

12-17-2013

Cook v. State Clerk's Record v. 1 Dckt. 41449

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Sean M Cook, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
12/28/2011	NCOC	VIGIL	New Case Filed - Other Claims John P. Luster
		VIGIL	Filing: L4a - Appeal - Post Conviction Relief Paid by: state Receipt number: 0052874 Dated: 12/28/2011 Amount: \$.00 (Cash) For: Cook, Sean M (plaintiff) John P. Luster
	ADMR	VIGIL	Administrative assignment of Judge Lansing L. Haynes
	AFFD	HUFFMAN	Affidavit of Robyn Fyffe Lansing L. Haynes
	MOTN	HUFFMAN	Motion & Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner Lansing L. Haynes
	MOTN	HUFFMAN	Motion & Affidavit in Support for Appointment of Counsel Lansing L. Haynes
	MISC	HUFFMAN	Petitioner's Request That The Court Take Judicial Notice Lansing L. Haynes
1/5/2012	FILE	HOFFMAN	*****New File Created - 2 ***** John R. Stegner
1/6/2012	ORDR	CLAUSEN	Order of Reassignment to Judge Stegner, 2nd District John T. Mitchell
	ADMR	CLAUSEN	Administrative assignment of Judge John R. Stegner John T. Mitchell
1/23/2012	ORDR	HOFFMAN	Order Regarding Assignment John R. Stegner
	ANSW	SREED	Respondent's Answer to Petition for Post-Conviction Relief - Donna Gardner OBO State of Idaho John R. Stegner
3/8/2012	ORDR	HOFFMAN	Order Granting Leave To Proceed Without Payment Of Court Fees And Order Appointing Counsel John R. Stegner
3/15/2012	NOAP	VICTORIN	Notice Of Appearance/Daniel Cooper John R. Stegner
3/21/2012	MOTN	LEU	Respondent's Motion For Summary Judgment And Memorandum In Support John R. Stegner
	MOTN	LEU	Motion To Set For Hearing John R. Stegner
3/29/2012	ORDR	HOFFMAN	Order Setting Hearing John R. Stegner
	HRSC	HOFFMAN	Hearing Scheduled (Motion for Summary Judgment 04/24/2012 01:00 PM) To Be Heard At The Kootenai County Courthouse John R. Stegner
3/30/2012	MOTN	DEGLMAN	Motion to appear telephonically John R. Stegner
4/10/2012	MNET	VIGIL	Motion For Extension Of Time to File Responsive Briefing John R. Stegner
4/11/2012	ORDR	MITCHELL	Order For Petitioner to Participate Telephonically John R. Stegner
	ORDR	MITCHELL	Order Granting Extension of Time to File Response Brief John R. Stegner
4/17/2012	MOTN	CRUMPACKER	Motion for Acceptance of Late Briefing and/or in the Alternative Motion to Continue Hearing John R. Stegner

Sean M Cook, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
4/19/2012	HRVC	MITCHELL	Hearing result for Motion for Summary Judgment scheduled on 04/24/2012 01:00 PM: Hearing Vacated In Kootenai - Petitioner to participate telephonically. Counsel to arrange telephonic appearance with IDOC. - per Terry
4/20/2012	ORDR	MITCHELL	Order Extending Time for Briefing and Order Granting Motion to Continue Hearing
	HRSC	MITCHELL	Hearing Scheduled (Motion for Summary Judgment 05/18/2012 10:00 AM) - In Kootenai
5/10/2012	MEMO	CRUMPACKER	Petitioners Memorandum on Summary Judgment
5/16/2012	MISC	HUFFMAN	State's Response To Petitioner's Memorandum On Summary Judgment
5/17/2012	ORDR	HOFFMAN	Order For Petitioner To Participate Telephonically
5/18/2012	DCHH	BOOTH	Hearing result for Motion for Summary Judgment scheduled on 05/18/2012 10:00 AM: District Court Hearing Held Court Reporter: Julie Foland Number of Transcript Pages for this hearing estimated: under 100 pages
6/15/2012	ORDR	MITCHELL	Order Granting Partial summary Dismissal and Order Denying Summary Dismissal on the Remainder of the Petitioner's Claims
	ORDR	MITCHELL	Order Setting Hearing
	HRSC	MITCHELL	Hearing Scheduled (Scheduling Conference 07/09/2012 09:30 AM) Telephonic Planning and Scheduling Conference - Initiated by the Latah County Court
7/2/2012	ORDR	HUFFMAN	Order Vacating And Resetting Scheduling Conference
7/3/2012	HRVC	MITCHELL	Hearing result for Scheduling Conference scheduled on 07/09/2012 09:30 AM: Hearing Vacated Telephonic Planning and Scheduling Conference - Initiated by the Latah County Court
	HRSC	MITCHELL	Hearing Scheduled (Scheduling Conference 07/30/2012 11:00 AM) Telephonic - Latah County to initiate calls to parties.
7/30/2012	HRHD	MITCHELL	Hearing result for Scheduling Conference scheduled on 07/30/2012 11:00 AM: Hearing Held Telephonic - Latah County to initiate calls to parties. - Informal Teleconference in chambers. No audio.
8/9/2012	ORDR	MCCOY	Order Setting Hearing on Petition
	HRSC	MITCHELL	Hearing Scheduled (Post Conviction Relief 12/06/2012 09:30 AM) In Kootenai
8/27/2012	DFWL	CRUMPACKER	Witness List
11/20/2012	MOTN	MCCOY	Motion to Transport

Sean M Cook, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
11/21/2012	STIP	MCKEON	Stipulation To Transport John R. Stegner
11/27/2012	MNCN	VIGIL	Motion To Continue & Motion to Shorten Time for Hearing John R. Stegner
	NOTH	VIGIL	Notice Of Hearing John R. Stegner
	HRSC	VIGIL	Hearing Scheduled (Motion 11/28/2012 10:00 AM) Telephonic Hearing John R. Stegner
11/28/2012	HRHD	MITCHELL	Hearing result for Motion scheduled on 11/28/2012 10:00 AM: Hearing Held Telephonic Hearing John R. Stegner
	GRNT	MITCHELL	Both Motions Granted John R. Stegner
	HRVC	MITCHELL	Hearing result for Post Conviction Relief scheduled on 12/06/2012 09:30 AM: Hearing Vacated In Kootenai John R. Stegner
11/29/2012	SUBF	BAXLEY	Subpoena Return/Found on 11/27/12 served Attorney Jonathan Hull John R. Stegner
12/3/2012	HRSC	MITCHELL	Hearing Scheduled (Post Conviction Relief 02/08/2013 10:00 AM) in Kootenai John R. Stegner
	ORDR	MITCHELL	Order Vacating and Rescheduling Hearing on Petition for Post Conviction Relief John R. Stegner
	ORDR	MITCHELL	Order to Transport John R. Stegner
	NTSV	VIGIL	Notice Of Service John R. Stegner
1/23/2013	SUBF	VIGIL	Subpoena Return/Found (JH 1/18/13) John R. Stegner
1/30/2013	CERT	LEU	Certificate Of Service - J.H. 1/24/13 John R. Stegner
2/7/2013	WITP	MCKEON	Witness List John R. Stegner
	RBRF	MCKEON	Respondent's Trial Brief John R. Stegner
2/8/2013	CONT	BURRINGTON	Hearing result for Post Conviction Relief scheduled on 02/08/2013 10:00 AM: Continued in Kootenai John R. Stegner
	ORDR	HOFFMAN	Order Rescheduling Hearing On Petition For Post Conviction Relief John R. Stegner
	HRSC	HOFFMAN	Hearing Scheduled (Post Conviction Relief 04/12/2013 01:30 PM) To be held at the Kootenai County Courthouse John R. Stegner
2/11/2013	FILE	HUFFMAN	New File ***** 3 ***** Created John R. Stegner
2/15/2013	NTSV	LEU	Notice Of Service John R. Stegner
3/28/2013	SUBI	MCKEON	Subpoena Post Conviction Trial John R. Stegner
4/12/2013	DCHH	HAMILTON	Hearing result for Post Conviction Relief scheduled on 04/12/2013 01:30 PM: District Court Hearing Held Court Reporter: Sheryl Engler Number of Transcript Pages for this hearing estimated: To be held at the Kootenai County Courthouse John R. Stegner

Sean M Cook, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
4/12/2013	FILE	HAMILTON	Expando File Made--file 4	John R. Stegner
4/18/2013	ORDR	LEU	Scheduling Order	John R. Stegner
5/1/2013	BRIE	LEU	Petitioner's Trial Brief	John R. Stegner
5/16/2013	MOTN	LEU	Motion To Review Trial Court Document Or To Reopen To Consider Admissibility	John R. Stegner
	NOTC	LEU	Notice Of Filing Under Seal	John R. Stegner
	BRFR	LEU	Respondent's 2nd Trial Brief And Response To Petitioner's Trial Brief	John R. Stegner
6/7/2013	ORDR	LEU	Order Setting Hearing	John R. Stegner
	HRSC	HOFFMAN	Hearing Scheduled (Status Conference 06/24/2013 10:30 AM) TELEPHONIC - Latah County to initiate the call to all parties - no courtroom or clerk needed	John R. Stegner
6/24/2013	HRVC	HOFFMAN	Hearing result for Status Conference scheduled on 06/24/2013 10:30 AM: Hearing Vacated TELEPHONIC - Latah County - Judge Stegner - to initiate the call to all parties - no courtroom or clerk needed - PER JUDGE STEGNER'S ORDER	John R. Stegner
	ORDR	HOFFMAN	Order Vacating And Resetting Hearing	John R. Stegner
	HRSC	HOFFMAN	Hearing Scheduled (Motion 07/09/2013 10:30 AM) To Review Trial Court Document or to Reopen To Consider Admissibility - To Be Held In Kootenai County	John R. Stegner
7/9/2013	HRHD	LARSEN	Hearing result for Motion scheduled on 07/09/2013 10:30 AM: Hearing Held To Review Trial Court Document or to Reopen To Consider Admissibility - To Be Held In Kootenai County	John R. Stegner
7/11/2013	ORDR	HOFFMAN	Order Granting State's Motion To Consider Preliminary Hearing Transcript From Underlying Criminal Case	John R. Stegner
7/16/2013	MOTN	LEU	Motion For Extention Of Time To File Briefing Related to Preliminary Hearing On Transcript	John R. Stegner
7/18/2013	STIP	MCCOY	Stipulation of the Parties for Extention of Time to File Briefing Related to Preliminary Hearing Transcript	John R. Stegner
7/26/2013	ORDR	HOFFMAN	Order For Extention Of Time To File Briefing Related To Preliminary Hearing Transcript	John R. Stegner
9/4/2013	CVDI	LEU	Civil Disposition entered for: State of Idaho Post Conviction Relief, Other Party; Cook, Sean M, Subject. Filing date: 9/4/2013	John R. Stegner
	FJDE	LEU	Memorandum Opinion	John R. Stegner
	STAT	LEU	Case status changed: Closed	John R. Stegner
9/16/2013	NOTC	HUFFMAN	Notice Of Appeal	John R. Stegner

Sean M Cook, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
9/23/2013	APDC	HUFFMAN	Appeal Filed In District Court	John R. Stegner
	STAT	HUFFMAN	Case status changed: closed	John R. Stegner
	CERT	HUFFMAN	Certificate Of Mailing-Supreme Court 7012 2920 0001 8385 4790	John R. Stegner
9/25/2013	MOTN	MCCOY	Motion for Stay Pending Appeal	John R. Stegner
9/27/2013	RTCT	MCCOY	Return Certificate - 9/25/13 - ISC	John R. Stegner
9/30/2013	ORDR	HUFFMAN	Order For Stay Pending Appeal	John R. Stegner
10/15/2013	MOTN	HUFFMAN	Motion To Reconsider Order For Stay Pending Appeal - Daniel Cooper	John R. Stegner
10/21/2013	ORDR	HUFFMAN	Order Setting Hearing Of Motion To Reconsider Order For Stay Pending Appeal	John R. Stegner
10/23/2013	HRSC	HOFFMAN	Hearing Scheduled (Motion to Reconsider 10/30/2013 10:30 AM) Telephonic - Latah County Court to initiate the call.	John R. Stegner
	STAT	HOFFMAN	Case status changed: Closed pending clerk action	John R. Stegner
10/30/2013	HRHD	HOFFMAN	Hearing result for Motion to Reconsider scheduled on 10/30/2013 10:30 AM: Hearing Held Telephonic - Latah County Court to initiate the call.	John R. Stegner
10/31/2013	MOTN	DIXON	Motion To Reconsider Order For Stay Pending Appeal by telephone conference pursuant to Rule 7(b)(4) IRCP	John R. Stegner
11/1/2013	HRSC	HOFFMAN	Hearing Scheduled (Bond Hearing 11/26/2013 11:00 AM)	John R. Stegner
11/4/2013	ORDR	HOFFMAN	Order To Transport Petitioner For Bond Hearing	John R. Stegner
11/7/2013	NLTR	HUFFMAN	Notice of Lodging Transcript	John R. Stegner

Sean Cook #27064
I.C.C. Unit K
P.O. Box 70010
Boise, ID 83707

Petitioner, Pro Se

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: *Neble*
2011 DEC 28 PM 3:57

CLERK DISTRICT COURT
Neble
DEPUTY

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)
_____)

CASE NO. *CV 2011-10315*
**VERIFIED PETITION FOR POST-
CONVICTION RELIEF**

I. INTRODUCTION:

1. Petitioner, Sean Cook, is presently incarcerated at the Idaho Correctional Center, in the custody of the Idaho Department of Corrections.

2. On January 30, 2009, the District Court for the First Judicial District in the State of Idaho, Kootenai County, the Honorable Lansing L. Haynes presiding ("district court") entered a Judgment decreeing that Mr. Cook was guilty of Rape in case number CR-2008- 13006. The district court sentenced Mr. Cook to a unified term of thirty years with a minimum period of confinement of ten years.

3. The district court adjudged Mr. Cook guilty based on a jury's verdict following a jury trial which was held on November 3, 5, and 6, 2008.

4. The district court reduced Mr. Cook's sentence to a unified term of twenty years with a minimum period of confinement of ten years on February 4, 2009.

5. Mr. Cook appealed to the Idaho Supreme Court. The case was assigned to the Idaho Court of Appeals, which affirmed Mr. Cook's judgment of conviction and sentence in an

unpublished opinion, *State v. Cook*, Docket No. 36145 (Ct. App. Nov. 22, 2010). The Idaho Supreme Court denied Mr. Cook's petition for review and issued a remittur on January 14, 2011.

II. GENERAL ALLEGATIONS:

6. On approximately May 27, 2008, Mr. Cook returned a police officer's call and agreed to come to the police department for an interview. Transcript on Appeal ("App. Tr."),¹ p. 438, ln. 23 - p. 439, ln. 11. The officer questioned Mr. Cook regarding a night in April on which he and a former friend, Danielle Whitten, had spent time together. *Id.* at 433, ln. 9 - p. 435, ln. 14. The officer accused Mr. Cook of forcibly having intercourse with Ms. Whitten, which Mr. Cook vehemently denied, indicating that the encounter was consensual. *See id.*

7. On June 23, 2008, the state charged Mr. Cook with rape.² Mr. Cook was represented by attorney Jonathan Hull. Mr. Cook was bound over to the district court following a preliminary hearing held on July 29, 2008.

8. An inmate awaiting sentencing for a felony who had briefly shared a cell with Mr. Cook, Paul Nelson, testified at the preliminary hearing that Mr. Cook admitted forcing Ms. Whitten. Preliminary Hearing Transcript ("PH Tr."), p. 90-106. Following the hearing, Mr. Nelson wrote a letter to the prosecutor indicating that he had limited his testimony at the preliminary hearing because Mr. Cook threatened him and his family with violence. *See App. Tr.* p. 384 - p. 385. The state charged Mr. Cook with intimidating a witness in a separate case, CR-2008-20200, as a result of Mr. Nelson's allegations.

9. At a pre-trial conference, Mr. Hull described an agreement with the state to consolidate the rape case with the intimidating a witness case and to continue the trial. *App. Tr.* p. 5, ln. 9 - p. 6, ln. 10. The state and Mr. Hull disagreed regarding the effect of this agreement on Mr. Cook's bond. *Id.* at p. 6, ln. 13 - p. 7, ln. 25. Mr. Hull indicated that if the \$50,000 bond that Mr. Cook had previously posted in the rape case would not effectuate his release once the

¹ A true and correct copy of the Transcript on Appeal in Supreme Court Docket Number 36145 is attached hereto as Exhibit A.

² Mr. Cook has filed a request that the Court judicially notice pertinent documents from the underlying criminal case, including the preliminary hearing transcript, contemporaneously with this petition.

cases were consolidated, he would object to a continuance of the trial. *Id.* at p. 8, ln. 1-24. However, because of his belief that the evidence in support of the intimidation of a witness charge would “come in anyway,” he did not object to the consolidation. *Id.* at p. 8, ln. 16-20. The state indicated that it could not be prepared to try the intimidation of a witness case on the scheduled date, November 3, 2008. *Id.* at p. 9, ln. 12-17.

10. Once the district court clarified that the only effective bond would be the bond in the rape case if the intimidation of a witness charge was added to that case, the state declined to amend the information to add the intimidation of a witness charge. App. Tr. p. 11, ln. 8-21. The trial on the rape charge then remained set for November 3, 2008. *Id.* at p. 11, ln. 22-25.

11. The state sought to introduce Mr. Nelson’s testimony that Mr. Cook allegedly threatened him, his family and Ms. Whitten and that Mr. Cook allegedly admitted to committing rape in the past, pursuant to Idaho Rule of Evidence 404(b). Mr. Hull told the judge that he believed Mr. Nelson’s testimony that Mr. Cook threatened to harm Mr. Nelson and his family was “part and parcel of” Mr. Cook’s confession. App. Tr. p. 108, ln. 4-16. Mr. Hull told the judge that he believed Mr. Cook’s alleged statement to Mr. Nelson that he needed to get out of jail to keep Ms. Whitten from testifying was admissible because it was part of a confession. *Id.* at p. 114, ln. 13-18. Mr. Hull objected to Mr. Nelson’s proposed testimony that Mr. Cook allegedly told Mr. Nelson that he had gotten away with rape in the past and the district court excluded the testimony as propensity evidence. *Id.* at p. 108, ln. 17-24; p. 111, ln. 8-22. Mr. Hull also objected to Mr. Nelson’s proposed testimony that Mr. Cook had said that he would have killed Ms. Whitten had he known she would report him to police. *Id.* at p. 113, ln. 15-23.

12. Mr. Nelson testified that he was transported with Mr. Cook for his preliminary hearing and that Mr. Cook threatened to follow Mr. Nelson’s wife and do to her the “same” that he had done to Ms. Whitten and that Mr. Nelson’s daughter would be “taken care of”. App. Tr. p. 381, ln. 21 - p. 382, ln. 4; p. 389, ln. 4-7. Mr. Nelson testified that as a result of Mr. Cook’s threats, he limited his preliminary hearing testimony. *Id.* at p. 383, ln. 2-23. Mr. Nelson testified that after the hearing he wrote the prosecutor and disclosed Mr. Cook’s alleged threats and his desire to be more forthcoming once his safety could be assured. *Id.* at p. 383, ln. 24 - 385, ln. 5. Mr. Nelson also testified that Mr. Cook expressed a desire to escape the jail so that nobody

would be left to testify against him and that he would kill Ms. Whitten so that she would not be able to testify. *Id.* at p. 387, ln. 10 - 388, ln. 16.

