visits to Karl Shurtliff's office and would deliver the messages as well to him regarding that he needed to get in touch with the Petitioner as soon as possible and was told by Karl Shurtliff that he was refused the Attorney Visit by the Ada County Sheriff;
11. Affiant had made at least thirty (30) to forty (40) other calls to Karl Shurtliff and left my home and cell phone numbers for him to call me and only upon my persistence of four to five repeated calls to his office would he call me back and I would tell him the

- information that the Petitioner had asked me to inform him of or that the Petitioner had requested he please come and see him regarding the representation of his case;
12. Karl Shurtliff further informed affiant that if I paid the Five Thousand (\$5,000) he could keep the Petitioner out of prison. This was stated to me as well as my girlfriend Suzie Robinson;
 13. Upon Counsel, Karl Shurtliff, reviewing the discovery he informed me that all he could do was sit there and listen to what the prosecution and witnesses said and use it against them;
 14. During the criminal trial of the Petitioner Affiant was subpoenaed to testify in the trial and was waiting out in the Courtroom lobby to do so along with other witnesses that were also there to testify as well;
 15. During the time Affiant was waiting in the courtroom lobby, affiant observed and heard the other witnesses that were there to testify for the prosecution come out of the Courtroom and would discuss what they had just said in the trial to the witnesses that were awaiting to testify for the prosecution;
 16. Affiant also observed August H. Cahill ("Cahill"), Ada County Public Defender, in the Courtroom lobby as well and was approached by him;
 17. Cahill asked this Affiant what he was there for and informed him it was to testify on his brother's (petitioner's) behalf at his trial;
 18. Cahill had then informed this Affiant that he had observed the state's witnesses discussing the case as to what their testimony was to the witnesses that had not yet testified at the trial and stated to this Affiant that what was taking place was not right;

19. Affiant then informed Cahill that he had also listened to what they had been discussing for Affiant was sitting directly around the corner to them and was able to listen to their conversations to the other state's witnesses regarding what their testimony had been and the questions that they had been asked and their answers to those questions;
20. Further your Affiant sayeth naught.

Timothy D. McMillin
Timothy D. McMillin, Affiant

SUBSCRIBED and SWORN to before me this 1 day of December, 2004.



Jeff Kirkman
NOTARY PUBLIC FOR IDAHO
Residing at: Boise
My Commission expires: 5/23/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of Dec, 2004, I served a true and correct original of the AFFIDAVIT OF TIMOTHY D. MCMILLIN for the purposes of filing with the court and of serving a true and correct copy to the following as indicated below to:

ADA COUNTY PROSECUTING ATTORNEY
200 W. Front St.
Boise, Idaho 83702

Hand delivered
 U.S. Mail

ADA COUNTY PUBLIC DEFENDER'S OFFICE
200 W. Front Street
Boise, Idaho 83702

Hand delivered
 U.S. Mail



NO. _____ FILED
 A.M. 10:40 P.M. _____
 JUL 01 2005
 J. DAVID NAVARRO, CLERK
 BY _____ DEPUTY

GREG H. BOWER
 Ada County Prosecuting Attorney

Roger Bourne
 Deputy Prosecuting Attorney
 Idaho State Bar No. 2127
 200 West Front Street, Room 3191
 Boise, Idaho 83702
 Phone: 287-7700
 Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
 Petitioner,)
 vs.)
)
 THE STATE OF IDAHO,)
)
 Respondent,)
)
)

Case No. SPOT 0400770D
**STATE'S RESPONSE AND
 MOTION TO DISMISS THE
 DEFENDANT'S AMENDED
 PETITION FOR POST
 CONVICTION RELIEF**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before the Court the State's Response and Motion to Dismiss the Amended Petition for Post Conviction Relief, as follows.

In November 2004, the State responded to the petitioner's original Petition for Post Conviction Relief, which had been filed in October 2004. The State incorporates that original response in this response along with an additional response entitled, Further State's Response to Petition for Post Conviction Relief, filed in January 2005. The State attached a copy of an

affidavit from trial counsel, Karl Shurtliff to that Further Response, which the State also incorporates by reference in this response.