13. Mr. Nelson's testimony described above did not make it more or less probable that Ms. Whitten consented to sex. Instead, it is just as probable that Mr. Cook would threaten Mr. Nelson and Ms. Whitten because they falsely accused Mr. Cook of rape than to keep them from telling the "truth." Evidence that Mr. Cook made threats was not relevant to a fact of consequence in the rape trial and was only relevant to whether he intimidated witnesses, which was at issue in a separate case.

14. Evidence that Mr. Cook was violent or had a bad character was not relevant to a permissible "fact of consequence" in the rape case.

15. Mr. Nelson's testimony about Mr. Cook's threats made him appear like a dangerous and violent person to the jury. The state was not allowed to prove that Mr. Cook committed rape by showing that he is a violent person.

16. Because evidence of Mr. Cook's alleged bad character was not admissible for a permissible purpose, the prejudice caused by Mr. Nelson's testimony that Mr. Cook threatened him and Ms. Whitten was unfair.

17. Even if Mr. Nelson's testimony had some tendency to make it more or less probable that Ms. Whitten consented to intercourse, its probative value was substantially outweighed by the danger of unfair prejudice.

18. Mr. Hull's belief that evidence in support of the intimidation of a witness charge was admissible and "part and parcel" of the confession as described in paragraph 11 above was incorrect.

19. Mr. Hull should have objected to the state's notice of intent to introduce evidence of Mr. Cook's alleged threats to Mr. Nelson, his family and Ms. Whitten. Had he objected, the district court would have excluded the evidence because it is irrelevant to any fact of consequence other than bad character and thus, inadmissible under I.R.E. 404(b). Even if the district court had determined there was some permissible probative value to the evidence, it would have concluded that the probative value was substantially outweighed by the danger of

unfair prejudice. Any contrary ruling by the district court would have been erroneous and would have resulted in reversal on direct appeal.

20. There was no sound strategic reason to agree to Mr. Nelson's testimony concerning Mr. Cook's alleged threats to Mr. Nelson, his family and Ms. Whitten.

21. Mr. Nelson's testimony was highly inflammatory in a case that rested on the jury's determination of whether to believe that Ms. Whitten or Mr. Cook was more credible. Had Mr. Nelson's testimony regarding the threats been excluded, there is a reasonable probability that the jury would not have found Mr. Cook guilty.

22. After Ms. Whitten and Mr. Cook had intercourse, friends of Ms. Whitten's boyfriend – the Dillon brothers, Hank and Hoss – came to the motel room where Ms. Whitten was staying. After hanging out for a period of time, the brothers and Ms. Whitten left in one vehicle and Mr. Cook left in another. According to the brothers' testimony at trial, Ms. Whitten appeared upset and not her usual self. After asking her what was the matter several times, Ms. Whitten allegedly told them that Mr. Cook had forced himself on her. App. Tr. p. 306, ln. 1-22. Mr. Hull did not object to the Dillon brothers' testimony concerning Ms. Whitten's statements.

23. Ms. Whitten's statements to the Dillon brothers after they returned to the motel room were not "a spontaneous reaction" and instead were made in response to repeated direct questioning and after ample time for reflective thought. Had Mr. Hull objected to the Dillon brothers' testimony concerning Ms. Whitten's out of court statements, the district court should have excluded the testimony as inadmissible hearsay. A contrary ruling would have resulted in reversal on direct appeal.

24. There was no sound strategic reason to not object to the Dillon brothers' testimony concerning Ms. Whitten's out of court statements

25. The Dillon brothers' testimony regarding Ms. Whitten's out of court statements bolstered her trial testimony. Had the hearsay been excluded, there is a reasonable probability the jury would not have convicted Mr. Cook.

26. In closing, the prosecutor argued:

Defense talks about reasonable doubt. When you're playing golf and you hit the golf ball and it fall into a pond, you know where that golf ball has gone. You know where that golf ball is. You watched it fall in there. And you go to the

pond and you try to fish it out with your golf club. And it gets murky, and it gets confusing. And you can't see where the ball is anymore, but you know it's there. You know beyond a reasonable doubt where that ball is. Exactly what you have here. There is no reasonable doubt Sean Cook committed rape.

App. Tr. p. 543, ln. 17 - 544, ln. 2.

27. Mr. Hull did not object to this argument.

28. A person who sees a golf ball fall into the pond would have no doubt the ball is in the water even if the ball is not visible.

29. The prosecutor's illustration regarding the golf ball described "reasonable doubt" as no doubt and diminished the state's burden of proof by arguing a higher degree of doubt than is required for acquittal.

30. There was no sound tactical reason not to object to argument that diminished the state's burden of proof.

31. Had Mr. Hull objected to the prosecutor's argument, the district court could have corrected the state and re-iterated the correct definition of reasonable doubt.

32. Because the prosecutor misinformed the jury regarding the burden of proof, the validity of all the jury's findings is destroyed.

33. Had Mr. Hull objected and the district court corrected the prosecutor's argument concerning reasonable doubt, there is a reasonable probability that the jury would not have returned a guilty verdict.

34. During closing argument, the prosecutor also argued:

When you're looking at your evidence, you can already consider the motives of the different witnesses. I submit that the State's witnesses have no motive here but the truth. [Mr. Cook], however, has a different motive altogether. He's facing a serious criminal charge here. [Mr. Cook] has had several weeks to look at what he did and think about how he was going to tell . . . what had happened. He's had several months to think about how he's going to tell you about what had happened and put himself in the best light. . . .

[Mr. Nelson] testified. He told you he was telling you the truth. He felt that this was the right thing to do. He knew he was going to prison. He's already in prison. He knew before that he was going to prison. Back when he testified back at the preliminary hearing, he knew he was going to prison. He was in custody, and he wasn't going anywhere. His only request was--after [Mr. Cook]

made this threat to him about his family, his only concern was that he be put in another jail beside this [one] so he could protect his family, because when his family came to visit, he didn't want anybody . . . harming them as [Mr. Cook] had threatened. That was his only request. His wife has been a victim of rape. Her daughter has been a victim of rape. And she could sympathize with this girl, the victim of [Mr. Cook]. He knows what treatment prisoners get when they rat out other prisoners. . . .

[Ms. Whitten], you can recall her demeanor. She was sober that night. This was not a drunken mistake. Her boyfriend and her were together at the time. In fact, he had rented a room for her to stay with her dog for several days. They were on good terms. Sure, they had some disagreements from time to time, but that happens. She might have even complained to [Mr. Cook] about that. She doesn't recall. That's not something significant that sticks out in her mind. She has no motive to come in here and make up a story about [Mr. Cook]. There's no motive that you can see that she would have to do that. And if she's lying, why would she call [the two friends of her boyfriend] and sabotage her relationship with her boyfriend if she's having consensual sex with this person? What would she accomplish by making any of this up?

And you also can consider whether or not she seemed to be a person that's cunning enough to plant sperm on her panties and jeans knowing they're going to be tested by the laboratory, and that she's cunning enough to have injured herself and be able to say exactly how they were caused. [The two friends of her boyfriend] haven't given you any reason to believe that they're being dishonest. They left a job site at the end of their work, but still they left the job site and they came to her aid. Her voice convinced them that something was wrong. And they've come into court to tell you what they observed. They have no motivation to lie. They have no reason to make up a story against [Mr. Cook].

In voir dire we discussed the question of whether you would look at the evidence and not at the suaveness of [Mr. Cook] and the likability of [Mr. Cook]. And your promise was to look at the evidence. Look at the evidence, look at the forensic reports. Look at the demeanor of the witnesses, look at [D.W.]'s demeanor. In looking at this evidence and not whether you like somebody or dislike somebody, you should come to the same conclusion, all of you, that [Mr. Cook] is guilty of rape. Thank you.

App. Tr. p. 516, ln. 23 - p. 520, ln. 2.

35. Mr. Hull did not object to this argument.

36. In the prosecutor's argument above, she committed misconduct by impermissibly vouching for the state's witnesses. This prosecutorial misconduct violated Mr. Cook's right to due process because the remarks rendered the trial fundamentally unfair.

37. There was no sound strategic reason to not object to the prosecutor's argument.

38. Had Mr. Hull objected to the prosecutor's argument, the district court would have sustained the objection and admonished the prosecutor. Had this occurred, there is a reasonable probability that the jury would not have returned a guilty verdict.

39. Mr. Cook reserves the right to amend this petition with additional claims at a later date.

III. FIRST CAUSE OF ACTION: Petitioner Received Ineffective Assistance of Trial Counsel

40. Mr. Cook re-alleges Paragraphs 1 to 39 as if fully set forth herein.

41. Mr. Cook received ineffective assistance of counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984) because Mr. Hull erroneously conceded the admissibility of Mr. Cook's alleged threats to harm Mr. Nelson, his family and Ms. Whitten.

42. Mr. Cook received ineffective assistance of counsel within the meaning of *Strickland* as a result of Mr. Hull's failure to object to the Dillon brothers' hearsay testimony regarding Ms. Whitten's statements.

43. Mr. Hull performed deficiently by failing to object to prosecutor's misconduct in closing arguments which abrogated the reasonable doubt standard. The prosecutor's argument misinstructed the jury on the burden of proof and thereby destroyed the validity of all the jury's findings. *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Because the prosecutor's argument deprived Mr. Cook of his right to a jury verdict of guilt beyond a reasonable doubt, counsel's failure to object qualifies as structural error requiring reversal of his conviction without demonstrating prejudice.

44. Mr. Cook was prejudiced by Mr. Hull's failure to object to prosecutor's misconduct in closing arguments which abrogated the reasonable doubt standard.

45. Mr. Cook received ineffective assistance of counsel within the meaning of *Strickland* as a result of Mr. Hull's failure to object to the prosecutor's misconduct in impermissibly

vouching for the state's witnesses. The Court of Appeals' holding that the prosecutor's misconduct was not improper was contrary to, and an unreasonable application of established United States Supreme Court precedent.

46. In addition to the prejudice suffered by each individual incidence of deficient performance described above, Mr. Cook was prejudiced by the cumulative effect of trial counsel's errors and had those errors not occurred, the jury would not have returned a guilty verdict.

47. Mr. Hull's actions and omissions referenced above individually and cumulatively deprived Mr. Cook of his right to the effective assistance of counsel and his right to confrontation and to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution.

V. SECOND CAUSE OF ACTION: Prosecutorial Misconduct Deprived Mr. Cook of His Right to a Fair Trial

48. Mr. Cook re-alleges Paragraphs 1 to 39 as if fully set forth herein.

49. The prosecutorial misconduct during arguments individually and cumulatively deprived Mr. Cook of his right to a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution.

VI. PRAYER FOR RELIEF: Petitioner requests the following relief:

A. That the conviction be vacated.

Respectfully submitted this 21 day of December, 2011.



Sean Cook

VERIFICATION OF PETITIONER

STATE OF IDAHO

SS.

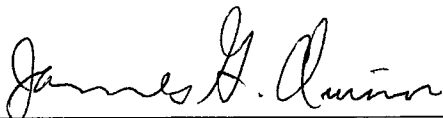
COUNTY OF ADA

I, Sean Cook, being duly sworn upon my oath; depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true to the best of my knowledge.



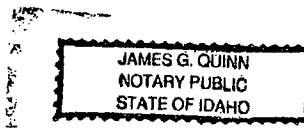
Sean Cook

SUBSCRIBED AND SWORN TO before me this 21st day of December, 2011



Notary Public for Idaho

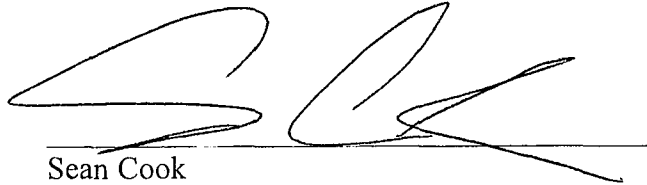
My commission expires: 9/10/2013
12/2



CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21 day of December, 2011, I caused a true and correct copy of the foregoing document to be mailed to:

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816-9000



Sean Cook

Sean Cook #27064
I.C.C. Unit K
P.O. Box 70010
Boise, ID 83707

Petitioner, Pro Se

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 DEC 28 PM 3: 57

CLERK DISTRICT COURT

Robyn Fyffe
DEPUTY

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)
_____)

CASE NO. CV2011-10315
AFFIDAVIT OF ROBYN FYFFE

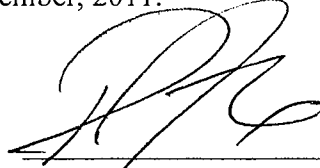
I, Robyn Fyffe, being first duly sworn upon oath, hereby depose and say:

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

2. That I was retained by the Petitioner, Sean Cook and his family to review his criminal case for possible post-conviction issues. However, neither Mr. Cook nor his family have the financial resources to retain my services to represent him in the post-conviction action. Therefore, I assisted Mr. Cook by drafting a Verified Petition for Post-Conviction Relief and accompanying documents for him to file pro se.


This ends my affidavit.

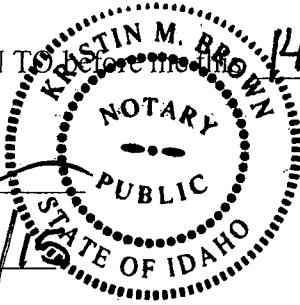
DATED this 14 day of December, 2011.



Robyn Fyffe

SUBSCRIBED AND SWORN TO before me this 14th day of December, 2011.


Notary Public for Idaho
My commission expires: 12/4/15



CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21 day of December, 2011, I caused a true and correct copy of the foregoing document to be mailed to:

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816-9000

A handwritten signature in black ink, appearing to read 'Sean Cook', written over a horizontal line.

Sean Cook

2011 DEC 28 PM 3:57

CLERK DISTRICT COURT

Sherry A. [Signature]
DEPUTY

Sean Michael Cook

Full Name of Party Filing This Document

Box 70010

Mailing Address (Street or Post Office Box)

Boise, ID 83707

City, State and Zip Code

Telephone Number

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Sean M Cook

Plaintiff,

vs.

STATE OF IDAHO

Defendant.

Case No.: CV2011-10315

MOTION AND AFFIDAVIT FOR
PERMISSION TO PROCEED ON PARTIAL
PAYMENT OF COURT FEES (PRISONER)

IMPORTANT NOTICE: Idaho Code § 31-3220A requires that you serve upon counsel for the county sheriff, the department of correction or the private correctional facility, whichever may apply, a copy of this motion and affidavit and any other documents filed in connection with this request. You must file proof of such service with the court when you file this document.

STATE OF IDAHO)
County of Kootenai) ss.

Plaintiff [] Defendant asks to start or defend this case on partial payment of court fees, and swears under oath

1. This is an action for (type of case) Post Conviction.
believe I'm entitled to get what I am asking for.

2. I have not previously brought this claim against the same party or a claim based on the same operative facts in any state or federal court. I have filed this claim against the same party or a claim based on the same operative facts in a state or federal court.

3. I am unable to pay all the court costs now. 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.

4. I understand I will be required to pay an initial partial filing fee in the amount of 20% of the greater of: (a) the average monthly deposits to my inmate account or (b) the average monthly balance in my inmate account for the last six (6) months. I also understand that I must pay the remainder of the filing fee by making monthly payments of 20% of the preceding month's income in my inmate account until the fee is paid in full.

5. I verify that the statements made in this affidavit are true. I understand that a false statement in this affidavit is perjury and I could be sent to prison for an additional fourteen (14) years.

Do not leave any items blank. If any item does not apply, write "N/A". Attach additional pages if more space is needed for any response.

IDENTIFICATION AND RESIDENCE:

Name: Seam Cook Other name(s) I have used: _____

Address: ICC Box 70010 Boise, ID 83707

How long at that address? 17 months Phone: _____

Date and place of birth: 11-7-69 Los Angeles

DEPENDENTS:

I am single married. If married, you must provide the following information:

Name of spouse: _____

My other dependents (including minor children) are: _____

INCOME:

Amount of my income: \$ 40 per [] week [X] month

Other than my inmate account I have outside money from: _____

My spouse's income: \$ _____ per [] week [] month.

ASSETS:

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

Your Address	City	State	Legal Description	Value	Equity
--------------	------	-------	-------------------	-------	--------

List all other property owned by you and state its value.

Description (provide description for each item)	Value
Cash	0
Notes and Receivables	0
Vehicles:	0
Bank/Credit Union/Savings/Checking Accounts	0
Stocks/Bonds/Investments/Certificates of Deposit	0
Trust Funds	0
Retirement Accounts/IRAs/401(k)s	0
Cash Value Insurance	0
Motorcycles/Boats/RVs/Snowmobiles:	0
Furniture/Appliances	0
Jewelry/Antiques/Collectibles	0

Description (provide description for each item)	Value
TVs/Stereos/Computers/Electronics	0
Tools/Equipment	0
Sporting Goods/Guns	0
Horses/Livestock/Tack	0
Other (describe)	0

EXPENSES: List all of your monthly expenses.

Expense	Average Monthly Payment
Rent/House Payment <i>incarcerated</i>	
Vehicle Payment(s)	
Credit Cards: (list each account number)	
Loans: (name of lender and reason for loan)	
Electricity/Natural Gas	
Water/Sewer/Trash	
Phone	\$ 20
Groceries / <i>Hygiene</i>	\$ 20
Clothing	
Auto Fuel	
Auto Maintenance	
Cosmetics/Haircuts/Salons	
Entertainment/Books/Magazines	
Home Insurance	

MOTION AND AFFIDAVIT FOR PERMISSION TO
 PROCEED ON PARTIAL PAYMENT OF COURT FEES
 (PRISONER)
 CAO 1-10C 2/25/2005

Expense	Average Monthly Payment
Auto Insurance	0
Life Insurance	0
Medical Insurance	0
Medical Expense	0
Other	Hygiene supplies, gym shoes & clothing, food & phone calls.


MISCELLANEOUS:

How much can you borrow? \$ 0 From whom? _____

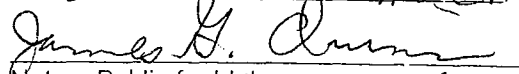
When did you file your last income tax return? 2008 Amount of refund: \$ 1100.00

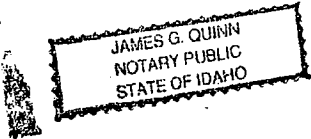
PERSONAL REFERENCES: (These persons must be able to verify information provided)

Name	Address	Phone	Years Known
Karen Cook	3514 N. Spaulding Ln.	667-6300	42


 Signature
Seon Cook
 Typed or Printed Name

SUBSCRIBED AND SWORN TO before me this 21ST day of December, 2011.


 Notary Public for Idaho
 Residing at Ada County
 My Commission expires 9/10/2013



= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 12/21/2011 =

Doc No: 27064 Name: COOK, SEAN MICHAEL
 Account: CHK Status: ACTIVE

ICC/UNIT K PRES FACIL
 TIER-0 CELL-8

Transaction Dates: 12/21/2010-12/21/2011

Beginning Balance		Total Charges	Total Payments	Current Balance	
41.43		1417.68	1454.70	78.45	
===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
12/21/2010	HQ0526797-002	011-RCPT MO/CC	844320	300.00	341.43
12/21/2010	HQ0526903-016	011-RCPT MO/CC	844248	50.00	391.43
12/23/2010	IC0527219-048	099-COMM SPL		304.25DB	87.18
12/28/2010	HQ0527660-005	011-RCPT MO/CC	182508	100.00	187.18
12/30/2010	IC0527964-004	078-MET MAIL	124863	0.44DB	186.74
01/03/2011	IC0528082-013	078-MET MAIL	125288	0.44DB	186.30
01/04/2011	IC0528324-055	099-COMM SPL		67.99DB	118.31
01/11/2011	IC0529332-052	099-COMM SPL		27.71DB	90.60
01/25/2011	IC0530816-055	099-COMM SPL		51.25DB	39.35
01/25/2011	HQ0530967-029	022-PHONE TIME	128843	6.80DB	32.55
01/27/2011	HQ0531314-004	061-CK INMATE	V-50391	9.25DB	23.30
02/01/2011	IC0531587-053	099-COMM SPL		22.25DB	1.05
02/15/2011	HQ0533430-011	011-RCPT MO/CC	632985	25.00	26.05
02/22/2011	IC0533968-054	099-COMM SPL		23.97DB	2.08
03/21/2011	HQ0537153-015	011-RCPT MO/CC	249738	50.00	52.08
03/22/2011	IC0537335-059	099-COMM SPL		28.97DB	23.11
03/29/2011	IC0538014-053	099-COMM SPL		21.57DB	1.54
04/22/2011	HQ0541349-021	011-RCPT MO/CC	450913	50.00	51.54
04/26/2011	IC0541543-046	099-COMM SPL		39.53DB	12.01
05/03/2011	HQ0542523-026	022-PHONE TIME	140539	3.40DB	8.61
05/09/2011	IC0543331-022	078-MET MAIL	149002	0.88DB	7.73
05/10/2011	IC0543460-056	099-COMM SPL		7.30DB	0.43
05/17/2011	HQ0544190-011	011-RCPT MO/CC	820168	50.00	50.43
05/24/2011	IC0544950-050	099-COMM SPL		29.40DB	21.03
05/24/2011	HQ0545000-001	011-RCPT MO/CC	850695	40.00	61.03
05/27/2011	IC0545449-033	099-COMM SPL		24.14DB	36.89
06/07/2011	IC0546583-061	099-COMM SPL		17.38DB	19.51
06/14/2011	IC0547480-061	099-COMM SPL		17.38DB	2.13
06/14/2011	IC0547575-060	099-COMM SPL		-17.38DB	19.51
06/21/2011	IC0548233-054	099-COMM SPL		18.12DB	1.39
06/27/2011	HQ0548782-002	011-RCPT MO/CC	642033	200.00	201.39
06/28/2011	IC0548964-058	099-COMM SPL		135.40DB	65.99
07/01/2011	IC0549525-026	099-COMM SPL		33.18DB	32.81
07/01/2011	IC0549568-006	078-MET MAIL	155090	0.44DB	32.37
07/12/2011	IC0550718-068	099-COMM SPL		17.31DB	15.06
07/19/2011	IC0551377-058	099-COMM SPL		14.12DB	0.94
08/02/2011	HQ0552866-017	011-RCPT MO/CC	437224	50.00	50.94
08/09/2011	IC0553907-057	099-COMM SPL		35.60DB	15.34
08/23/2011	IC0555424-062	099-COMM SPL		11.68DB	3.66

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 12/21/2011 =

Doc No: 27064 Name: COOK, SEAN MICHAEL
 Account: CHK Status: ACTIVE

ICC/UNIT K PRES FACIL
 TIER-0 CELL-8

Transaction Dates: 12/21/2010-12/21/2011

	Beginning Balance	Total Charges	Total Payments	Current Balance	
	41.43	1417.68	1454.70	78.45	
===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
09/07/2011	HQ0557197-001	011-RCPT MO/CC	221803	60.00	63.66
09/09/2011	HQ0557550-009	026-JAIL INCOM	AUG PAY	8.50	72.16
09/13/2011	IC0557863-077	099-COMM SPL		67.00DB	5.16
09/20/2011	IC0558579-063	099-COMM SPL		4.88DB	0.28
09/22/2011	HQ0558879-016	011-RCPT MO/CC	968270	30.00	30.28
09/27/2011	IC0559231-051	099-COMM SPL		13.47DB	16.81
10/10/2011	HQ0560810-008	026-JAIL INCOM	SEPT PAY	18.20	35.01
10/11/2011	IC0560860-062	099-COMM SPL		6.63DB	28.38
10/18/2011	IC0561601-075	099-COMM SPL		26.33DB	2.05
10/18/2011	HQ0561621-022	011-RCPT MO/CC	449010	45.00	47.05
10/25/2011	IC0562383-057	099-COMM SPL		42.66DB	4.39
11/01/2011	HQ0563156-007	011-RCPT MO/CC	451110	100.00	104.39
11/07/2011	HQ0564062-017	011-RCPT MO/CC	458438	50.00	154.39
11/07/2011	HQ0564159-005	026-JAIL INCOM	OCT PAY	33.00	187.39
11/08/2011	IC0564263-060	099-COMM SPL		72.53DB	114.86
11/15/2011	IC0565042-003	078-MET MAIL	172678	0.54DB	114.32
11/18/2011	IC0565383-045	099-COMM SPL		77.26DB	37.06
11/29/2011	IC0566210-071	099-COMM SPL		35.03DB	2.03
12/07/2011	HQ0567428-006	026-JAIL INCOM	NOV PAY	45.00	47.03
12/13/2011	IC0567959-073	099-COMM SPL		44.90DB	2.13
12/13/2011	HQ0567970-019	011-RCPT MO/CC	804482	150.00	152.13
12/16/2011	IC0568405-062	099-COMM SPL		72.36DB	79.77
12/19/2011	IC0568614-014	078-MET MAIL	172558	1.32DB	78.45

STATE OF IDAHO

Idaho Department of Correction

I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand hereto affixed this 21ST

day of December A.D., 2011

By [Signature]

2011 DEC 28 PM 3: 57

CLERK DISTRICT COURT

Sherry Huffman
DEPUTY

Inmate name Sean M. Cook
IDOC No. 27064
Address ICC V-8B
Box 70010 Boise, ID 83707

Defendant

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Sean M. Cook,)

Plaintiff,)

vs.)

The state of IDAHO,)

Defendant.)

Case No. CW2011-10315

**MOTION AND AFFIDAVIT IN
SUPPORT FOR
APPOINTMENT OF
COUNSEL**

COMES NOW, Sean M. Cook, Plaintiff/Defendant, in the above entitled matter and moves this Honorable Court to grant Plaintiff/Defendant's Motion for Appointment of Counsel for the reasons more fully set forth herein and in the Affidavit in Support of Motion for Appointment of Counsel.


1. Plaintiff/Defendant is currently incarcerated within the Idaho Department of Corrections under the direct care, custody and control of Warden Wengler, Warden of the IDAHO Correctional Center.

2. The issues to be presented in this case may become to complex for the Plaintiff/Defendant to properly pursue. Plaintiff/Defendant lacks the knowledge and skill needed to represent him/herself.

3. Plaintiff/Defendant required assistance completing these pleadings, as he/she was unable to do it him/herself.

4. Other: _____

DATED this 21 day of December, 2011.



Plaintiff/Defendant
(Circle one)

AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL

STATE OF IDAHO)
County of ADA) ss

Sean M. Cook, after first being duly sworn upon his/her oath, deposes

and says as follows:

1. I am the Affiant in the above-entitled case;
2. I am currently residing at the IDAHO Correctional Center,
under the care, custody and control of Warden UMengler;
3. I am indigent and do not have any funds to hire private counsel;
4. I am without bank accounts, stocks, bonds, real estate or any other form of real property;
5. I am unable to provide any other form of security;
6. I am untrained in the law;
7. If I am forced to proceed without counsel being appointed I will be unfairly

handicapped in competing with trained and competent counsel of the State;


MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL - 2

Revised: 10/14/05

Further your affiant sayeth naught.

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

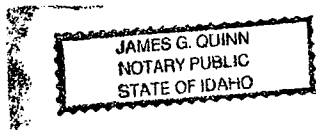
DATED This 21 day of December, 2011.

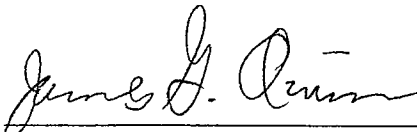


Plaintiff/Defendant

SUBSCRIBED AND SWORN AND AFFIRMED to before me this 21st day
of December, 2011.

(SEAL)






Notary Public for Idaho
Commission expires: 9/10/13

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21 day of December, 2011, I mailed a copy of this MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL for the purposes of filing with the court and of mailing a true and correct copy via prison mail system for processing to the U.S. mail system to:

Koenen AI County Prosecuting Attorney


 Plaintiff Defendant
(Circle one)

- 02/04/2009 Order Reducing Sentence

3. Mr. Cook also asks the Court to take judicial notice of the Register of Actions in *State v. Sean Michael Cook*, Kootenai County District Court Number CR-2008-20200.

Dated this 21 day of December, 2011.

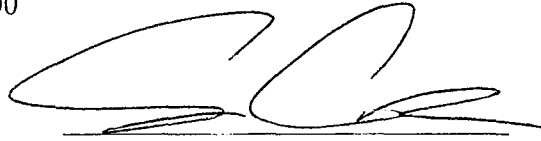


Sean Cook
Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21 day of December 2011, I caused a true and correct copy of the foregoing document to be mailed to:

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816-9000



Sean Cook

IN THE SUPREME COURT OF THE STATE OF IDAHO
2009 JUN -4 PM 3: 35

* * * * *
COPY

* * * * *
CLERK DISTRICT COURT

DEPUTY

STATE OF IDAHO,)
)
Plaintiff-Respondent.)
)
vs.)
)
SEAN M. COOK,)
)
Defendant-Appellant.)
-----)

SUPREME COURT NO.
3 6 1 4 5

RECEIVED

JUN 12 2009

STATE APPELLATE
PUBLIC DEFENDER

TRANSCRIPT ON APPEAL

For the Appellant: LAWRENCE G. WASDEN
Idaho Attorney General
Statehouse, Room 210
Boise, Idaho 83720

For the Respondent: MOLLY J. HUSKEY
State Appellate Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703

APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

THE HONORABLE LANSING L. HAYNES, PRESIDING

R E P O R T E R ' S I N D E X

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent.)
)
 vs.) SUPREME COURT NO.
) 3 6 1 4 5
 SEAN M. COOK,)
)
 Defendant-Appellant.)

TRANSCRIPT ON APPEAL

For the Appellant: LAWRENCE G. WARDEN
Idaho Attorney General
Statehouse, Room 210
Boise, Idaho 83720

For the Respondent: MOLLY J. HUSKEY
State Appellate Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703

APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
THE HONORABLE LANSING L. HAYNES, PRESIDING

1	R E P O R T E R ' S I N D E X	
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IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF KOOTENAI

--oOo--

STATE OF IDAHO,)
)
 Plaintiff,) Case No. CR 08-13006
)
 vs.) PRETRIAL CONFERENCE
 SEAN M. COOK,)
)
 Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AT: Kootenai County, Coeur d'Alene, Idaho

ON: Thursday, October 28, 2008, 8:52 a.m.

BEFORE: The Honorable Lansing L. Haynes, District Judge

Laurie A. Johnson, CSR 720, Official Court Reporter

STATE OF IDAHO VS COOK

SUPREME COURT DOCKET 41449

A P P E A R A N C E S

For the Plaintiff:

DONNA GARDNER, Deputy Prosecuting Attorney
Kootenai County Prosecuting Attorney's Office
501 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

For the Defendant:

JONATHAN R. HULL, Attorney at Law
508 East Garden Avenue
Coeur d'Alene, ID 83814

--oOo--

STATE OF IDAHO VS COOK

SUPREME COURT DOCKET 41449

37 of 428

PROCEEDINGS

1
 2 THE COURT: This is State of Idaho versus Sean
 3 M. Cook. Kootenai Criminal Case: 08-13006. Mr. Cook is
 4 present. He is in custody. Mr. Jonathan Hull represents
 5 him. Ms. Donna Gardner is here on behalf of the State.
 6 Counsel, is this matter staying on the trial
 7 calendar? Is there a resolution? Or other?
 8 MR. HULL: Other, Your Honor.
 9 There's a variety of stipulations in this
 10 matter. The parties have entered into a stipulation
 11 wherein the Case, CR 08-20200, which is the intimidation
 12 of a witness case, would be consolidated in an Amended
 13 Information which has been prepared in 08-13006, which is
 14 the case which is on for pretrial today. And I've
 15 executed a stipulation in that regard. There's also a
 16 stipulation that there be a restraining order entered in
 17 08-13006 regarding the family of Paul Nelson. And that
 18 Mr. Cook would be restrained from any contact with the
 19 family of Paul Nelson or Paul Nelson. We have no
 20 objection to that and would stipulate to that.
 21 There's a stipulation to a continuance of the
 22 consolidated matters for 60 days. The 08-20200, we just
 23 waived last week. And we need more time to get witnesses
 24 located. There is a stipulation.
 25 The bonds in these two cases were previously

5

1 available the last week and into the first week of January
 2 for trial. So I would ask that those weeks we not have a
 3 setting in these cases.
 4 As far as the consolidation of the bonds, I was
 5 not the handling attorney at that hearing. I've spoken to
 6 the handling attorney. And it's still not clear to me
 7 exactly what he intended in agreeing to consolidate the
 8 bonds for a waiver. My initial interpretation of that was
 9 consolidation means combining the bonds into one bond,
 10 which would be \$90,000.
 11 Mr. Hull and I have a disagreement on what the
 12 interpretation of that was -- um -- I pulled the recording
 13 -- requested the recording from that hearing. And, maybe,
 14 the Court can obtain that quicker than me. I haven't
 15 received it yet. I asked for it yesterday when this issue
 16 came up.
 17 As far as the no contact order -- um -- the
 18 parties are now stipulating that there be a no contact
 19 order with Mr. Nelson or with any of his family members,
 20 who still, my understanding, still reside in this area.
 21 So that's what I have, Judge, as far as my
 22 understanding of what we're doing.
 23 I have an Amended Information to submit along
 24 with a stipulation to consolidate and an order to
 25 consolidate in this case.

STATE OF IDAHO VS COOK

7

1 ordered to be concurrent and no more than the bond that's
 2 already posted in 08-13006. That seems to have confused
 3 the bail bondsman to no end.
 4 So the defense would be requesting that once
 5 the consolidation takes place, that 08-20200 would be
 6 dismissed because it would be a redundant allegation of
 7 intimidation of a witness which would be contained in the
 8 Amended Information in 08-13006.
 9 Mr. Cook waives his right to a speedy trial in
 10 this consolidated matter.
 11 THE COURT: What's the State's position on all
 12 of that?
 13 MS. GARDNER: Well, Judge, I have the -- we
 14 have agreed to consolidate the matters. The 08-20200 is a
 15 case that's been assigned to Your Honor. I don't believe
 16 it's been brought in for today. The prelim was on
 17 October 16th; so it's relatively recent.
 18 In this case, Mr. Nelson has been transported
 19 here from the Department of Corrections down in Boise.
 20 And he was awaiting not only the prelim that we've had
 21 recently but also the trial in this matter. So I'm asking
 22 that if this is rescheduled, that it be set out a
 23 significant amount of time so that he can be transported
 24 down and then transported back up in the next few months.
 25 I've indicated to Mr. Hull that I am not

6

1 THE COURT: Well, let me ask Mr. Hull first.
 2 If there's a disagreement regarding the bail, is it still
 3 the defense's request to vacate this trial and allow the
 4 Amended Information consolidating the two charges to be
 5 filed with the Court?
 6 MR. HULL: Your Honor, there's no objection to
 7 consolidating the cases unless -- it's my understanding
 8 that there would be a 50,000-dollar bond that's already
 9 posted in the new case. If that turns out not to be the
 10 upshot of this hearing, we would request that the
 11 consolidated case remain set for November 3. Because it
 12 was my understanding, from talking to Mr. Reiersen and
 13 Judge Wayman and to Donna yesterday, that the end result
 14 of this would be a 50,000-dollar bond in 08-13006 that's
 15 already been posted.
 16 So I think the consolidation, I wouldn't be
 17 agreeing to it on a bond issue unless I thought it was
 18 going to happen anyway; so I'm -- the consolidation I
 19 would consent to certainly because I believe the evidence
 20 would come in anyway.
 21 But if Mr. Cook isn't going to be out to be
 22 able to assist me in locating witnesses, I'm not going to
 23 be able to locate witnesses. And it would be in
 24 Mr. Cook's best interest to try this on November 3rd.
 25 THE COURT: Try which case? This or concurrent

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8

1 charge here?
 2 MR. HULL: The consolidated case on
 3 November 3rd.
 4 THE COURT: The 20200?
 5 MR. HULL: I believe the Amended Information,
 6 it would be appropriate to file, which would have Count I,
 7 which is this current count in 08-13006. And it would
 8 have the count, which is the only count currently, in CRF
 9 08-20200. So I think a trial on the Amended Information
 10 on November 3rd would be as much in Mr. Cook's interest as
 11 having just the one count settled on November 3rd.
 12 THE COURT: Would the State be ready to go to
 13 trial on the Amended Information on November the 3rd?
 14 MS. GARDNER: I don't believe so, Judge. That
 15 obviously was a recent -- um -- we haven't subpoenaed all
 16 of our witnesses in that matter, so no.
 17 THE COURT: All right. Let me take just a
 18 moment here.
 19 (Pause in proceedings.)
 20 THE COURT: All right. The Court is not
 21 exactly hearing clarity in the agreement. So I think to
 22 take one step at a time without that clarity of agreement
 23 we're faced with the situation of Mr. Cook's charge in
 24 this current case, 08-13006, is on for trial November 3rd.
 25 Because I'm not hearing an agreement to go to trial on the

1 parties work out the bail situation.
 2 I think Mr. Hull's argument makes sense. If
 3 there's no 20200, there's no bail set on that. Bail is
 4 set in 13006 at \$50,000. And if you file an amended
 5 charge, the bail remains the same unless there's a motion
 6 to increase that bail, which would need notice and all
 7 so --
 8 MS. GARDNER: I'm having a problem with that
 9 interpretation, Judge, because there is 08-20200, whatever
 10 that number is, and there is a bond in that amount of
 11 \$40,000, and it hasn't changed by court order. Even
 12 though there was that discussion of consolidation, the
 13 Judge at that hearing left that with the discretion of the
 14 bonding company to decide whether or not they were going
 15 to do that consolidation so --
 16 THE COURT: I understand that. If the State
 17 does not want to file an Amended Information consolidating

18 the cases, I mean, the bond is going to be \$50,000 in
 19 13006 if you file a consolidated Amended Information.
 20 Do you choose to file that or not?
 21 MS. GARDNER: I'll take it back, Judge.
 22 THE COURT: All right. Do I deduce, then, that
 23 this matter remains on the trial calendar for November the
 24 3rd?

25 MR. HULL: Yes, Your Honor.
 STATE OF IDAHO VS COOK SUPREME COURT

1 consolidated cases on that date. So this matter is on for
 2 trial November 3rd.
 3 Do you want to go forward on that matter or
 4 not?
 5 MR. HULL: Your Honor, the only issue is, is
 6 the reason I need a continuance is to find witnesses. But
 7 I can't find witnesses if he's in jail. So I don't have
 8 any objection to a consolidation if that leads to -- I
 9 think it would. There would be no 20 -- I mean, I don't
 10 know that it's a matter of the State having to agree to
 11 it.
 12 In 08-20200, there's one count of witness
 13 intimidation which would be contained in the Amended
 14 Information. Whether they are agreeing that the bond is
 15 concurrent with the bond in this or not after that to me
 16 is irrelevant because there would be no case in 20200.
 17 If the Court's interpretation of that is the
 18 same as mine, what I would suggest we do is amend the
 19 Information and dismiss 20200 because it's a redundant
 20 charge. If that isn't the Court's interpretation, then I
 21 guess the only thing to do, although it doesn't do
 22 Mr. Cook much good, is to have a trial on the rape charge
 23 on November 3rd.
 24 THE COURT: All right. I'll allow the State to
 25 file its Amended Information here today. I'll let the

1 MS. GARDNER: Yes, Judge.
 2 THE COURT: All right. Are there any discovery
 3 issues?
 4 MR. HULL: I've responded to the discovery
 5 recently, Your Honor -- um -- I've received discovery.
 6 THE COURT: All right. What's the State's
 7 position on discovery?
 8 MS. GARDNER: I haven't received a witness list
 9 from defense. I haven't received anything from the
 10 defense, I don't believe, as far as any additional
 11 information, Judge.
 12 THE COURT: Do you have a witness list in,
 13 Mr. Hull?
 14 MR. HULL: I have a response to discovery. Is
 15 there a pretrial order requiring a witness list?
 16 THE COURT: If it's contained in discovery
 17 where you've disclosed witnesses and addresses, that's

18 sufficient.
 19 MR. HULL: I disclosed Mr. Cook and the
 20 witnesses previously disclosed by the State.
 21 THE COURT: All right. Mr. Cook, are you
 22 prepared to go to trial November 3rd with your counsel?
 23 THE DEFENDANT: Um -- I take it we're not
 24 amending those charges together?