In the State's first response, the State admitted that the petitioner is in the custody of the Idaho Department of Corrections, pursuant to a judgment and sentence pronounced by Judge Michael McLaughlin of the Fourth Judicial District in Ada County, Idaho. The petitioner was convicted in Ada County case no. H0300279 of second degree kidnapping, aggravated battery, and misdemeanor assault. The State agrees that the defendant was sentenced to twenty-five years with twelve years fixed for the kidnapping, fifteen years with seven years fixed for the aggravated battery and ninety days in jail for the assault, all of which were to run concurrently. The State denies all other grounds for which the defendant relies in support of his petition for post conviction relief.

Specifically, the State denies that trial counsel, Karl Shurtliff, rendered ineffective assistance of counsel to the defendant in any respect regarding the case referred to above. The State denies that the State's witness Alison Cooke was not a competent and reliable witness. The State denies that trial counsel was ineffective for not utilizing Clay Ward as a witness, and denies that trial counsel was ineffective in his cross-examination of Alison Cooke.

In support of his first claim, the petitioner relies upon a statement made by Alison Cooke, dated July 2004 and her affidavit from May 2005, both of which are attached to the petition. The defendant also relies upon a medical report from St. Alphonsus Hospital, that is unsigned but apparently authored by Clay H. Ward, Ph.D. The petitioner intends for the Court to believe that these documents in combination mean that the jury did not know of Alison Cooke's mental and medical condition at the time she testified.

At first glance, the report from Clay H. Ward, Ph.D. would appear to indicate that Alison Cooke was not a competent witness at the time she testified. However, a close reading of that document shows that the report was made on January 23, 2003. That date was about five days after Alison was injured, which was approximately five months before she testified. There is nothing in Clay H. Ward's report that expresses an opinion about her ability to testify in June of 2003. It appears to the undersigned that the recommendation portion of the report suggests that she not be interviewed by police officers at that time because of her injuries. This unsigned report, assuming it is from Dr. Ward, has no relevance to Alison Cooke's June 2003 testimony.

Alison Cooke's affidavit was dated May 2005. Her letter dated July 2004, is attached to it. The letter was written nearly a year after her testimony and her affidavit nearly two years. The petitioner does not supply a transcript of Alison Cooke's testimony for comparison to the affidavit or letter. The undersigned's recollection of her testimony is that her letter and affidavit are generally consistent with her testimony. The undersigned is unable to say whether or not she remembers in 2005 what she testified to in 2003. However, her 2004 and 2005 recollections are not relevant to her ability to testify in 2003. The undersigned generally recalls that she testified that she could remember certain things and was uncertain and unable to testify about other things. No showing has been made by the petitioner that she was an incompetent witness or that the jury did not have all of the facts concerning her condition at the time of her testimony. The petitioner has not shown that trial counsel could have presented additional information that the jury did not have, nor that he was ineffective.

The petitioner also claims that he asked trial counsel to file an appeal. Karl Shurtliff's affidavit has been filed earlier, but is refiled with this response and incorporated herein. In that


affidavit, Mr. Shurtliff agrees that the petitioner asked him to file an appeal, but did not ask until after the time for appeal had run.

In the petitioner's affidavit, he claims that he would have filed the appeal on time himself, but for the prison paralegal miscalculating the relevant time for filing. The State denies this allegation and refers the Court to the affidavit of Janel Gardner, who is the prison paralegal referred to by the petitioner. Ms. Gardner indicates in her affidavit that she did not deny the petitioner a request for a notarization of his signature based on miscalculation of filing time. She says that it is her practice to accommodate inmates when she can, but that she does not notarize petitions until they are properly filled out and that she and the prison require that inmates make appointments for her services. Ms. Gardner notes that when she did notarize an item for the petitioner on October 8, 2003, she mailed it the very next day.

It appears that the defendant did not make his request to Karl Shurtliff until after the appeal time had run based upon the prison's record of his mailing to Mr. Shurtliff and Mr. Shurtliff's recollection. His late filing is not the fault of the prison. The defendant has placed no genuine issue of material fact before the Court that would justify a hearing as required by Idaho Code §19-4906. For the reasons set out above, the State moves the Court to deny this petition without hearing.

RESPECTFULLY SUBMITTED this 1st day of July ~~June~~ 2005.

GREG H. BOWER
Ada County Prosecutor


Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to Ada County Public Defender, 200 West Front Street, Room 1107, Boise Idaho 83702, through the Interoffice Mail, this 1st day of ~~June~~ ^{July} 2005.



GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)	
)	
Petitioner,	)	Case No. SPOT0400770D
vs.)	
	)	AFFIDAVIT OF KARL
THE STATE OF IDAHO,	)	SHURTLIFF
)	
Respondent,)	
)	
)	

AFTER BEING FIRST SWORN STATES AS FOLLOWS:

1. That your affiant, Karl Shurtliff, is a licensed attorney in the State of Idaho, practicing in Boise, Idaho. Your affiant has been an active member of the Idaho State Bar since approximately 1968.
2. That your affiant has done criminal work both as the United States Attorney for the District of Idaho from approximately 1977 to 1981 and since that time has been actively involved in criminal defense work as a part of a general practice.

3. That your affiant represented Max Ritchie Cooke in Ada County Case No. H0300279 from the time of the defendant Cooke's arraignment through sentencing, which all occurred during 2003.
4. Your affiant was privately retained by the defendant Cooke for that representation.
5. That during the above-described representation, your affiant received the police reports and other discovery information from the State. Your affiant discussed the discovery information with the defendant and discussed with the defendant the facts relevant to his defense.
6. As part of an anticipated defense, your affiant contacted an accident reconstructionist, Clyde Lookhart and consulted with him. Your affiant decided that Mr. Lookhart's information would not be beneficial to the defendant. A copy of Mr. Lookhart's bill is attached to this affidavit.
7. Your affiant discussed with the defendant various other witnesses, and determined who had information helpful to the defendant. Your affiant put that information before the jury. Of the list of witnesses in the defendant's post conviction affidavit, your affiant only recalls that Ruth Cooke was a character witness. The other names are not familiar at the present time. Your affiant does not recall any conversation with the defendant about calling medical experts to discuss the victim's mental ability. Your affiant saw no reason to do so then and sees none now. The victim's mental ability was clearly before the jury.
8. At the conclusion of the sentencing, your affiant told the defendant to call him on the telephone. The defendant did not call. Your affiant received a letter from the defendant, requesting an appeal, after the 42 day time limit for appeals had expired. Your affiant did then file a notice of appeal and a request for the appointment of the

public defender, both on October 10, 2003. Your affiant knows that thereafter, the Court filed an amended judgment of conviction on October 15, 2003. The Court granted the motion for the appointment of counsel on October 20, 2003, and your affiant again filed a notice of appeal on November 5, 2003. Your affiant knows of no appealable issue, the success of which would have likely changed the outcome of the conviction or sentence. Your affiant merely filed the notice of appeal as requested by the defendant.

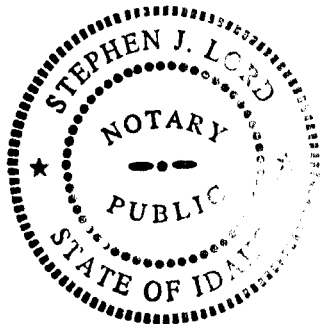
FURTHER YOUR AFFIANT SAYETH NOT.

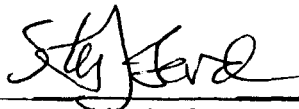
DATED this 27 day of January 2005.


Karl Shurtliff

STATE OF IDAHO)
) ss.
County of Ada)

On this 27 day of January 2005, before me, a Notary Public for Idaho, appeared M. Karl Shurtliff known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.




Notary Public for the State of Idaho
Residing at: BOISE, Idaho
My Commission Expires: 9/29/2010

Session: McLaughlin081505
Session Date: 2005/08/15
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 07:58

Courtroom: CR508

Clerk(s):
Brown, Kristin

State Attorneys:
Bourne, Roger

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case Number: SPOT0400770D
Plaintiff: Cooke, Max
Plaintiff Attorney:
Defendant: State of Idaho
Additional audio and annotations can be found in case: 0005.
Co-Defendant(s):
Pers. Attorney:
State Attorney:
Public Defender:

2005/08/15

14:37:12 - Operator
Recording:
14:37:12 - New case
State of Idaho
14:37:16 - Operator
Stop recording:

Case ID: 0005

Case Number: SPOT0400770D
Plaintiff: Cooke, Max
Plaintiff Attorney:

Defendant: State of Idaho
Previous audio and annotations can be found in case: 0003.
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender:

15:13:54 - Operator
Recording:
15:13:54 - Recall
State of Idaho
15:14:04 - Plaintiff: Cooke, Max
present in custody
15:14:10 - State Attorney: Bourne, Roger
present
15:14:24 - Public Defender:
Mr. Deangelo not present
15:14:41 - Judge: McLaughlin, Michael R.
will reset to 3pm tomorrow to set for hearing
15:14:56 - Judge: McLaughlin, Michael R.
petitioner does not need to be present
15:15:07 - Judge: McLaughlin, Michael R.
speaks to petitioner
15:17:49 - Operator
Stop recording:

Session: McLaughlia081605
Session Date: 2005/08/16
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 14:36

Courtroom: CR507

Clerk(s):
Brown, Kristin

State Attorneys:
Bratcher, Kimberlee
Darrington, Shane
Medema, Jonathan

Public Defender(s):
DeAngelo, Michael
Odessey, Ed
Smethers, Dave
Steveley, Craig

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case Number: SPOT0400770D
Plaintiff: Cooke, Max
Plaintiff Attorney:
Defendant: State of Idaho
Co-Defendant(s):
Pers. Attorney:
State Attorney:
Public Defender: DeAngelo, Michael

2005/08/16

15:01:56 - Operator
Recording:
15:01:56 - New case
State of Idaho
15:02:05 - State Attorney:
Roger Bourne
15:02:11 - Public Defender: DeAngelo, Michael
present

15:02:46 - Judge: McLaughlin, Michael R.
will set hearing for 9/28/05 at 3pm
15:03:09 - Operator
Stop recording:

Session: McLaughlin092805
Session Date: 2005/09/28
Judge: McLaughlin, Michael R.
Reporter: Hohenleitner, Tammy

Division: DC
Session Time: 08:31

Courtroom: CR508

Clerk(s):
Brown, Kristin

State Attorneys:
Armstrong, Shelley
Bratcher, Kimberlee
Darrington, Shane
FISHER, JEAN
Medema, Jonathan
UDINK, DENISE

Public Defender(s):
DeAngelo, Michael
Odessey, Edward
Steveley, Craig

Prob. Officer(s):

Court interpreter(s):

Case ID: 0004

Case Number: SPOT0400770D
Plaintiff: Cooke, Max Ritchie
Plaintiff Attorney:
Defendant: State of Idaho
Additional audio and annotations can be found in case: 0006.
Co-Defendant(s):
Pers. Attorney:
State Attorney:
Public Defender:

2005/09/28

15:05:57 - Operator
Recording:
15:05:57 - New case
State of Idaho
15:06:14 - Operator

00083

Stop recording:

Case ID: 0006

Case Number: SPOT0400770D
Plaintiff: Cooke, Max Ritchie
Plaintiff Attorney:
Defendant: State of Idaho
Previous audio and annotations can be found in case: 0004.
Co-Defendant(s):
Pers. Attorney:
State Attorney: FISHER, JEAN
Public Defender: DeAngelo, Michael

15:06:36 - Operator
Recording:
15:06:36 - Recall
State of Idaho
15:07:06 - Other: Roger Bourne
present for State
15:07:10 - Public Defender: DeAngelo, Michael
present
15:07:18 - Plaintiff: Cooke, Max Ritchie
present in custody
15:07:23 - Judge: McLaughlin, Michael R.
speaks as to case, time set for motion to dismiss
15:09:30 - Other: Roger Bourne
argues motion to dismiss - speaks as to amended petition
15:13:00 - Other: Roger Bourne
speaks as to petitioner's allegations of ineffective counsel
15:15:48 - Public Defender: DeAngelo, Michael
response to State, speaks as to amended petition
15:23:31 - Judge: McLaughlin, Michael R.
questions, comments to counsel
15:26:36 - Public Defender: DeAngelo, Michael
continues to Court
15:28:54 - Judge: McLaughlin, Michael R.
will grant State's motion to dismiss, makes comments as to t
his decision
15:31:53 - Judge: McLaughlin, Michael R.
state to prepare order
15:32:00 - Operator
Stop recording:

00084

FILED
AM. P.M. 130

OCT 06 2005

DAVID NAVARRO
DEPUTY
David Navarro

RECEIVED
OCT 04 2005
Ada County Clerk

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
)
)
)

Case No. SPOT 0400770D

**ORDER DISMISSING PETITION
FOR POST CONVICTION
RELIEF**

The petitioner, Max Ritchie Cooke, filed an Amended Petition for Post Conviction Relief on June 6, 2005, basically alleging ineffective assistance of counsel. The Amended Petition was accompanied by affidavits intended to support the petition. The State responded to the Amended Petition and moved to dismiss. The State's motion also contained the affidavit of trial counsel, Karl Shurtliff, and Janel Gardner, who is a paralegal at the prison where the petitioner is incarcerated. The State's Motion to Dismiss was heard on September 28, 2005. The Court has considered the Amended Petition with the accompanying affidavits, the State's Motion to

ORDER DISMISSING PETITION FOR POST CONVICTION RELIEF (COOKE),

KB

Dismiss with its accompanying affidavits, the argument of Counsel and is otherwise fully informed based upon the knowledge the Court has from the original trial. The State's Motion to Dismiss is granted for the reasons set out below.