25 THE COURT: The State has not filed an Amended
 STATE OF IDAHO VS COOK SUPREME COURT DOCKET 41449

1 Information because the Court has indicated that bail on
 2 both of the charges would be \$50,000 unless there's a
 3 motion to change that bail. So they haven't filed a
 4 consolidated charge against you.
 5 THE DEFENDANT: Oh, okay.
 6 THE COURT: So you're facing the trial on the
 7 rape charge on November the 3rd.
 8 THE DEFENDANT: Right.
 9 THE COURT: Do you feel ready to go with you
 10 and your counsel?
 11 THE DEFENDANT: Um -- sure. There was one
 12 thing that I was concerned about was that I was coming
 13 into court looking like this.
 14 THE COURT: Your counsel will know how to
 15 address that.
 16 THE DEFENDANT: There's a way to deal with
 17 that?
 18 MR. HULL: Yeah. I can get you clothes.
 19 THE DEFENDANT: Okay.
 20 THE COURT: Okay.
 21 THE DEFENDANT: Um -- sure, yeah. Let's go
 22 ahead with it, then.
 23 THE COURT: All right. A reminder to both
 24 parties to have jury instructions in five days prior to
 25 trial date, please.

13

1 MS. GARDNER: Yes, Judge.
 2 THE COURT: Are there any other matters to be
 3 addressed?
 4 MS. GARDNER: No, Your Honor.
 5 MR. HULL: No, Your Honor.
 6 THE COURT: All right. You are excused.
 7 (The proceedings concluded at 9:06 a.m.)
 8 ---o0o---
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IN THE DISTRICT COURT OF THE FIRST
 JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR THE COUNTY OF KOOTENAI

--o0o--

STATE OF IDAHO,)
)
 Plaintiff,) Case No. CR 08-13006
)
 vs.)
) JURY TRIAL
 SEAN M. COOK,)
)
 Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AT: Kootenai County, Coeur d'Alene, Idaho

ON: ~~November 3, 2008 and November 5-6, 2008~~

BEFORE: The Honorable Lansing L. Haynes,
District Judge

Laurie A. Johnson, CSR 720, Official Court Reporter

STATE OF IDAHO VS COOK

15

A P P E A R A N C E S

For the Plaintiff:

DONNA GARDNER, Deputy Prosecuting Attorney
 Kootenai County Prosecuting Attorney's Office
 501 Government Way
 P.O. Box 9000
 Coeur d'Alene, ID 83816-9000

For the Defendant:

JONATHAN R. HULL, Attorney at Law
 508 East Garden Avenue
 Coeur d'Alene, ID 83814

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16

I N D E X

1

2

3 JURY TRIAL OF: NOVEMBER 3, 2008 and NOVEMBER 5-6, 2008

4

5

6 PLAINTIFF'S WITNESSES: PAGE/LINE

7 BRUMBAUGH, Tracy Direct 446/9
Voir Dire 455/24

8 DILLON, Harold Russell Direct 336/20
Cross 345/6

9 DILLON, Hoss Direct 285/14
Cross 313/16
Redirect 331/1
Recross 334/22

10

11

12 FREELAND, Karen Direct 395/21

13 MARTIN, Tracy Direct 416/6
Cross 438/22
Redirect 443/10
Recross 445/12

14

15 NELSON, Paul Direct 369/5
Cross 391/14
Redirect 394/1

16

17 ROGERS, Leslie Direct 348/25
Cross 358/18
Redirect 360/8

18

19 WHITTEN, Danielle Direct 156/21
Voir Dire 203/12
Cross 263/14
Redirect 278/10
Recross 283/10

20

21

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1

2 (DAY NO.: 1 - November 3, 2008 - 9:26 a.m.)

3 P R O C E E D I N G S

4 THE COURT: We're on the record in First

5 District Court for Kootenai County. I'm District Judge

6 Lansing Haynes. This is the time set for the matter of

7 the State of Idaho versus Sean Cook. It's Kootenai Case:

8 08-13006.

9 Are the parties ready to go forward?

10 MS. GARDNER: The State is ready, Judge.

11 MR. HULL: The defense is prepared, Your Honor.

12 THE COURT: Thank you.

13 Members of the Jury, we're about to do a roll

14 call and then begin jury selection in this matter. The

15 roll call will be calling you by a juror number. So look

16 down on your juror number and know who you are that way.

17 Throughout the Jury selection the Court and the attorneys

18 will be referring to you by your juror number as well. We

19 don't do this to further depersonalize you in an already

20 depersonalized society, but jurors have let us know that

21 they for the most part enjoy the anonymity of being

22 referred to on the record by their number. There may be

23 times when a juror is referred to by name occasionally.

24 So if the lawyers call you Ms. 51 or Mr. 60, it's not to

25 be mean. STATE OF IDAHO VS. COOK SUPREME COURT DOCKET 41449

19

I N D E X

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3 DEFENDANT'S WITNESS: PAGE/LINE

4 COOK, Sean Direct 462/22
Cross 486/20
Redirect 497/17

5

6

7

8

9 E X H I B I T S

10 Offered Rejected

11 PLAINTIFF'S EXHIBITS: Marked Admitted

12 No. 1 - Pictures, (2.5 pages) 203/208 208 206

13 No. 2 - Four Poloroid Pictures (1 page) 256 257

14 No. 3 - Jeans 259 259

15 No. 4 - Panties 259 259

16 No. 5 - Letter from Paul Nelson 385

17 No. 6 - Lab Report 423 424

18 No. 7 - Lab Report 423 424

19 No. 8 - Lab Report 423 424

20 No. 9 - Photos 455 456

21

22 Offered Rejected

23 DEFENDANT'S EXHIBITS: Marked Admitted

24 (None)

25

18

1 So, Madam Clerk, if you could call the roll of

2 the Jury, please.

3 THE CLERK: Juror No. 1?

4 JUROR NO. 1: Here.

5 THE CLERK: Two?

6 JUROR NO. 2: Here.

7 THE CLERK: Three?

8 JUROR NO. 3: Here.

9 THE CLERK: Four?

10 JUROR NO. 4: Here.

11 THE CLERK: Five?

12 JUROR NO. 5: Here.

13 THE CLERK: Six?

14 JUROR NO. 6: Here.

15 THE CLERK: Seven?

16 JUROR NO. 7: Here.

17 THE CLERK: Eight?

18 JUROR NO. 8: Here.

19 THE CLERK: Juror No. 9?

20 JUROR NO. 9: Here.

21 THE CLERK: Ten?

22 JUROR NO. 10: Here.

23 THE CLERK: Eleven.

24 THE BAILIFF: Absent.

25 THE CLERK: Twelve?

20

1 JUROR NO. 12: Here.
 2 THE CLERK: Thirteen?
 3 JUROR NO. 13: Here.
 4 THE CLERK: Fourteen?
 5 JUROR NO. 14: Here.
 6 THE CLERK: Fifteen?
 7 JUROR NO. 15: Here.
 8 THE CLERK: Sixteen?
 9 JUROR NO. 16: Here.
 10 THE CLERK: Seventeen?
 11 JUROR NO. 17: Here.
 12 THE CLERK: Eighteen?
 13 JUROR NO. 18: Here.
 14 THE CLERK: Nineteen?
 15 JUROR NO. 19: Here.
 16 THE CLERK: Twenty?
 17 JUROR NO. 20: Here.
 18 THE CLERK: Twenty-one?
 19 JUROR NO. 21: Here.
 20 THE CLERK: Twenty-two?
 21 JUROR NO. 22: Here.
 22 THE CLERK: Twenty-three?
 23 JUROR NO. 23: Here.
 24 THE CLERK: Twenty-four?
 25 JUROR NO. 24: Here.

21

1 JUROR NO. 37: Here.
 2 THE CLERK: Thirty-eight?
 3 THE BAILIFF: Absent.
 4 THE CLERK: Thirty-nine?
 5 JUROR NO. 39: Here.
 6 THE CLERK: Forty?
 7 JUROR NO. 40: Here.
 8 THE CLERK: Forty-one?
 9 THE BAILIFF: Absent.
 10 THE CLERK: Forty-two?
 11 JUROR NO. 42: Here.
 12 THE CLERK: Forty-three?
 13 JUROR NO. 43: Here.
 14 THE CLERK: Forty-four?
 15 JUROR NO. 44: Here.
 16 THE CLERK: Forty-five?
 17 JUROR NO. 45: Here.
 18 THE CLERK: Forty-six?
 19 JUROR NO. 46: Here.
 20 THE CLERK: Forty-seven?
 21 JUROR NO. 47: Here.
 22 THE CLERK: Forty-eight?
 23 JUROR NO. 48: Here.
 24 THE CLERK: Forty-nine?
 25 JUROR NO. 49: Here.

23

1 THE CLERK: Twenty-five?
 2 JUROR NO. 25: Here.
 3 THE CLERK: Twenty-six?
 4 JUROR NO. 26: Here.
 5 THE CLERK: Twenty-seven.
 6 JUROR NO. 27: Here.
 7 THE CLERK: Twenty-eight?
 8 JUROR NO. 28: Here.
 9 THE CLERK: Twenty-nine?
 10 JUROR NO. 29: Here.
 11 THE CLERK: Thirty?
 12 JUROR NO. 30: Here.
 13 THE CLERK: Thirty-one?
 14 JUROR NO. 31: Here.
 15 THE CLERK: Thirty-two?
 16 JUROR NO. 32: Here.
 17 THE CLERK: Thirty-three?
 18 JUROR NO. 33: Here.
 19 THE CLERK: Thirty-four?
 20 JUROR NO. 34: Here.
 21 THE CLERK: Thirty-five?
 22 THE BAILIFF: Absent.
 23 THE CLERK: Thirty-six?
 24 JUROR NO. 36: Here.
 25 THE CLERK: Thirty-seven?

22

1 THE CLERK: Fifty?
 2 THE BAILIFF: Absent.
 3 THE CLERK: Fifty-one.
 4 JUROR NO. 51: Here.
 5 (Juror No. 52 not called.)
 6 THE CLERK: Fifty-three.
 7 JUROR NO. 53: Here.
 8 THE CLERK: Fifty-four?
 9 THE BAILIFF: Absent.
 10 THE CLERK: Fifty-five.
 11 JUROR NO. 55: Here.
 12 THE CLERK: Fifty-six.
 13 JUROR NO. 56: Here.
 14 THE CLERK: Fifty-seven?
 15 JUROR NO. 57: Here.
 16 THE CLERK: Fifty-eight?
 17 JUROR NO. 58: Here.
 18 THE CLERK: Fifty-nine?
 19 JUROR NO. 59: Here.
 20 THE CLERK: Sixty?
 21 JUROR NO. 60: Here.
 22 THE CLERK: Sixty-one?
 23 JUROR NO. 61: Here.
 24 THE CLERK: Sixty-two?
 25 JUROR NO. 62: Here.

24

1 THE CLERK: Sixty-three?
 2 JUROR NO. 63: Here.
 3 THE CLERK: Sixty-four?
 4 JUROR NO. 64: Here.
 5 THE CLERK: Sixty-five?
 6 JUROR NO. 65: Here.
 7 THE CLERK: Sixty-six?
 8 JUROR NO. 66: Here.
 9 THE CLERK: Sixty-seven?
 10 JUROR NO. 67: Here.
 11 THE CLERK: Sixty-eight?
 12 JUROR NO. 68: Here.
 13 THE CLERK: Sixty-nine?
 14 JUROR NO. 69: Here.
 15 THE COURT: If the Jury Commissioner can please
 16 look into those persons who did answer the Jury call.
 17 Well, Members of the Prospective Panel, you
 18 have been summoned as prospective jurors in the lawsuit
 19 now before us. The first thing we do in a trial is to
 20 select 12 jurors and one alternate from among you ladies
 21 and gentlemen. The 13 of you that will be seated in the
 22 box to hear this case will hear all of the evidence and
 23 the closing arguments. And then at the end of the closing
 24 arguments, one of the 13 will be selected as the alternate
 25 juror. That way no one knows who the alternate is all

25

1 throughout the trial.
 2 My name is Lansing Haynes, the Judge in charge
 3 of the courtroom and this trial. The deputy clerk of
 4 court is Ms. Suzi Taylor. She marks the trial exhibits
 5 and administers oaths to the jurors and the witnesses.
 6 The Clerk will also keep a tape recording of all matters
 7 of record during the trial. The court reporter before me
 8 is Ms. Laurie Johnson, who will be recording a verbatim
 9 account of everything said in the courtroom. The Bailiff,
 10 Mr. Mike Hrehor, will assist me in maintaining courtroom
 11 order and will arrange for your needs during the trial.
 12 Each of you has the requisite qualifications to serve as a
 13 juror of this court.
 14 You are not frequently called for jury duty,
 15 but it is part of your obligation of citizenship in this
 16 state and of this country. No one should avoid fulfilling
 17 this obligation, except under the most pressing
 18 circumstances.
 19 We are now going to call a selection of 35
 20 initial jurors. And those are the persons who will come
 21 up front. And I don't know. Do we have enough chairs for
 22 that? Or do you have to set up more?
 23 THE BAILIFF: What we're going to do,
 24 Your Honor, is we're going to need these chairs and then
 25 three more. If that's okay.

26

1 THE COURT: That is okay.
 2 So all of you who are in the Jury box right now
 3 are going to have to crowd to the back of the room.
 4 Pretend it's like church. Everybody has to scoot in. And
 5 then the three pews on the left need to be vacated as
 6 well. Those first three pews over here on my left, your
 7 right. Even if you have to stand, we'll clear this out
 8 shortly.
 9 (Pause in proceedings.)
 10 THE COURT: So as your number is called, please
 11 come forward and take a seat as directed by our Bailiff.
 12 THE CLERK: Number 25, 44, 47, 66, 34, 10, 24,
 13 67.
 14 THE BAILIFF: You can go ahead right around the
 15 corner, Ma'am.
 16 THE CLERK: Seven, 48, 16, 3, 23, 55, 5, 27,
 17 61, 37, 30, 4, 1, 22, 58, 19, 39, 2, 6, 12, 57.

18 THE BAILIFF: Fifty-seven?
 19 THE CLERK: Twenty-nine, 15, 8, 46, 18, and 42.
 20 THE COURT: All right. Thank you for that.
 21 Everyone, please take a moment and make sure
 22 any cell phones are off or deactivated. I'll check mine
 23 just to make sure, too. I don't want to hold myself in
 24 contempt.
 25 Also as you're being asked questions in this

STATE OF IDAHO vs. SEAN M. COOK

27

1 particular courtroom, the heating or the venting system is
 2 very loud. And so speak much more loudly than you think
 3 you would ordinarily. The temptation is to speak softly.
 4 So I encourage you to speak loudly even though you may
 5 feel like you're shouting in your neighbor's ear. It's
 6 really important for everyone to be able to hear.
 7 THE COURT: The next step in the process is for
 8 all the jurors to take an oath to tell the truth during
 9 the voir dire process. So will all of you please stand
 10 and raise your right hands.
 11 (The prospective jury panel is sworn.)
 12 THE COURT: Thank you. Please be seated.
 13 The way the Jury selection commences, then, is
 14 the group of 35 whose numbers have been called are the
 15 primary panel right now. Counsel and the Court will
 16 direct their questions to the group of 35. If any of you
 17 whose numbers have not been called would have answered yes

18 to any of those questions, remember them. We're not going
 19 to call on you at this point unless you become part of the
 20 group of 35. But, remember, listen carefully to the
 21 questions and remember them. And if you would have
 22 answered yes to any of them, if you are called into the
 23 group of 35, you can let us know. And we'll see how those
 24 goes.
 25 The Court and counsel for the parties will be

28

1 asking you questions concerning your qualifications to
2 serve as jurors in this particular case. This part of the
3 case is known as the voir dire examination. A voir dire
4 examination is for the purpose of determining if your
5 decision in this case would in any way be influenced by
6 opinions which you now have or special personal experience
7 for some knowledge which you may have concerning this
8 case. The object is to obtain a jury that will
9 impartially try the issues of this case upon the evidence
10 presented in this courtroom without being influenced by
11 any other factors. Please understand that this
12 questioning is not for the purpose of prying into your
13 affairs for personal reasons but is only for the purpose
14 of obtaining an impartial jury.

15 Each question has an important bearing upon
16 your qualifications as a juror. And each question is
17 based upon a requirement of the law with respect to such
18 qualifications.

19 If your answer to any question is yes, please
20 raise your hand. During the voir dire examination, one or
21 more of you may be challenged.

22 Each side has a certain number of preemptory
23 challenges, by which I mean each side can challenge a
24 juror and ask that he or she be excused without giving a
25 reason therefore. In addition, each side has challenges

1 for cause, by which I mean that each side can ask that a
2 juror be excused for a specific reason. If you are
3 excused by either side, please do not feel offended or
4 feel that your honesty or integrity is being questioned.
5 It is not.

6 This case is the State of Idaho versus Sean
7 Cook, Defendant. I will now read you the pertinent
8 portion of the Information which sets forth the charge
9 against the Defendant.

10 "William J. Douglas, Prosecuting Attorney in
11 and for the County of Kootenai, State of Idaho, who
12 prosecutes in its behalf, comes now into Court, and does
13 accuse Sean M. Cook with the crime of rape, Idaho Code
14 Section: 18-1601, committed as follows.

15 That the Defendant, Sean M. Cook, on or about
16 the 8th day of April, 2008, in the County of Kootenai,
17 State of Idaho, did penetrate the vaginal opening of
18 Danielle Whitten, a female person, with his penis, where
19 Danielle Whitten resisted, but her resistance was overcome
20 by force or violence, all of which is contrary to the
21 form, force, and effect of the statute in such case made
22 and provided and against the peace and dignity of the
23 People of the State of Idaho."

24 It is dated the 31st day of July, 2008, by
25 Marty M. Raap for William J. Douglas. To this charge the

1 Defendant has pled not guilty.

2 The Information is a mere accusation and is not
3 evidence. You must not allow yourselves to be prejudiced
4 or biased by the fact that this accusation has been made.
5 You have heard the charge made in the Information against
6 the Defendant. Do any of you know anything about this
7 case either through your own personal knowledge or by
8 discussion with anyone else? If so, please raise your
9 hand. No responses. Have you read or heard about it in
10 any of the news media? No response.

11 The Defendant is Sean Cook. If you would
12 please stand for a moment, sir. Are any of you related by
13 blood or marriage to the Defendant? Or do you know the
14 Defendant from any business or social relationship? Thank
15 you. You may be seated. No response.

16 The alleged victim in this case is Danielle
17 Whitten. Are any of you related by blood or marriage to

18 Danielle Whitten or do you know her from any business or
19 social relationship? No response. The individual who's
20 signed the complaint in this matter is a Detective Tracy
21 Martin. Are you related by blood or marriage to him? Or
22 do you know him from any business or social relationship?
23 No responses.

24 Does the relationship of guardian or ward,
25 attorney and client, employer and employee, landlord and

1 tenant, boarder or lodger exist between any of you and
2 Sean Cook or Danielle Whitten or Tracy Martin? No
3 responses.

4 Are any of you a party in any civil action
5 against Sean Cook? No hands.

6 Have any of you ever complained against
7 Sean Cook or been accused by Sean Cook in a criminal
8 prosecution? No hands.

9 Counsel for the prosecution is Ms. Donna
10 Gardner. If you'd please stand for a moment. Counsel for
11 the Defendant is Mr. Jonathan Hull. If you'd please
12 stand. Do you know either attorney through any personal,
13 social or business relationship? The second row, your
14 number, please, sir.

15 JUROR NO. 7: Seven.

16 THE COURT: Which do you know?

17 JUROR NO. 7: Uh -- the Defendant's counsel.

18 THE COURT: You know Mr. Hull?

19 JUROR NO. 7: Yes.

20 THE COURT: Is it a professional relationship
21 or a social relationship?

22 JUROR NO. 7: Previous professional.

23 THE COURT: How long ago was this?

24 JUROR NO. 7: Um -- 15, 16 years.

25 THE COURT: All right. Is there anything

1 about that previous professional relationship that makes
 2 you think you would be a biased juror or prejudiced in any
 3 way?
 4 JUROR NO. 7: No, sir.
 5 THE COURT: Who else had their hand raised? In
 6 the front row. Are you No. 30?
 7 JUROR NO. 30: Yes, sir.
 8 THE COURT: Who do you know, please.
 9 JUROR NO. 30: Mr. Hull.
 10 THE COURT: Is that knowledge a business or a
 11 social relationship?
 12 JUROR NO. 30: Professional. Purely
 13 professional.
 14 THE COURT: All right. How long ago?
 15 JUROR NO. 30: I believe I quit in '94.
 16 THE COURT: And is there anything about that
 17 relationship that makes you think you would be prejudiced
 18 or biased?
 19 JUROR NO. 30: I don't believe so, no.
 20 THE COURT: Anyone else in the group of 35 that
 21 would have raised their hand? There may be other
 22 questions followed up on that.
 23 I will now have counsel read the names of those
 24 who may possibly testify in this case. Not for sure but
 25 may possibly testify. Their names will please be read

1 slowly. And ask that, if you know any of them in any
 2 capacity, that you immediately advise me of this fact.
 3 Now, oftentimes, the defense intends to call the same
 4 witnesses that the prosecutor does. So the prosecutor
 5 usually reads a lot of names. The defense rarely reads
 6 any because it's the same names. Don't hold that against
 7 either party.
 8 Ms. Gardner, please.
 9 MS. GARDNER: I have a list here of 19 persons;
 10 so I'm going to go slowly. Detective Tracy Martin with
 11 the Coeur d'Alene Police Department. Danielle Whitten of
 12 Spirit Lake. Hoss Dillon of Coeur d'Alene. Paul Nelson.
 13 Officer Brian Brumbaugh of the Coeur d'Alene Police
 14 Department. Detective John Kelly. A Detective Dacia
 15 Turner, both of the Coeur d'Alene Police Department.
 16 THE COURT: We'll get to you. Just indicate
 17 that. And we'll follow up on those.
 18 MS. GARDNER: Stacy Guess, Randy Parker, and
 19 Ethan Conway. All with the Idaho State Police forensic
 20 laboratory in Meridian, Idaho. Deputy Andrew Deak, Harol
 21 Dillon of Rathdrum. David McKee. Nurse Jennie Renn with
 22 the County Medical Center. Dr. Robin Shaw. Nurse Leslie
 23 Rogers of Kootenai Medical Center. Karen Freeland, Ashten
 24 Brandley. Karen and Ashten are both from Rathdrum. James
 25 Sawley of Spirit Lake.

1 THE COURT: Thank you.
 2 Mr. Hull, are there any witnesses that you
 3 would list different from those listed by the prosecutor?
 4 MR. HULL: Sean Cook, Charity Pirone.
 5 THE COURT: Thank you.
 6 Now, who raised their hands to knowing any of
 7 those listed witnesses? And we'll identify you. In the
 8 back row? Nobody. In the second row? Juror No. 7,
 9 again?
 10 JUROR NO. 7: Yes, sir.
 11 THE COURT: Which person do you know?
 12 JUROR NO. 7: I know John Kelly and Dr. Shaw.
 13 THE COURT: Let's take John Kelly first. Is
 14 that a professional or a social relationship?
 15 JUROR NO. 7: Past professional.
 16 THE COURT: And how long ago was it that you
 17 had professional interaction?
 18 JUROR NO. 7: Um -- that would be 16 years.
 19 THE COURT: And, again, anything about that
 20 relationship that would make you a prejudiced or a biased
 21 juror?
 22 JUROR NO. 7: No, sir.
 23 THE COURT: And then you also know Dr. Shaw?
 24 JUROR NO. 7: Yes, sir.
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1 JUROR NO. 7: I'll call it professional.
 2 THE COURT: All right. Maybe, a little of
 3 both?
 4 JUROR NO. 7: Uh -- no. I'm a firefighter/EMT;
 5 so --
 6 THE COURT: All right. Anything about that
 7 relationship that makes you feel like you would be an
 8 unfair juror?
 9 JUROR NO. 7: No.
 10 THE COURT: Who else would have raised their
 11 hand? In this front row here anybody? All right. In the
 12 pews in back. Am I looking at No. 39?
 13 JUROR NO. 39: Yes.
 14 THE COURT: And you've got to speak real
 15 loudly. Who do you know, please.
 16 JUROR NO. 39: Dr. Shaw.
 17 THE COURT: Anyone else?
 18 JUROR NO. 39: No.
 19 THE COURT: Is your knowledge of Dr. Shaw
 20 professional or social?
 21 JUROR NO. 39: It's professional.
 22 THE COURT: And how long ago is that?
 23 JUROR NO. 39: It's current. I work at
 24 Kootenai Medical Center; so I know him.
 25 THE COURT: So on an ongoing basis do you interact

1 professionally?
 2 JUROR NO. 39: Once in a while.
 3 THE COURT: Is there anything about that
 4 relationship that would make you unfair as a juror?
 5 JUROR NO. 37: No.
 6 THE COURT: Again, in that row. Am I looking
 7 at No. 6, is it?
 8 JUROR NO. 6: Yes.
 9 THE COURT: And who do you know?
 10 JUROR NO. 6: Dr. Shaw.
 11 THE COURT: Is there anyone that doesn't know
 12 Dr. Shaw? Is that professional or social?
 13 JUROR NO. 6: Professional.
 14 THE COURT: How long is that your knowledge of
 15 him?
 16 JUROR NO. 6: About six years.
 17 THE COURT: Is there anything about that
 18 relationship that would make you an unfair juror?
 19 JUROR NO. 6: No.
 20 THE COURT: And, also, am I looking at No. 12?
 21 JUROR NO. 12: Yes, sir.
 22 THE COURT: Who do you know?
 23 JUROR NO. 12: Dr. Shaw.
 24 THE COURT: Professionally or socially?
 25 JUROR NO. 12: Um -- socially and

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1 interaction?
 2 JUROR NO. 8: Probably two years.
 3 THE COURT: Is there anything about that
 4 relationship and that time span that makes you feel like
 5 an unfair juror?
 6 JUROR NO. 8: No.
 7 THE COURT: The same questions with Dr. Shaw,
 8 please.
 9 JUROR NO. 8: Professionally.
 10 THE COURT: How long ago?
 11 JUROR NO. 8: Probably about a year or two ago.
 12 THE COURT: And does that affect your ability
 13 to be an impartial juror at all?
 14 JUROR NO. 8: No.
 15 THE COURT: All right. And in the last group
 16 there, anyone raised their hand? Anyone who I missed?
 17 There may be some follow-up questions regarding those.

18 Thank you all for that.
 19 Have any of you ever formed or expressed an
 20 unqualified opinion that the Defendant is guilty or not
 21 guilty of the offense charged? No hands.
 22 Do any of you have a religious or moral
 23 position that would make it impossible for you to render
 24 judgment? All right. I'm seeing a hand in the back. Am
 25 I looking at No. 46?

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1 professionally indirectly. My wife used to be a nurse for
 2 the ER at Kootenai Medical Center.
 3 THE COURT: All right. Is there anything about
 4 the indirect professional relationship with him that would
 5 make you feel like an unfair juror?
 6 JUROR NO. 12: No, sir.
 7 THE COURT: The social relationship, are you an
 8 acquaintance? A good friend? How would you describe
 9 that?
 10 JUROR NO. 12: Um -- years past. We went to
 11 various functions together. And nothing about that
 12 relationship would make me feel uncomfortable.
 13 THE COURT: Unfair at all.
 14 JUROR NO. 12: Unfair.
 15 THE COURT: Very well. Thank you for that.
 16 Who else raised their hand in the group back
 17 there? Am I looking at No. 8?
 18 JUROR NO. 8: Yes.
 19 THE COURT: And who do you know?
 20 JUROR NO. 8: I know Tracy Martin and also
 21 Dr. Shaw.
 22 THE COURT: Tracy Martin, is that relationship
 23 professional or social?
 24 JUROR NO. 8: Professional.
 25 THE COURT: And how long ago was that

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1 JUROR NO. 46: Yes, you are.
 2 THE COURT: And what is that religious or moral
 3 position, sir?
 4 JUROR NO. 46: Just, perhaps, my impartiality.
 5 In my religious position I've done quite a bit of
 6 counseling with rape victims. And I tend to be close to
 7 them.
 8 THE COURT: Would you be able to set aside any
 9 knowledge or any preconceived notions that you may have
 10 about this type of a case, set it aside, and decide the
 11 facts of this case just on the evidence that you hear in
 12 this courtroom and on the law as I instruct you on it?
 13 JUROR NO. 46: I hope so.
 14 THE COURT: All right. There may be some
 15 follow-up questions. I thank you for that.
 16 Anyone else who would have raised their hand to
 17 that question? Religious or moral position that makes it

18 impossible to render a judgment on the facts? No other
 19 hands.
 20 Do any of you have any bias or prejudice either
 21 for or against Sean Cook? No hands.
 22 If you are selected as a juror in this case,
 23 will any of you be unable to render a fair and impartial
 24 verdict based upon the evidence presented in this
 25 courtroom and the law as it pertains in this particular

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1 case as instructed by the Court? hands.
 2 This case is scheduled at least anticipated to
 3 go into Friday of this week. We will not have court
 4 tomorrow as it's election day. And there can be no
 5 compulsory court, but we'll have court Wednesday,
 6 Thursday, and probably into Friday. Does that affect
 7 anybody's ability to sit as a juror in this case? No
 8 hands.
 9 Do any of you have any other reason why you
 10 cannot give this case your undivided attention and render
 11 a fair and impartial verdict? I'm looking at No. 5?
 12 JUROR NO. 5: (Nods head.)
 13 THE COURT: Please, ma'am.
 14 JUROR NO. 5: I've been involved as a victim
 15 and in a shelter. I escaped a violent environment.
 16 THE COURT: All right. I had real trouble
 17 hearing you. I hate to have you repeat that. You've been
 18 in violent situations before and sought shelter because of
 19 that?
 20 JUROR NO. 5: Yes.
 21 THE COURT: All right.
 22 JUROR NO. 5: One particular time I escaped a
 23 violent environment. And I don't think I can be a fair
 24 and an impartial juror.
 25 THE COURT: I'm sensing some emotion in your

1 answered yes to any of those questions?
 2 JUROR NO. 53. No.
 3 THE COURT: Ms. Gardner, you may voir dire the
 4 panel.
 5 MS. GARDNER: Thank you, Judge.
 6 Good morning. I'm going to start off by
 7 talking about anybody that's ever served on a prior jury
 8 and had jury trial experience. So -- um -- talking about
 9 just criminal trials, has anybody here ever served as a
 10 juror on a criminal jury trial? All right. I want to
 11 start with the first row in the back there. Number 66?
 12 JUROR NO. 66: Yes.
 13 MS. GARDNER: When were you a juror?
 14 JUROR NO. 66: Probably, like, 10 or 12 years
 15 ago.
 16 MS. GARDNER: And was that here in Kootenai
 17 County?

18 JUROR NO. 66: Yeah. It was in Moscow District
 19 Court.
 20 MS. GARDNER: Do you remember what the charge
 21 was?
 22 JUROR NO. 66: It was a prior felon in
 23 possession of weapons.
 24 MS. GARDNER: Okay. And do you recall whether
 25 you were able to reach a verdict?

1 voice even as you say that.
 2 JUROR NO. 5: Yes.
 3 THE COURT: What do you think about your
 4 ability to set aside those emotional factors in this case?
 5 And you're shaking your head no.
 6 JUROR NO. 5: No, I can't.
 7 THE COURT: All right.
 8 JUROR NO. 5: To be honest I can't.
 9 THE COURT: The Court, in exercise of its
 10 discretion, does again make note for the record that
 11 you're having an emotional reaction to the subject matter
 12 understandably. And so, Juror 5, I'm going to excuse you
 13 from this case.
 14 Is there a need to call back in?
 15 THE BAILIFF: There wouldn't be. The
 16 commitment is for one week.
 17 THE COURT: All right. Then you do not need to
 18 call back in. And you're excused from jury service.
 19 THE COURT: Will Madam Clerk please call the
 20 number of another juror.
 21 THE CLERK: Fifty-three.
 22 THE COURT: Juror 53, did you hear all of the
 23 questions that I've asked of the possible panel?
 24 JUROR NO. 53: Yes, I did.
 25 THE COURT: Would you have raised your hand or

1 JUROR NO. 66: We did.
 2 MS. GARDNER: And do you recall what that
 3 verdict was?
 4 JUROR NO. 66: Guilty.
 5 MS. GARDNER: Do you recall having to deal with
 6 certain legal concepts such as proof beyond a reasonable
 7 doubt?
 8 JUROR NO. 66: Yes.
 9 THE COURT: And did you have any difficulty in
 10 serving on that jury?
 11 JUROR NO. 66: No.
 12 MS. GARDNER: And you want to serve on this
 13 jury today?
 14 JUROR NO. 66: Sure.
 15 MS. GARDNER: All right. Number 37, you had
 16 your hand raised?
 17 JUROR NO. 37: Can you define criminal? I was

18 on a jury but --
 19 MS. GARDNER: Where you had to weigh whether or
 20 not the person was guilty beyond a reasonable doubt.
 21 JUROR NO. 37: It was a car/pedestrian
 22 accident.
 23 MS. GARDNER: It was what now?
 24 JUROR NO. 37: Car/pedestrian.
 25 MS. GARDNER: And were you making a decision

1 whether somebody was guilty or no guilty?
 2 JUROR NO. 37: Exactly.
 3 MS. GARDNER: Do you remember what kind of
 4 crime it was?
 5 JUROR NO. 37: The car hit a pedestrian.
 6 MS. GARDNER: Okay. But the driver of the car
 7 was being charged with something for hitting a pedestrian?
 8 JUROR NO. 37: Correct.
 9 MS. GARDNER: Do you remember how many jurors
 10 were on that jury?
 11 JUROR NO. 37: Twelve or 13.
 12 MS. GARDNER: Okay. And how long ago was that?
 13 JUROR NO. 37: Ten years.
 14 MS. GARDNER: All right. Do you think it was
 15 here in this county or somewhere else?
 16 JUROR NO. 37: It was right here.
 17 MS. GARDNER: And do you remember what the
 18 outcome of that was?
 19 JUROR NO. 37: Not guilty.
 20 MS. GARDNER: I couldn't hear you.
 21 JUROR NO. 37: Not guilty.
 22 MS. GARDNER: Not guilty.
 23 Did you have any difficulty arriving at a
 24 decision in that case?
 25 JUROR NO. 37: No.

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1 JUROR NO. 25: Um -- I don't.
 2 MS. GARDNER: Not this judge?
 3 JUROR NO. 25: Um -- I don't remember.
 4 MS. GARDNER: All right. Number 44, you had
 5 your hand raised?
 6 JUROR NO. 44: Yes.
 7 MS. GARDNER: And when were you a juror?
 8 JUROR NO. 44: Over 20 years ago.
 9 MS. GARDNER: And was that in this county?
 10 JUROR NO. 44: No, it was not.
 11 MS. GARDNER: Where was it?
 12 JUROR NO. 44: It was in San Diego County.
 13 MS. GARDNER: Do you remember what the crime
 14 was that was charged?
 15 JUROR NO. 44: It was a DUI.
 16 MS. GARDNER: And did you have any difficulty
 17 understanding the law?

18 JUROR NO. 44: No.
 19 MS. GARDNER: And do you remember what your
 20 finding was?
 21 JUROR NO. 44: I believe there were three
 22 charges. I believe it came out two not guilty and one
 23 guilty.
 24 MS. GARDNER: Okay. Now, of the people I've
 25 asked so far -- I asked the first person -- but do any of

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1 MS. GARDNER: All right. Anybody else here?
 2 Oh, I've got a couple here I missed on the back row.
 3 Number 25?
 4 JUROR NO. 25: (Nods head.)
 5 MS. GARDNER: Can you tell us how long ago you
 6 were a juror.
 7 JUROR NO. 25: Uh - three years. It was three
 8 years ago.
 9 THE COURT: Was that here in this county?
 10 JUROR NO. 25: It was.
 11 MS. GARDNER: Do you remember what the charge
 12 was?
 13 JUROR NO. 25: I think it was a felony DUI,
 14 perhaps.
 15 MS. GARDNER: Do you remember how many jurors
 16 there were?
 17 JUROR NO. 25: Thirteen or 14.
 18 MS. GARDNER: Did you have any difficulty in
 19 serving as a juror and understanding the concepts that you
 20 had to --
 21 JUROR NO. 25: None at all.
 22 MS. GARDNER: What was your finding in that?
 23 JUROR NO. 25: I believe it was guilty.
 24 MS. GARDNER: Do you remember who the judge
 25 was?

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1 you want to serve on this jury today? It's your dream of
 2 a lifetime? Number 37, you're nodding.
 3 JUROR NO. 37: Yes.
 4 MS. GARDNER: I'm not getting anything from the
 5 people in the back I just asked.
 6 Anybody else in this section over here that has
 7 been a juror before in a criminal proceeding? All right.
 8 Now, starting with the first row here -- um -- No. 39.
 9 JUROR NO. 39: Yes.
 10 MS. GARDNER: When were you a juror?
 11 JUROR NO. 39: It was about eight years ago.
 12 MS. GARDNER: Was that here in this county?
 13 JUROR NO. 39: Yes.
 14 MS. GARDNER: And do you remember what the
 15 charge was?
 16 JUROR NO. 39: Yes.
 17 MS. GARDNER: Do you remember what the verdict

18 was?
 19 JUROR NO. 39: We never came to a decision. We
 20 dismissed it; so we couldn't decide.
 21 MS. GARDNER: Did the parties come to a
 22 resolution before or --
 23 JUROR NO. 39: No. What happened we as a jury
 24 couldn't.
 25 MS. GARDNER: Okay.