The Court finds that there is no showing in the Amended Petition that trial counsel was ineffective in any respect as to cross examination of the victim, Allison Cooke. There is no evidence that Ms. Cooke was incompetent to testify regardless of her current opinion. The Court takes notice that when Ms. Cooke testified, she was oriented as to time and place and was able to testify that she remembered certain things and did not remember others. She was responsive to questions and was appropriate in every respect. The jury was informed through her testimony that she had some memory lapses.

The report of Dr. Clay Ward, which is attached to the Amended Petition, refers to Allison Cooke's condition at the time of the crash. It gives the Court no information concerning Allison Cooke's condition at the time she testified, which was about five months later. The Court is satisfied that Ms. Cooke was competent to testify. The petitioner has not carried his burden to show that trial counsel was ineffective in any respect regarding Ms. Cooke.

The petitioner claims that trial counsel was ineffective for failing to hire an accident reconstructionist to assist in his defense. In his affidavit, trial counsel has stated that he did hire an accident reconstructionist and has attached the reconstructionist's bill as evidence of that. Trial counsel stated that the information given by the accident reconstructionist was not helpful to the petitioner. The petitioner now asks the Court to speculate that a different reconstructionist may have arrived at some different conclusion, but offers no evidence to support that. The Court finds that the petitioner has failed to carry his burden to prove that trial counsel was ineffective in this regard.

Finally, the petitioner claims that trial counsel was ineffective for failing to file an appeal. After a review of the affidavit of trial counsel and of the prison paralegal, the Court finds that the petitioner did not ask trial counsel to file an appeal until after the appeal time had run. Further, the Court finds that the petitioner has not shown that there was any appealable issue. The Court is satisfied that the verdict and the sentence are fully supported by the record. The Court knows of no appealable issue which would likely have been settled in the petitioner's favor. The Court finds that the petitioner has not shown ineffective assistance of counsel regarding the appeal and has not shown any prejudice to himself from the lack of an appeal.

As stated by the Idaho Court of Appeals in *Goodwin v. State*, 138 Idaho 269 (Ct. App. 2002):


To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency *Hassett v. State*, 127 Idaho 313, 316 (Ct. App. 1995); *Russell v. State*, 118 Idaho 65 (Ct. App. 1990); *Davis v. State*, 116 Idaho 401 (Ct. App. 1989). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758 (1988); *Russell supra*. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different.

The Court is satisfied that the Petitioner has shown neither deficient performance, nor prejudice on any claim, for the reasons set out above. The Court further finds that the petitioner's allegations are conclusory and are unsupported by admissible evidence. *Roman v. State*, 125 Idaho 736 (Ct. App. 1987); *Baruth v. Gardner*, 110 Idaho 156 (Ct. App. 1986). The Court finds that summary dismissal is appropriate and finds that the petitioner's evidence has raised no genuine issue of material fact, which requires a hearing under Idaho Code §19-4906. Therefore, the State's Motion to Dismiss the Amended Petition is granted and the Amended

ORDER DISMISSING PETITION FOR POST CONVICTION RELIEF (COOKE),

Petition is dismissed. The petitioner has twenty days from September 28, 2005, to file an Amended Petition for Post Conviction Relief.

IT IS SO ORDERED this 6 day of October.



MICHAEL R. MCLAUGHLIN
District Judge

RECEIVED

OCT 28 2005

ADA COUNTY PUBLIC DEFENDER

Ada County Clerk for Defendant

200 W. Front, Suite 1107

Boise, Idaho 83702

Telephone: (208) 287-7400

NO. _____
AM. _____ FILED _____
PM. _____

OCT 27 2005

J. DAVID NAVARRO, Clerk

By _____
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,)
)
Petitioner-Appellant,)
)
vs.)
)
)
THE STATE OF IDAHO,)
)
)
Respondent.)
_____)

SPOT 0400770
Case No. ~~SPOT040070~~ D
NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, GREG BOWER, ADA COUNTY
PROSECUTOR, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Petitioner, appeals against the State of Idaho to the Idaho Supreme Court from the final Decision and Order entered against him in the above-entitled action on the 6th day of October, 2005, the Honorable Michael R. McLaughlin, District Judge, presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph one (1) above is appealable pursuant to I.A.R. 11(c)(1).
3. That the Petitioner requests the entire reporter's standard transcript as defined in Rule 25(a), I.A.R.