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1 JUROR NO. 38: We had one juror that wouldn't
 2 go along with everybody else's opinion, so they dismissed
 3 it.
 4 MS. GARDNER: Okay. So you just didn't come to
 5 a decision.
 6 JUROR NO. 39: We didn't.
 7 MS. GARDNER: Okay. All right. Did you have
 8 any problem understanding the law and the facts that were
 9 presented?
 10 JUROR NO. 39: No.
 11 MS. GARDNER: So you weren't that one juror?
 12 JUROR NO. 39: I wasn't that one juror.
 13 MS. GARDNER: All right. Number 2, you also
 14 had your hand raised?
 15 JUROR NO. 2: Yes.
 16 MS. GARDNER: How long ago were you a juror?
 17 JUROR NO. 2: Probably 16 or 17 years ago in
 18 Kootenai County.
 19 MS. GARDNER: And do you remember what the
 20 charge was?
 21 JUROR NO. 2: It was an assault. And it was a
 22 not guilty.
 23 MS. GARDNER: And did you have any difficulty
 24 understanding the legal concepts?
 25 JUROR NO. 2: No, I did not.

1 JUROR NO. 18: It was guilty.
 2 MS. GARDNER: Do you recall if you had any
 3 difficulties understanding the concepts of law?
 4 JUROR NO. 18: No problems.
 5 MS. GARDNER: Okay. Anybody else that I've
 6 missed? Oh, sorry. Number 23, when was that?
 7 JUROR NO. 23: It was probably four years ago.
 8 MS. GARDNER: Here in this county?
 9 JUROR NO. 23: Yes.
 10 MS. GARDNER: And do you know what the charge
 11 was?
 12 JUROR NO. 23: Assault with a deadly weapon.
 13 MS. GARDNER: Okay. And do you remember how
 14 many jurors there were on that?
 15 JUROR NO. 23: Probably around 13.
 16 MS. GARDNER: Do you remember what judge that
 17 was?

18 JUROR NO. 23: I don't remember his name.
 19 MS. GARDNER: Okay.
 20 JUROR NO. 23: It was not this judge.
 21 MS. GARDNER: And do you remember what that
 22 finding was?
 23 JUROR NO. 23: It was guilty.
 24 MS. GARDNER: And did you have any difficulty
 25 understanding the legal concepts?

1 MS. GARDNER: Now, was there anybody else there
 2 in that front row? Anybody on the second row? Third row?
 3 Okay. Number 46, how long ago were you a juror?
 4 JUROR NO. 46: It was, approximately, eight
 5 years ago. It was at the federal seat in Moscow.
 6 MS. GARDNER: Okay.
 7 JUROR NO. 46: We had called it the Straw Man
 8 Arms Purchase, firearms purchase, for a number of years
 9 that was used for these crimes. It was pretty
 10 straight-forward. It was three days. And the verdict was
 11 guilty.
 12 MS. GARDNER: And, No. 18, when were you a
 13 juror?
 14 JUROR NO. 18: In 2000.
 15 MS. GARDNER: In?
 16 JUROR NO. 18: 2000.
 17 MS. GARDNER: 2000?
 18 JUROR NO. 18: Yes.
 19 MS. GARDNER: Okay. And do you remember what
 20 the crime was?
 21 JUROR NO. 18: Assault with a deadly weapon.
 22 MS. GARDNER: Was that here?
 23 JUROR NO. 18: Yes.
 24 MS. GARDNER: And do you recall what your
 25 decision was?

1 JUROR NO. 23: No.
 2 MS. GARDNER: All right. All right. Anybody
 3 else? All right.
 4 I want to give you a scenario and just follow
 5 along with what I'm saying. Let's say that I go to work.
 6 It's in the middle of summertime. The weather is warm.
 7 The day is clear. I go to work. There's nothing unusual
 8 about the weather. Everything is dry. I come back home
 9 that afternoon. It's still a warm, sunny, dry day. And
 10 then I go to sleep, wake up the next morning, head outside
 11 to go to work again. And now everything is wet. The
 12 driveway is wet. The grass on my lawn is wet. My house
 13 roof is wet, the car. All the neighboring yards, from
 14 what I can see, are all wet. Streets are wet. What would
 15 you say to anybody beyond a reasonable doubt had happened
 16 while I slept before I went outside?
 17 The Jury PANEL: It rained.

18 MS. GARDNER: All right. Number 30, do you
 19 agree with that?
 20 JUROR NO. 30: Yes, I do.
 21 MS. GARDNER: And is there any doubt that you
 22 have that it rained?
 23 JUROR NO. 30: No.
 24 MS. GARDNER: Is there anybody here that's
 25 thinking, well, something else could have happened?

1 Nobody.

2 What if my neighbor came outside and says,

3 well, it didn't rain last night as you may think. What

4 happened was a bird flew over the neighborhood with a

5 bucket. And in that bucket it was full of water. And he

6 held it in his little talons. And he sprinkled it all

7 over the houses and yards. And that's why it's wet out.

8 What would you say about that neighbor's story, No. 19?

9 JUROR NO. 19: I would question it.

10 MS. GARDNER: Why would you question it?

11 JUROR NO. 19: Because it's not logical.

12 MS. GARDNER: All right. Anybody here say:

13 "Well, you know, if my neighbor is saying that, I'm going

14 to put some weight into the truth of that"? Anybody not?

15 Number 46, what do you think about how much weight you're

16 going to put into the truthfulness of your neighbor's

17 assessment?

18 JUROR NO. 46: Well, my neighbor is sitting

19 behind me. If he had said that, it would still sound

20 outlandish.

21 MS. GARDNER: Okay. All right. Does anybody

22 here have a problem applying their own knowledge of how

23 things work in the real world in making a decision if

24 you're chosen as a juror? Does anybody here believe that

25 what somebody says in court is always the truth? Does

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1 What do you think about that, No. 24? Are you a good

2 judge of character?

3 JUROR NO. 24: Not always right off the bat.

4 MS. GARDNER: I'm sorry?

5 JUROR NO. 24: Not always at first. If I,

6 perhaps, think someone is bad, I want more detail about it

7 to make a final decision.

8 MS. GARDNER: It's real difficult for me to

9 hear with the ventilation in here. I kind of hear

10 swishing as I'm talking. So when you see me do this, just

11 try to speak up a little bit.

12 Do you think that you would be able -- Juror

13 No. 24, do you think you would be able to listen to

14 witnesses testify and weigh the believability or

15 credibility based on your own personal experiences?

16 JUROR NO. 24: I believe so.

17 THE COURT: Okay. Do people -- do witnesses

18 always tell the same exact story as the prior witness? In

19 other words, do you expect a witness to come in here and

20 tell bit by bit, piece by piece, the exact story as the

21 prior witnesses? Juror No. 34, what do you think about

22 that?

23 JUROR NO. 34: Well, I mean, everybody has

24 their own perspective. I mean, they can all see the same

25 thing that happened, but everybody's story is going to be

1 anybody here consider themselves a good judge of

2 character? Number 67, are you a good judge of character?

3 JUROR NO. 67: I believe so, yes.

4 MS. GARDNER: What situations have you been in

5 where you've had to weigh whether someone was telling the

6 truth or not?

7 JUROR NO. 67: I'm a mom.

8 MS. GARDNER: Okay. Are your children

9 teenagers yet?

10 JUROR NO. 67: Yes. He's 20 now.

11 MS. GARDNER: All right. So you've been able

12 to assess -- could you tell us an example of how you

13 applied that?

14 JUROR NO. 67: Well, I think you have to weigh

15 the circumstances, the facts versus the stories. And

16 that's --

17 MS. GARDNER: All right. And in doing so, have

18 you been able to apply from your own experiences -- pull

19 from your own experience what really happened?

20 JUROR NO. 67: Yes.

21 MS. GARDNER: Would you be able to do that if

22 chosen as a juror, pull on your own personal experiences?

23 JUROR NO. 67: I believe so, yes.

24 MS. GARDNER: Anybody here hesitating in that?

25 Thinking, maybe, I'm not such a good judge of character?

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1 a little bit different because not everybody's account is

2 exactly the same.

3 MS. GARDNER: Who here has ever had a

4 psychology class? Usually it's a psychology class. And

5 the classroom will be full. And at the very beginning

6 somebody will run in and maybe they're in a costume or

7 something unusual. And they'll slap the professor or

8 something, and they'll run out. And then the teacher will

9 ask: Who saw what? And has anybody had that experience

10 before? Nobody? Okay. Number 67? Have you had that

11 happen before in class?

12 JUROR NO. 67: Yes.

13 MS. GARDNER: How were the accounts? Were they

14 all the same?

15 JUROR NO. 67: No.

16 MS. GARDNER: How much were they different?

17 JUROR NO. 67: Some of the accounts were

18 totally different. Some people were paying attention.

19 Some weren't.

20 MS. GARDNER: So some people pay attention

21 more?

22 JUROR NO. 67: Probably.

23 MS. GARDNER: And some people just recall

24 different pieces of what happened more than others?

25 JUROR NO. 67: They notice other things, yes.

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1 MS. GARDNER: All right. Anybody disagree with
 2 that? Anybody here saying, "you know, if something
 3 happened, then everybody should be consistent when they
 4 testify"? What do you think about that, No. 47?
 5 JUROR NO. 47: I forgot my number -- um -- no.
 6 I would say that from my own personal example of something
 7 that if someone witnessed an accident at one time and
 8 there was several people around, and everybody has a
 9 slightly different viewpoint just because they might have
 10 looked up at a different moment or they might have been
 11 right on to it from the very beginning. So they might
 12 have just come on it later. So even though the cops will
 13 go around and collect all the stories, it wouldn't be
 14 exactly the same.
 15 MS. GARDNER: Does it matter -- um -- to any of
 16 you how old the person is? The victim in this case is
 17 young. Twenty-three, I believe, a 23-year-old woman. The
 18 Defendant here is in his late 30s. Is anybody here more
 19 inclined to believe an older person over a younger person?
 20 Should that matter, No. 30?
 21 JUROR NO. 30: I think an older person would
 22 have more experience and a better understanding of what
 23 may have happened to them versus a younger person.
 24 MS. GARDNER: So you think the younger person
 25 may not have as good an ability to --

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1 abilities? No. 22, you're shaking your head. What do you
 2 think about that?
 3 JUROR NO. 22: I think as long as you listen to
 4 the facts that are presented to you and think about them,
 5 it doesn't matter what age they are -- um --
 6 MS. GARDNER: All right. What about a 20-
 7 something-year-old female? Does anybody here believe that
 8 in today's society 20 year olds or plus are just more
 9 promiscuous and more involved in, like, one-night stands
 10 and things like that? What do you think about that
 11 No. 58?
 12 JUROR NO. 58: I think you can be promiscuous
 13 at any age. It doesn't really matter if you're 24 or 34.
 14 MS. GARDNER: Okay. So not necessarily
 15 anything to do with the age or gender?
 16 JUROR NO. 58: No. I think it goes both ways.
 17 MS. GARDNER: Does that happen more nowadays?

18 JUROR NO. 58: I'm a stay-at-home mom. I don't
 19 know.
 20 MS. GARDNER: Anybody here know? Does that
 21 happen more or less nowadays than it did in, maybe, the
 22 older days? Do we have any 20 somethings here today? All
 23 right. I'm going to pick on somebody. I don't know.
 24 Number 8? What would you say about that? Are people more
 25 promiscuous nowadays? Take part in one-night stands

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1 JU. NO. 30: Not necessarily the ability, but
 2 just the whereabouts to understand what exactly happened
 3 to them. Sometimes when you're younger, you get a little
 4 bit more hysterical. I think when you're older, you have
 5 more experience. So you try to take it one step at a
 6 time.
 7 MS. GARDNER: Does everybody agree or anybody
 8 disagree with No. 30? What do you think about that,
 9 No. 53?
 10 JUROR NO. 53: I think that we should take
 11 every case, every instance, by the facts and by the
 12 witnesses and things like that. And someone who is, you
 13 know, may be younger, talking like a child, you know, 8, 9
 14 or 10 maybe doesn't understand what has happened or that
 15 sort of thing versus someone who's older. But an adult, I
 16 would say, I think you just need to take -- I mean, I just
 17 think that you need to check the evidence and -- um --
 18 just the story and the situation. They understand what
 19 happened. And sometimes younger might perceive it as
 20 something more than it was -- um -- but, again, you just
 21 need the facts and the evidence and that sort of thing, I
 22 think, to make a decision.
 23 MS. GARDNER: Are any of you concerned that you
 24 may not believe a younger person if the older person, I
 25 guess, is more fluent or more suave in their speaking

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1 versus --
 2 JUROR NO. 8: I'm 20 something. And I'm
 3 married, and I have kids. So I don't think it's a
 4 generational thing. Everybody is different.
 5 MS. GARDNER: Okay. Is anybody here going to
 6 assume that our victim, alleged victim, is 23 years old,
 7 that she is a person that would have a one-night stand and
 8 be promiscuous? Okay. I see some people shaking their
 9 heads. What do you think about that, No. 15?
 10 JUROR NO. 15: I don't really think it has much
 11 to do with age. You know, just a person's ideas and what
 12 they decide to do with their own body and what they want
 13 to do. I think people can be 20 or 40, you know.
 14 MS. GARDNER: All right. What do you think
 15 about that Number -- let me get somebody I haven't picked
 16 on yet. No. 66, what do you think about that?
 17 JUROR NO. 66: I think it all depends on the

18 age. I mean, everybody does things differently.
 19 MS. GARDNER: So you think it does depend on
 20 the age? If somebody is in their 20s that they probably
 21 are more promiscuous?
 22 JUROR NO. 66: I really don't know.
 23 MS. GARDNER: Are you going to make any --
 24 um -- judgments?
 25 JUROR NO. 66: No.

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1 MS. GARDNER: Essential... what I want to do.
 2 JUROR NO. 66: No. Not by age.
 3 MS. GARDNER: Not by age.
 4 JUROR NO. 66: No.
 5 MS. GARDNER: Is there anything that would
 6 affect your perception of a victim just sitting here
 7 today?
 8 JUROR NO. 66: No. Just the facts.
 9 MS. GARDNER: Okay. Would it surprise anybody
 10 here that a victim of a rape or a sexual assault would not
 11 tell immediately?
 12 JUROR NO. 23: What was the question?
 13 MS. GARDNER: Would it surprise you that a
 14 victim of a sexual assault would not tell immediately?
 15 Did not report it immediately. And since you raised your
 16 hand to the question, No. 23, what do you think about
 17 that?
 18 JUROR NO. 23: No. I think that someone --
 19 um -- would. Yeah, I don't think that the time frame
 20 really has -- how do I answer the question? Yeah, I think
 21 that if it takes a while, that would not surprise me if
 22 that's your question here. Yes. If it takes some time or
 23 maybe not take some time.
 24 MS. GARDNER: Do you think it is more likely it
 25 didn't happen or it's more than likely that it didn't

1 she didn't call 911, for instance, right after it
 2 happened. Yes, No. 48?
 3 JUROR NO. 48: Yeah. I would say I would have
 4 a real hard time if she didn't come forward right away. I
 5 would have my doubts.
 6 MS. GARDNER: If they reported it right away?
 7 JUROR NO. 48: If they didn't report it right
 8 away, I would have my doubts.
 9 MS. GARDNER: Okay.
 10 JUROR NO. 48: It would just depend on if she
 11 was in a tavern or whatever the scenario was, you know.
 12 If she was just walking down the street and maybe she
 13 wouldn't come forward right away if there was alcohol
 14 involved and thinks it might have had a play in it.
 15 MS. GARDNER: Okay. So you would have problems
 16 believing --
 17 JUROR NO. 48: Sure.

18 MS. GARDNER: -- a victim if there was alcohol
 19 involved?
 20 JUROR NO. 48: And if she would not have come
 21 forward right away, yeah.
 22 MS. GARDNER: Okay. All right.
 23 Anybody here agree with Juror No. 48 on that?
 24 You would have problems if -- um -- well, we've already
 25 gone over the immediate reporting. What if alcohol was

1 happen and it wasn't reported immediately?
 2 JUROR NO. 23: No. I don't think that affects
 3 the likelihood.
 4 MS. GARDNER: You don't think that matters?
 5 JUROR NO. 23: (Shakes head.)
 6 MS. GARDNER: All right. Number 1, what do you
 7 think about that?
 8 JUROR NO. 1: I don't think time makes a
 9 difference. I think different people come to different
 10 realizations of what's taken place. I don't think time
 11 would affect it.
 12 MS. GARDNER: All right. Does anybody here
 13 have a -- you're kind of wondering about that. The
 14 person, let's say, they knew each other, and the victim
 15 didn't report it right away. Do you think that comes into
 16 play any? That, maybe, it should have been reported
 17 immediately? Or, maybe, it shouldn't have been reported
 18 immediately? Number 27, what do you think about that?
 19 JUROR NO. 27: I think that women react
 20 differently. We might be more intimidated and try to
 21 figure out if it's their fault. Why did it happen? You
 22 know, I think it's just -- I'd like to hear the facts and
 23 go by that. Because people react differently.
 24 MS. GARDNER: Okay. So what I'm hearing is
 25 nobody here is going to make a judgment on the victim if

1 involved? What if either or both of them were drinking?
 2 Would that come into play as far as your believing the
 3 victim? Anybody else here have a similar opinion to Juror
 4 No. 48? What do you think about that, No. 3?
 5 JUROR NO. 3: I don't think it has any bearing
 6 really. She may not have reported it right away or it may
 7 have been a friend or she may have felt ashamed or
 8 embarrassed.
 9 MS. GARDNER: So you'd weigh other possible
 10 reasons why. A friendship or embarrassment?
 11 JUROR NO. 3: Right.
 12 MS. GARDNER: Anybody else have an opinion that
 13 they want to share on that subject matter before we move
 14 on?
 15 Has anybody here ever been the victim of a
 16 sexual assault or known somebody close to them that has
 17 been a victim of a sexual assault? Number 46, how did

18 that experience affect you personally as far as your
 19 opinions?
 20 JUROR NO. 46: It has an emotional side which
 21 may cause them to not come forward right away in answer to
 22 your question earlier. You know, the emotions are real.
 23 Those are real. And you can't say yes or no to feelings.
 24 Sometimes the facts and circumstances might not line up,
 25 but you can't dismiss the feelings that they have. And if

1 you're involved with someone in some type of a
 2 relationship, whether it's a friendship or whatever, and
 3 you get mixed up in those feelings, you can't tell.
 4 MS. GARDNER: Okay. Number 18, you had your
 5 hand raised. Same question. How did that experience
 6 affect you as far as your opinions or these kinds of
 7 feelings?
 8 JUROR NO. 18: Well, the victims are two of my
 9 nieces at two different times. And they were ten and
 10 under at the time. And one of them never said anything
 11 because it was her father. And her father actually
 12 threatened to kill her and her mother if she ever told
 13 anyone. So she didn't tell anybody until, like, two years
 14 after.
 15 MS. GARDNER: Do you think that it was that
 16 threat that affected her decision or some other things?
 17 JUROR NO. 18: She would have done anything for
 18 her mother.
 19 MS. GARDNER: Have those experiences affected
 20 your ability to be a fair and impartial juror in a case
 21 where rape is alleged?
 22 JUROR NO. 18: No. Because I know of another
 23 case where somebody was accused, and it was a false
 24 accusation.
 25 MS. GARDNER: And how far did that case go?

1 years. And most of that was gone. It didn't have any
 2 effect on our relationship.
 3 MS. GARDNER: All right. Anybody else here
 4 have anything they'd like to share on that subject of
 5 people that they've known that either have been victims of
 6 these types of crimes or -- um -- have known somebody in
 7 their lives or they, themselves, have been wrongfully
 8 accused of a crime? Number 24?
 9 JUROR NO. 24: I have family members that were
 10 sexually assaulted.
 11 MS. GARDNER: And how have -- well, you say
 12 members. More than one I would assume.
 13 JUROR NO. 24: Right. The first one she was
 14 five years old when it happened. And it was her dad. And
 15 he was never prosecuted -- um --
 16 MS. GARDNER: How has that affected your
 17 opinion of these types of cases?
 18 JUROR NO. 24: I think it can go both ways. I
 19 mean, I wouldn't want to say, just because this case is a
 20 sexual assault, that he's guilty of it already. I would
 21 have to see the details and so forth.
 22 The small girl that was assaulted -- well,
 23 she's my half-sister. And later her two children were
 24 sexually assaulted by their step-grandfather. And he told
 25 them that if they told anybody, he would be a fair juror?

1 JUROR NO. 18: It almost went to prosecution
 2 before she admitted she had lied.
 3 MS. GARDNER: So it didn't actually get
 4 prosecuted?
 5 JUROR NO. 18: No, it didn't.
 6 MS. GARDNER: And has that situation, a false
 7 accusation, affected your opinions as far as this case?
 8 JUROR NO. 18: No. I don't think so.
 9 MS. GARDNER: Okay. All right.
 10 Anybody else here ever know or themselves been
 11 falsely accused or known somebody that was falsely accused
 12 of a sexual assault? Juror No. 47, did you have your hand
 13 raised?
 14 JUROR NO. 47: To the previous question.
 15 MS. GARDNER: Go ahead and respond.
 16 JUROR NO. 47: That incident actually happened
 17 with my wife, but it was before I met her. We've been
 18 married 19 years. And this was when she was 16 or 18. I
 19 was not involved in that. I just heard about it when she
 20 was telling me, but it's been a long time ago.
 21 MS. GARDNER: Did she report that immediately?
 22 JUROR NO. 47: I don't think it was even
 23 reported. I don't really know the full extent of those
 24 particulars. The only thing was the emotional residue
 25 from that that she worked through, you know, over the

1 got six months; so --
 2 MS. GARDNER: And so he was prosecuted for
 3 that?
 4 JUROR NO. 24: Yes.
 5 MS. GARDNER: And did those -- the second set
 6 you just talked about, did those get reported immediately?
 7 JUROR NO. 24: They were not reported
 8 immediately.
 9 MS. GARDNER: Okay. Was it the threat that
 10 caused that to not be reported or something else along
 11 with that?
 12 JUROR NO. 24: Right. It was -- well, they
 13 were threatened. And then I didn't find out until later.
 14 They were my nieces and my nephew. And because they were
 15 scared, it didn't come about until weeks later.
 16 MS. GARDNER: Have your personal experiences
 17 despite those are you still able to be a fair and
 18 impartial juror if you're picked?
 19 JUROR NO. 24: Yeah.
 20 MS. GARDNER: Okay. All right. Anybody else
 21 here sitting here thinking: "Well, I'm having some
 22 reservations. Given the nature and my own personal
 23 experience, I'm having some reservations whether I could
 24 be a fair juror"? What do you think about that, No. 6?
 25 Anybody else here ever know or themselves been

1 JUROR NO. 61: Sixty-one.
 2 MS. GARDNER: Sixty-one. Sorry.
 3 JUROR NO. 61: No problem.
 4 MS. GARDNER: I saw the six.
 5 Can you be a fair juror?
 6 JUROR NO. 61: I believe so. I don't really
 7 have any experience in this whole area. I don't have any
 8 knowledge one way or the other.
 9 MS. GARDNER: Okay. All right. Are you a good
 10 judge of character?
 11 JUROR NO. 61: Not on first sight. After some
 12 observations I believe so.
 13 MS. GARDNER: Does anybody here have any
 14 expectation as far as, you know, the nature of a case? Is
 15 there anybody here that has any expectations of what kind
 16 of evidence the State is going to bring to them? In other
 17 words, this is a confusing one, so I'll go ahead.
 18 We've got different types of evidence. You
 19 could have DNA evidence. You could have witnesses
 20 testifying from what they've seen. You could have
 21 fingerprints, videotape confessions and those kinds of
 22 things. Is anybody here thinking, "I've got to have this
 23 certain piece of evidence in this kind of case -- for
 24 instance, DNA -- or I cannot find anybody guilty? No. 55?
 25 JUROR NO. 55: Yeah, I would need evidence.

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1 witnesses and the State has one witness? Would that make
 2 a difference in your mind?
 3 JUROR NO. 55: No, it wouldn't.
 4 MS. GARDNER: And why not?
 5 JUROR NO. 55: Again, I would assess each of
 6 the persons, their credibility.
 7 MS. GARDNER: All right. Anybody have a
 8 difference of opinion than Juror No. 55? Number 6, what
 9 do you think about that? Are you able to -- let's say
 10 there's one witness on each side. Is that going to make a
 11 difference to you?
 12 JUROR NO. 6: Um -- I don't think I could make
 13 a finding just from what they're saying, no. I would need
 14 some evidence one way or the other.
 15 MS. GARDNER: Okay. You mean physical
 16 evidence.
 17 JUROR NO. 6: Physical evidence.

18 MS. GARDNER: Okay. So what would you want to
 19 see?
 20 JUROR NO. 6: Whatever you bring forward.
 21 MS. GARDNER: Something physical.
 22 JUROR NO. 6: Something physical, yeah. I'm a
 23 good judge of character, but I'm not going to say somebody
 24 is guilty or not guilty just by their character. I want
 25 some evidence.

1 MS. GARDNER: What kind of evidence?
 2 JUROR NO. 55 -- um -- testimony, DNA. I
 3 wouldn't want to make a judgment on somebody just by what
 4 one person was saying. I would need some sort of evidence
 5 to make a conclusion whether somebody was guilty or not.
 6 MS. GARDNER: Okay. Let's say, well, this is
 7 not necessarily the case, but let's say we have one
 8 witness, one victim, alleged victim, and we have one
 9 defendant, his version. Are you saying that based on that
 10 -- if that was all the evidence that you had, you could
 11 not reach a finding of guilty?
 12 JUROR NO. 55: It would probably be difficult
 13 -- um -- I would also, you know, through their testimony
 14 determine which one I believe was a better character.
 15 More believable.
 16 MS. GARDNER: Okay. So you can make that
 17 assessment and you feel comfortable with that?
 18 JUROR NO. 55: I don't make an immediate
 19 judgment on somebody. I need to evaluate them, but by
 20 evaluating them, yes, I'd be able to.
 21 MS. GARDNER: Okay. All right. So you're
 22 willing to weigh the credibility, it sounds like, and the
 23 believability of each witness individually.
 24 JUROR NO. 55: Yes.
 25 MS. GARDNER: What if the defense has two

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1 MS. GARDNER: Okay. What if it's a situation
 2 where sex occurred? The only question is: Was it forced
 3 or not? What kind evidence do you think --
 4 JUROR NO. 6: Well, it depends. Somebody was
 5 bringing up alcohol. It depends on how much alcohol was
 6 involved. What was the state of mind? There's a whole
 7 spectrum of questions, I guess, that I would have.
 8 MS. GARDNER: Okay. Can you -- you haven't
 9 heard any evidence yet, but can you tell us how the
 10 alcohol would affect your decision on guilt in this case.
 11 JUROR NO. 6: I guess I couldn't say. I mean,
 12 it just depends. It depends on the evidence that was
 13 brought forward, you know. I mean, of course, if you're
 14 sloppy drunk and you don't know what you're doing --
 15 MS. GARDNER: Or, maybe, not knowing what's
 16 happening to you? Is that what you're saying?
 17 JUROR NO. 6: Yeah. It can go both ways.

18 MS. GARDNER: Okay.
 19 JUROR NO. 6: It's kind of a common sense, you
 20 know, thing. But the evidence, that would be the
 21 important evidence.
 22 MS. GARDNER: Does anybody else here want to
 23 follow-up on what No. 6 says? Does it make a difference?
 24 Juror No. 34?
 25 JUROR NO. 34: Yeah, well, talking about

1 alcohol, it can be a double-edged sword. I mean, it can
 2 be -- it can make a person invite something, or it can
 3 also be the other side where they don't have the control
 4 to say no. So it works in either way really. So, I mean,
 5 unless -- would the evidence and the testimony, I mean,
 6 you can't really -- you would have to weigh all that.

7 MS. GARDNER: That kind of makes me think of
 8 something else. Does anybody here think that, if the
 9 suspect is drinking a lot, that that excuses his actions?
 10 Anybody say that, no, it doesn't excuse? Number 61?

11 JUROR NO. 61: I don't see how drinking excuses
 12 drunken driving. If you drink and you've committed a
 13 crime, you've committed the crime whether you've been
 14 drinking or not.

15 MS. GARDNER: Anybody here? Yes, number --

16 UNIDENTIFIED JUROR: I think everybody here
 17 knows that alcohol impairs judgment. So it doesn't matter
 18 who's drinking, you know. It's going to make you, you
 19 know, just like Juror No. 44 said. You know, it's going
 20 to bring out your inhibitions or it's going to reserve
 21 you. Everybody is different. And everybody reacts
 22 differently. People are just different. And you have to
 23 -- you have to weigh everything that everybody says. But,
 24 yeah, if there's alcohol involved, it just affects you.
 25 Everybody is affected by alcohol.

1 JUROR NO. 22: I think it depends on the person
 2 how they'd be able to handle that situation. Everyone is
 3 different.

4 MS. GARDNER: If the alleged victim comes in
 5 and acts in a way that, maybe, you didn't expect, are you
 6 going to think, "I don't believe her"? No. 1, what do you
 7 think of that?

8 JUROR NO. 1: I don't expect anything. I just
 9 look at whatever is taking place.

10 MS. GARDNER: What do you think about that,
 11 No. 37?

12 JUROR NO. 37: I don't have a comment really.

13 MS. GARDNER: So you're like No. 1. You're not
 14 expecting anything; so you're not going to be let down.

15 JUROR NO. 37: She's got to be scared to death.
 16 I mean, yeah. It's going to be somewhat emotional I would
 17 think.

18 MS. GARDNER: I'm sorry?

19 JUROR NO. 37: There's probably going to be
 20 some emotion up there.

21 MS. GARDNER: What if there is no emotion up
 22 there?

23 JUROR NO. 37: That's the person.

24 MS. GARDNER: So you're not going to hold it
 25 against her if she's not showing any emotions?

1 THE COURT REPORTER: What is your number,
 2 please.

3 JUROR NO. 42: I'm sorry. I'm 42.

4 THE COURT REPORTER: Thank you.

5 MS. GARDNER: Does anybody here have the
 6 opinion that you just don't like drinking. You don't like
 7 alcohol. And when people drink they're just kind of
 8 asking for trouble. Anybody here feel that way about
 9 alcohol? Number 10, what do you think about that?

10 JUROR NO. 10: Uh -- you know, drinking too
 11 much alcohol, it's never a good thing. But I have no dire
 12 opinion of it. I wouldn't condemn anybody for that.

13 MS. GARDNER: All right. Anybody else want to
 14 comment on that area before we move on?

15 How does a victim usually -- how would you
 16 expect a victim of a rape, for instance, to react? Does
 17 anybody here have any opinions? If they have a victim up
 18 here, an alleged victim up here testifying, how is she
 19 going to appear in court? Anybody? Number 58, what do
 20 you think she's going to be like?

21 JUROR NO. 58: I don't know. I don't know a
 22 rape victim. I haven't seen a rape victim case, so I
 23 wouldn't know how she should react.

24 MS. GARDNER: What about you, No. 22? What do
 25 you expect?

1 JUROR NO. 37: No.

2 MS. GARDNER: All right.

3 JUROR NO. 37: I'm here to tell the truth or
 4 get the truth.

5 MS. GARDNER: Anybody here have a different
 6 opinion of that? Number 12, what do you think? If the
 7 victim comes in, doesn't show any emotion, are you going
 8 to question whether or not this actually occurred?

9 JUROR NO. 12: Well, I guess, I would kind of
 10 expect there to be some kind of nervousness or emotions
 11 because of the situation. But I would also, I think, look
 12 at, maybe, the reasons why they weren't being emotional or
 13 that kind of thing.

14 Can I ask a question?

15 MS. GARDNER: Yeah.

16 JUROR NO. 12: I'm thinking because the age is
 17 right and the location is right. And I don't know what I

18 should say out loud or not, but is it possible that the
 19 victim had a different last name previously?

20 MS. GARDNER: Um --

21 JUROR NO. 12: The first name is right. I'm a
 22 school teacher. And I'm thinking that she may have been a
 23 former student of mine with a different last name.

24 MS. GARDNER: I don't know really what the
 25 answer to that is.

1 JUROR NO. 12: And I wouldn't know that until I
 2 actually saw her.
 3 MS. GARDNER: Would the fact that you taught
 4 previously, maybe, taught the victim, affect your ability
 5 to listen to the evidence and make a fair decision?
 6 JUROR NO. 12: I don't think so, but --
 7 MS. GARDNER: If it turns out, in fact, it was
 8 your prior student, would that make a difference in
 9 your -- um --
 10 JUROR NO. 12: I don't believe so.
 11 MS. GARDNER: Because I just can't answer that
 12 question because I simply don't know -- um --
 13 Okay. Has anybody here either themselves or
 14 had a close friend or a family member that's been a
 15 defense attorney or they've worked in a defense attorney's
 16 office?
 17 JUROR NO. 30: I have.
 18 MS. GARDNER: Number 30. You had previously
 19 said that you knew defense counsel here.
 20 JUROR NO. 30: Correct.
 21 MS. GARDNER: Did you work in his office?
 22 JUROR NO. 30: I did.
 23 MS. GARDNER: And through that experience --
 24 um -- are you still able to be a fair and impartial juror?
 25 JUROR NO. 30: I believe so. But I was

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1 MS. GARDNER: Okay. So you've worked with the
 2 public defender's office as an investigator?
 3 JUROR NO. 7: No. I didn't work for the public
 4 defender. I worked for the City of Coeur d'Alene as a
 5 police officer.
 6 MS. GARDNER: Okay. I got you.
 7 JUROR NO. 7: Does that clear it up?
 8 MS. GARDNER: That's good. All right. And how
 9 long ago was that?
 10 JUROR NO. 7: I left there in '92.
 11 MS. GARDNER: All right.
 12 Anybody else here? Friends? Family? Defense
 13 attorneys? Juror Number 1?
 14 JUROR NO. 1: My father-in-law is a retired
 15 attorney.
 16 MS. GARDNER: A defense attorney? A former
 17 defense attorney?

18 JUROR NO. 1: A defense attorney.
 19 MS. GARDNER: In this area?
 20 JUROR NO. 1: Not in criminal cases. He worked
 21 primarily insurance.
 22 MS. GARDNER: Okay. Has that relationship
 23 affected your ability to be a fair and impartial juror in
 24 a criminal prosecution?
 25 JUROR NO. 1: No.

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1 thinking about the previous question that you had about
 2 the alleged victim not showing any emotion. The Defendant
 3 has got to be scared, too. His life is on the line, you
 4 know. It may be a false accusation. I mean, it works
 5 both ways. So I guess I would look at it from both sides.
 6 MS. GARDNER: Okay. All right.
 7 JUROR NO. 30: But I've also worked -- after I
 8 quit the public defender's office for other public defense
 9 attorney, yes.
 10 MS. GARDNER: Okay.
 11 JUROR NO. 30: Not recently, though.
 12 MS. GARDNER: What other defense attorneys?
 13 JUROR NO. 30: I've worked with Tom Vasseur,
 14 Tim Gresback, Bill Nixon.
 15 MS. GARDNER: Okay. Anybody else here that's
 16 ever worked for or knows somebody that's a defense
 17 attorney? We had somebody that said they knew defense
 18 counsel. Number 7?
 19 JUROR NO. 7: Yes.
 20 MS. GARDNER: Did you know them as a client or
 21 just working with him in the job or --
 22 JUROR NO. 7: If I remember correctly, he used
 23 to be with the public defender's office. I'm previous law
 24 enforcement; so I know the defense attorney. I also know
 25 the Judge.

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1 MS. GARDNER: Anybody else? Number 15?
 2 JUROR NO. 15: My boyfriend's sister-in-law is
 3 a lawyer. I don't know what kind in Spokane.
 4 MS. GARDNER: Okay. So you're not close enough
 5 with that person to know what kind of work. Has that,
 6 though, affected your ability to sit impartially in this
 7 jury?
 8 JUROR NO. 1: No, huh-uh.
 9 MS. GARDNER: Did somebody else have a hand up
 10 back here? No? Okay.
 11 Anybody here had any bad experiences with law
 12 enforcement in general? Prosecutors? Police officers?
 13 Detectives? Or known somebody that's had a bad experience
 14 and that may have affected your opinion of just law
 15 enforcement in general? Number 47?
 16 JUROR NO. 47: No.
 17 MS. GARDNER: Okay. All right.

18 JUROR NO. 47: No personal experience.
 19 MS. GARDNER: Does anybody here have a problem
 20 believing the truthfulness of a police officer just
 21 because they are a police officer if they come in to
 22 testify? Number 10, what do you think of that? Do you
 23 have a problem believing the truthfulness of a police
 24 officer?
 25 JUROR NO. 10: No.

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1 MS. GARDNER: Number 58:
 2 JUROR NO. 58: No.
 3 MS. GARDNER: All right. Is there anybody here
 4 that's uncomfortable with the fact that the punishment, if
 5 you determine a verdict of guilty, is up to the Judge?
 6 Does anybody have a problem with that? You'll be
 7 instructed that you can't consider that punishment in your
 8 deliberations in making a decision. Is anybody here
 9 thinking, "Yeah, I want to weigh that when I'm making my
 10 decision of guilt or innocence"? What do you think about
 11 that, No. 25?
 12 JUROR NO. 25: I don't have a problem with
 13 that. Our job is to determine guilt or innocence.
 14 MS. GARDNER: Does anybody here disagree with
 15 that that your job solely is to make a decision on guilt
 16 or innocence? And you're comfortable leaving the rest up
 17 to the Judge? Number 37, are you comfortable with that?
 18 JUROR NO. 37: Oh, I'm comfortable with that.
 19 MS. GARDNER: You're comfortable with that?
 20 JUROR NO. 37: We've each got a job.
 21 MS. GARDNER: Number 30, are you comfortable
 22 with that?
 23 JUROR NO. 30: Yes.
 24 MS. GARDNER: How about you, No. 4? Are you
 25 comfortable with that?