4. The Petitioner also requests the preparation of the following additional portions of the reporter's transcript:

Hearing on State's Motion to Dismiss
September 28, 2005.

5. The Petitioner requests that the clerk's record contain only those documents automatically included as set out in I.A.R. 28(b)(2), including the Grand Jury Transcript if Indicted, any Jury Instructions requested and given, and Pre-Sentence Investigation Report.

6. I certify:

- a) That a copy of this Notice of Appeal has been served on the reporter.
- b) That the Petitioner is exempt from paying the estimated transcript fee because he is an indigent person and is unable to pay said fee.
- c) That the Petitioner is exempt from paying the estimated fee for preparation of the record because he is an indigent person and is unable to pay said fee.
- d) That the Petitioner is exempt from paying the appellate filing fee because he is indigent and is unable to pay said fee.
- e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

7. That the Petitioner anticipates raising issues including, but not limited to:

Whether the District Court erred in summarily dismissing the Petitioner's Amended Petition For Post-Conviction Relief without conducting or granting the Petitioner the right to any evidentiary hearing or such other relief as may be just and proper?

DATED This 27th day of October, 2005.



MICHAEL DeANGELO
Attorney for Petitioner

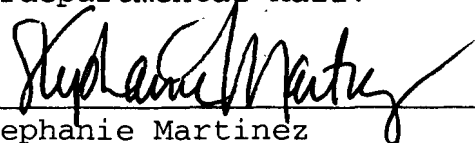
CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on the 27th day of October, 2005, I mailed a true and correct copies of the foregoing, **NOTICE OF APPEAL** to:

LAWRENCE G. WARDEN, ATTORNEY GENERAL, and

HONORABLE JUDGE MICHAEL R. McLAUGHLIN COURT REPORTER

by depositing the same in the Interdepartmental Mail.


Stephanie Martinez

RECEIVED

OCT 28 2005

Ada County Clerk

ADA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner
200 W. Front St., Ste. 1107
Boise, Idaho 83702
Telephone: (208) 287-7400

RECEIVED

OCT 27 2005

Ada County Clerk

NO. _____ FILED _____
A.M. 9 P.M. _____

OCT 31 2005

DAVID NAVARRO, CLERK
David Navarro
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX R. COOKE,)
)
Petitioner-Appellant,)
)
vs.)
)
MAX R. COOKE,)
)
Respondent.)
_____)

Case No. SPOT 0400770 D

ORDER APPOINTING STATE
APPELLATE PUBLIC DEFENDER
ON DIRECT APPEAL

The above-named Petitioner, MAX R. COOKE, being indigent and having heretofore been represented by the Ada County Public Defender's Office in the District Court, and said Petitioner having elected to pursue a direct appeal in the above-entitled matter;

IT IS HEREBY ORDERED, AND THIS DOES ORDER, That the Idaho State Appellate Public Defender is appointed to represent the above named Petitioner, MAX R. COOKE, in all matters pertaining to the direct appeal.

DATED This 28 day of October 2005.

Michael R. McLaughlin
MICHAEL R. McLAUGHLIN
District Judge

ORDER APPOINTING STATE APPELLATE
PUBLIC DEFENDER ON DIRECT APPEAL

LB

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 32447

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Affidavit Of: Max Ritchie Cooke, filed November 23, 2004.
2. Affidavit Of: Timothy D. McMillin, filed December 6, 2004.
3. Affidavit Of Karl Shurtliff, filed January 28, 2005.
4. Affidavit Of Janel Gardner, filed July 1, 2005.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 22nd day of December, 2005.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY L. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

00093

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT CASE NO. 32447

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: DEC 23 2005

By BRADLEY L. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

00094

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT CASE NO. 32447

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed on the 27th day of October, 2005.

J. DAVID NAVARRO
Clerk of the District Court

By _____
Deputy Clerk

BRADLEY J. THIES

SEAL

CERTIFICATE TO RECORD

00095