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1 merely if someone got on the stand and said it happened?
 2 Again, are any of you going to merely disregard the
 3 testimony of the Defendant because he is a defendant?
 4 Now, the prosecution has picked out sort of
 5 apparently randomly, but perhaps not certain kinds of
 6 evidence and asked you, well, would that make a
 7 difference? And there's been a lot of back and forth.
 8 And I believe the prosecution talked about if there was a
 9 delay in the reporting and if there was alcohol involved.
 10 Now, do all of you agree with me that these are things to
 11 consider in weighing someone's testimony? And some of
 12 you, I think, got to the nut of the thing. Do all of you
 13 agree that all of the circumstances surrounding the
 14 allegation, all of the evidence that would be adduced, has
 15 to be weighed carefully before a decision can be made?
 16 I'm not seeing any violent head shaking no. And,
 17 actually, quite a few nods. Does that mean that everybody
 18 wants to say "Yes" at once.
 19 The Jury PANEL: Yes.
 20 MR. HULL: It's important to let it out once in
 21 a while.
 22 Now, these kind of allegations, of course, are
 23 very personal allegations and very, perhaps, emotional
 24 allegations. Do any of you feel that you would be unable,
 25 with a potentially tearful alleged victim, to weigh that

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1 JU. NO. 4: Yes.
 2 MS. GARDNER: All right. I don't have any
 3 other questions. I pass this panel for cause.
 4 THE COURT: All right.
 5 Mr. Hull, before you begin, we are going to be
 6 in recess for a few minutes. We're going to take a
 7 ten-minute recess.
 8 Those of you in the panel of 35, come back and
 9 sit in the same seats that you're in right now. We all
 10 have these scientific seat charts. And if you don't do
 11 that, chaos will reign.
 12 Don't talk about the case, any of you. Don't
 13 form or express any opinions about the case. We'll
 14 reconvene at five minutes to 11:00 by this clock.
 15 THE BAILIFF: All rise.
 16 (Recess taken.)
 17 THE COURT: We're back on the record in State
 18 versus Cook. And it looks like the prospective group of
 19 35 have returned and are in their appropriate places.
 20 Mr. Hull, you may voir dire on behalf of
 21 defendant.
 22 MR. HULL: Thank you, Your Honor.
 23 Good morning. This is my first chance to talk
 24 to you. Do any of you think that all allegations of date
 25 rape or acquaintance rape are true and would convict

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1 testimony rationally? Or do any of you fear you might be
 2 overcome with pity for a person who's making an allegation
 3 like that and in a sense identify with them to an extent
 4 that you would be unable to weigh this kind of case
 5 rationally?
 6 Now -- oh, that was the other one the
 7 prosecution picked out, if the witness wasn't emotional or
 8 was emotional and went into that. But everyone agrees
 9 that all of the factors should count. And you should
 10 weigh the evidence and try to determine to the best of
 11 your ability whether or not there's been proof beyond a
 12 reasonable doubt that Mr. Cook committed a crime.
 13 Now, that brings me to one point. In some of
 14 the discussion with the prosecution, the prosecutor talked
 15 about the alleged victim. And there seemed to be some
 16 responses as if it were already proven she was a victim.
 17 Does anybody at this point feel like that? That somehow
 18 the starting point is, well, the victim is telling the
 19 truth and there has to be proof that she isn't telling the
 20 truth? Is anybody starting with that perspective? And
 21 everyone understands that in the United States -- and I
 22 think it's nice that it's the day before an election day
 23 to remind us all that, you know, this is a very good
 24 aspect of the country in which we live -- that people are
 25 presumed innocent. Does everybody think that's a good

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1 thing and can accept that as a starting point? The
 2 default meter is on innocence. You know, you don't start
 3 out with the default meter on guilty. Everybody think
 4 that's a good idea? Anybody have any problems with that
 5 idea?
 6 Now, also, in this country the default meter
 7 stays there unless there's proof beyond any reasonable
 8 doubt. And some of you, in talking with the prosecution,
 9 were discussing weighing the alleged victim's testimony,
 10 weighing Mr. Cook's testimony. Do any of you, because of
 11 the nature of the allegation or just because of any
 12 reason, have a problem with resolving any doubt in favor
 13 of Mr. Cook? Because that's what presumed innocent means.
 14 Does anybody think, "Well, gee, you know, I'm not sure,
 15 but because I'm not sure, you know, I don't want to acquit
 16 Mr. Cook because I'm not sure. So I think I'm going to go
 17 with what the alleged victim has to say." And, maybe, I'm
 18 not saying it real well, but does everybody -- does
 19 anybody have a problem with that? That if as a jury
 20 you're arguing, about, well, it probably didn't happen or
 21 maybe it didn't. But if there's a doubt that -- proof
 22 beyond a reasonable doubt means you resolve that doubt in
 23 favor of the Defendant. Can everybody do that, do they
 24 think? Are you okay?
 25 JUROR NO. 30: I'm good.

1 for anybody that I used to be in the public defender's
 2 office? And if I do do something during this trial that
 3 you find offensive -- I mean, we're talking about very
 4 delicate subjects. Are any of you going to hold that
 5 against my client, like, you think I'm insensitive? I
 6 mean, I'm not going to go out and try to be insensitive or
 7 anything. But you never know what people are going to
 8 think on these sort of delicate topics. Anybody going to
 9 hold that against my client and go: "Well, Mr. Hull is
 10 such a brute that I'm going to convict his client"?
 11 Anybody really hate my beard? My wife wanted
 12 me to grow a beard. I figured that's the least I could do
 13 for her. She's put up with an awful lot. And it wasn't
 14 hard. I could do that. Number 48, do you find my beard
 15 okay? Because you look like an expert in the field. You
 16 have a beautiful one.
 17 JUROR NO. 48: Thank you.

18 MR. HULL: Nineteen's moustache is nice, too.
 19 So -- um -- one thing I'm sort of concerned
 20 about. Now, all of you women are obviously no older than
 21 29, so I don't want to pick anybody out. But do the young
 22 women -- we're talking about an alleged victim about
 23 23 years old. Do any of the women who are about 23 years
 24 old or any of the people who have daughters that are late
 25 teenagers or in their early 20s, fear that, if a

1 MR. HULL: That's good. I was looking at the
 2 guy choking to death behind you, though. I didn't want to
 3 stand here and ignore the guy turning purple. Well, I'm a
 4 sensitive soul. Well, I guess, we'll need to call another
 5 potential juror. Are you all right?
 6 UNIDENTIFIED JUROR: I'm all right.
 7 MR. HULL: Do you need a time-out or something?
 8 Because I know, if you've got a cough going, it can be
 9 really --
 10 UNIDENTIFIED JUROR: Well, I've got some water
 11 provided.
 12 MR. HULL: I'll try not to make you cough, but
 13 if you need time, raise your hand or something. I don't
 14 want anybody --
 15 But getting back to you, Melinda, it is nice to
 16 see you.
 17 JUROR NO. 30: And you, too, Mr. Hull.
 18 MR. HULL: And you're looking very well.
 19 JUROR NO. 30: Oh, thank you so much.
 20 MR. HULL: And I was sorry to hear about your
 21 health issues. And I hope they've all been resolved.
 22 JUROR NO. 30: Uh -- pretty much, yes.
 23 MR. HULL: Now, Melinda spilled the beans that
 24 I used to be in the public defender's office. Some people
 25 don't like ex-public defenders. Does that cause a problem

1 23-year-old woman gets on the stand testifying that,
 2 because of the similarity and the situation you're in or
 3 the similarity or the situation your daughter may be in,
 4 that you would identify with that juror to such an extent
 5 that you couldn't weigh her testimony rationally? Who
 6 among you has a daughter that's late teens, early 20s?
 7 UNIDENTIFIED JUROR: Do granddaughters count?
 8 MR. HULL: Men daughters?
 9 UNIDENTIFIED JUROR: Granddaughters.
 10 MR. HULL: Oh, I never would have thought you
 11 could have possibly have a granddaughter. But
 12 granddaughters, too. The concept isn't daughter,
 13 granddaughter. It's -- I mean I don't want -- number one,
 14 I don't want people on the Jury that aren't comfortable
 15 thinking they can do what they need to do. And, number
 16 two, I want Mr. Cook to get a fair shake. So the concept
 17 would apply to granddaughters.

18 Now, No. 47, you raised your hand? Who do you
 19 have that's in that age group?
 20 JUROR NO. 47: I don't. I don't have any
 21 granddaughters.
 22 MR. HULL: Daughters?
 23 JUROR NO. 47: Or granddaughters.
 24 MR. HULL: Thank you. You didn't raise your
 25 hand.

1 JUROR NO. 47: No, I didn't
 2 MR. HULL: I'm sorry. Who? You did.
 3 JUROR NO. 44: I have four daughters.
 4 MR. HULL: And what are their ages?
 5 JUROR NO. 44: Twenty-five, 22, 18, and 16.
 6 MR. HULL: You're my poster child. What do you
 7 think? I mean, do you think you're going to see your
 8 daughter sitting up there? And it's going to be, like,
 9 "Man."
 10 JUROR NO. 44: No.
 11 MR. HULL: Are you confident about that?
 12 JUROR NO. 44: Yes.
 13 THE COURT: Was that Juror 44?
 14 MR. HULL: That is Juror 44.
 15 THE COURT: Thank you.
 16 JUROR NO. 27: I have a granddaughter.
 17 MR. HULL: And you're Juror 27? Because I
 18 think the Judge reminded I should say that. And how old
 19 is your granddaughter?
 20 JUROR NO. 27: She's 22.
 21 MR. HULL: And how do you think about that? If
 22 there's a 23-year-old victim that gets on the stand, are
 23 you going to be thinking about your 22-year-old
 24 granddaughter? And that may be affecting your ability to
 25 be fair?

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1 36, do you think a young woman, since you're a young
 2 woman, testifying you would be able to -- you would be
 3 able to relate to them to such an extent that pity would
 4 take over as opposed to weighing the evidence and seeing
 5 if it carries weight and if there's proof beyond a
 6 reasonable doubt, all that stuff?
 7 JUROR NO. 55: I don't.
 8 MR. HULL: And, No. 23, I've given up guessing
 9 ages, but you look young to me. But do you think you
 10 would be identifying too strongly with the alleged victim
 11 to be able to be fair?
 12 JUROR NO. 23: No, I wouldn't.
 13 MR. HULL: Do you think you can be fair in a
 14 situation like this?
 15 JUROR NO. 23: Absolutely.
 16 MR. HULL: And if I don't pick you out, it
 17 doesn't mean that you're -- I'm just trying to be

18 realistic.
 19 THE COURT: There was a hand raised, though,
 20 Mr. Hull, at the end of the row.
 21 JUROR NO. 23: I just wanted to say I'm in my
 22 20s. And I think, if it's based on evidence and witnesses
 23 and that sort of thing, and even though I'm close in age,
 24 I wouldn't -- I mean, if it's based on the facts and what
 25 we have. And I wouldn't try to identify myself with her

1 JUROR NO. 27: I don't think so. I think I can
 2 be fair.
 3 MR. HULL: Was there anyone back here in this
 4 box who raised their hand?
 5 JUROR NO. 3: I did.
 6 MR. HULL: Juror No. 3?
 7 JUROR NO. 3: Yeah.
 8 MR. HULL: And what's the situation with you?
 9 JUROR NO. 3: I have a 20-year-old daughter.
 10 MR. HULL: How old?
 11 JUROR NO. 3: Twenty.
 12 MR. HULL: I yawned or something, but I
 13 couldn't hear again. I'm sorry.
 14 JUROR NO. 3: Twenty years old.
 15 MR. HULL: Twenty years old? How do you think
 16 that kind of situation might affect you?
 17 JUROR NO. 3: Basically, not. Judging on that
 18 alone.
 19 MR. HULL: Would it be a factor that the
 20 alleged victim is close in age to your daughter?
 21 JUROR NO. 3: No.
 22 MR. HULL: How about Juror 55? Not to be
 23 indelicate, how old are you?
 24 JUROR NO. 55: Thirty-six.
 25 MR. HULL: Well, since you're such a youthful

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1 just because we're close in age. It's not based on age.
 2 It's based on the situation and what happened, and that
 3 sort of thing; so --
 4 MR. HULL: Well, I'm not saying I think anybody
 5 would try to identify. I'm just concerned they might
 6 identify with them without trying. And I just want to
 7 raise the prospect of that ahead of time because I don't
 8 want to leave somebody in a difficult situation. And,
 9 also, I think that I need to know in order to pick a jury
 10 that could be fair. But I appreciate your response. It's
 11 well thought out. And I appreciate it.
 12 THE COURT: And was that Juror 53?
 13 MR. HULL: That is Juror No. 53.
 14 THE COURT: Thank you.
 15 MR. HULL: I can't see your juror number.
 16 JUROR NO. 4: Number 4.
 17 MR. HULL: Number 4, how about you? You look

18 like a woman in her early 20s.
 19 JUROR NO. 4: Nineteen.
 20 MR. HULL: Nineteen? At least I was in the
 21 ballpark.
 22 JUROR NO. 4: I think I'm a pretty good judge
 23 of character. And I can be -- I mean, I won't feel pity
 24 for her just because we're young. I can -- I'll judge but
 25 just by the facts and everything.

1 MR. HULL: All right. And you don't have any
 2 concerns in that regard?
 3 JUROR NO. 4: No.
 4 MR. HULL: Was there anybody else up here that
 5 fell into those various categories? Go back here if not.
 6 Number 12?
 7 JUROR NO. 12: I have a 23-year-old daughter.
 8 MR. HULL: So what do you think about a 23 year
 9 old testifying and having to weigh in a sensitive topic
 10 like this?
 11 JUROR NO. 12: I think I could be impartial.
 12 MR. HULL: Okay. Anybody else back here?
 13 UNIDENTIFIED JUROR: I have daughters, two and
 14 seven.
 15 MR. HULL: And you've already expressed some
 16 concerns because of the rape counseling you do about being
 17 involved in this?
 18 JUROR NO. 46: I'm a father. I would need to
 19 protect them. I would hope I would fair in weighing that,
 20 but there's always that thought.
 21 MR. HULL: You understand that as a juror you
 22 would have a totally different function than as a
 23 counselor?
 24 JUROR NO. 46: Absolutely.
 25 MR. HULL: Because I would assume that a

1 counselor -- that the main concern is your client, I would
 2 think.
 3 JUROR NO. 46: You just don't know what your
 4 emotions would do. I've never been in that situation.
 5 MR. HULL: You don't know what your emotions
 6 would do?
 7 JUROR NO. 46: I've never been in that
 8 situation what emotions I would have. I've never been in
 9 that situation; so I wouldn't know.
 10 MR. HULL: But that does have some concern for
 11 you?
 12 JUROR NO. 46: A little.
 13 MR. HULL: But you're going to try to be fair?
 14 JUROR NO. 46: Absolutely.
 15 MR. HULL: But you're not certain that you
 16 could be? And I'm not saying you're not certain that you
 17 wouldn't try. But you'd have some concern about it?
 18 JUROR NO. 46: That would be fair.
 19 MR. HULL: All right. And I can't see your
 20 number.
 21 THE COURT: I'm sorry. Was that last juror
 22 No. 46?
 23 JUROR NO. 46: Yes.
 24 THE COURT: Thank you.
 25 MR. HULL: And Juror No. 42, you look fairly

1 young.
 2 JUROR NO. 42: I'm 24.
 3 MR. HULL: So how do think about that?
 4 JUROR NO. 42: Um -- I think this is -- these
 5 are really sensitive issues because, of course, when
 6 someone feels that they've been raped or haven't been,
 7 it's not an issue to be taken lightly. However, if you
 8 wrongly accuse somebody, that's going to affect them for
 9 the rest of their life. So really you have to be aware
 10 and pay attention and listen. And you have to weigh it
 11 heavily. I mean, I don't think being a juror is going --
 12 you know, would be an easy job because you have to do all
 13 those things. And it's, like, oh, we can't just, you
 14 know, just pick -- make an opinion right away because that
 15 could be detrimental to anybody.
 16 MR. HULL: Are you willing to take on a burden
 17 like that? I agree with you totally, but I don't think

18 being a juror would be an easy job.
 19 JUROR NO. 42: I'm proud of my country, and I'm
 20 proud of our constitution. And I feel like -- I feel like
 21 that it's not something we should take lightly, but yes.
 22 MR. HULL: Well, I agree with you
 23 wholeheartedly.
 24 And, Juror No. 18?
 25 JUROR NO. 18: Eight.

1 MR. HULL: Well, I'll ask 8. Eight and 18.
 2 I'll start with eight.
 3 JUROR NO. 8: Okay.
 4 MR. HULL: What do you think?
 5 JUROR NO. 8: I don't think being close in age
 6 to the alleged victim will affect my judgment.
 7 MR. HULL: Okay. And No. 18?
 8 JUROR NO. 18: I don't think it would. Each
 9 person and all the testimony and evidence need to be
 10 weighed individually, you know -- um -- to prove or
 11 disprove all the allegations.
 12 MR. HULL: And how old are you?
 13 JUROR NO. 18: I'm in my mid thirties.
 14 MR. HULL: Now, there's a number of people who
 15 either work at KMC or are married to people who used to
 16 work at KMC and that kind of thing. And Dr. Shaw and
 17 these nurses are from KMC. Does that cause a concern to

18 any of those people with connections to KMC? Kootenai
 19 Medical Center. Maybe, it's not even called that anymore.
 20 Is it still called that?
 21 The Jury PANEL: Yeah.
 22 MR. HULL: They get bigger buildings and bigger
 23 names as far as that goes.
 24 You work at KMC, No. 39?
 25 JUROR NO. 39: I'm not a medical person. I

1 work in the business office.
 2 MR. HULL: Okay.
 3 JUROR NO. 39: I know who Dr. Shaw is. I don't
 4 know if he knows who I am.
 5 MR. HULL: Do you think that that would unduly
 6 influence your opinions of any testimony from people from
 7 KMC?
 8 JUROR NO. 39: No.
 9 MR. HULL: And is there anyone else who has
 10 ties to KMC?
 11 JUROR NO. 12: My wife works there.
 12 MR. HULL: That would be a tie. A big one.
 13 And your wife is a nurse?
 14 JUROR NO. 12: Yes.
 15 MR. HULL: That kind of takes me to a different
 16 question. But just starting out with the question I'm
 17 asking, so it doesn't get totally confusing, that there's
 18 testimony from people from KMC. Do you think that's going
 19 to unduly affect your ability to weigh evidence?
 20 JUROR NO. 12: I don't think so.
 21 MR. HULL: And that your wife is a nurse.
 22 There's going to be testimony from nurses -- um -- you
 23 would agree with me that nurses see their primary duty as
 24 dealing, you know, taking care of their patients.
 25 Correct?

1 JUROR NO. 2: My wife is a registered nurse
 2 there. And I don't think it would make any difference in
 3 my judgment.
 4 I just -- I don't know if this is the time to
 5 say it or not, but I just need to be on the record to say
 6 that I am a diabetic. And because of my diabetes I've had
 7 a kidney transplant. And I need to check my blood sugar
 8 quite often. And sometimes it goes up and down in
 9 situations especially under stress. And there are times
 10 when I could have to eat or -- and I don't know if it's
 11 going to be disruptive if I have a cracker or something
 12 like that. I wear an insulin pump, also, and it beeps
 13 once in a while. So I just wanted to -- I don't know if
 14 that makes a difference or --
 15 MR. HULL: I'm sure the Bailiff and the Judge
 16 would accommodate you in any way you need to be
 17 accommodated. Are you concerned at all about not being
 18 able to pay attention because of the situation?
 19 JUROR NO. 2: Uh -- no. If I can control my
 20 blood sugars, I should be fine. I have had occasion in
 21 the past if my blood sugar has gotten very low, that I
 22 don't think as well as I should. I just wanted to let
 23 everybody know up-front.
 24 MR. HULL: But you believe that you could be --
 25 you could weigh the evidence in this case if you were

1 JUROR NO. 12: Yes.
 2 MR. HULL: And that they do identify with their
 3 patients in many ways. And that your wife is a nurse.
 4 And she does that. And it's a noble profession certainly.
 5 Would you agree with me?
 6 JUROR NO. 12: Yes.
 7 MR. HULL: So do you think you would just be
 8 able to weigh a nurse's testimony rationally without any
 9 sort of emotional baggage because your wife is a nurse?
 10 JUROR NO. 12: Maybe, even more impartially
 11 because my wife is a nurse. Because I know that they get
 12 emotionally attached to their patients who they really
 13 care for.
 14 MR. HULL: Yeah. That's, you know, the concern
 15 I'm concerned about is that people be able to weigh
 16 relationships and what peoples' motives -- and I don't
 17 mean motives in the sense of evil motives, but what
 18 peoples' reasons are for testifying the way they testify
 19 and weighing that rationally.
 20 Anyone else have a nurse or --
 21 THE COURT: Was that Juror No. 12? The last
 22 one?
 23 MR. HULL: That was Juror No. 12.
 24 THE COURT: Thank you.
 25 MR. HULL: Juror No. 2.

1 picked to be a juror?
 2 JUROR NO. 2: Yes, I do.
 3 MR. HULL: And I'm sure you can poke yourself
 4 any time you want to.
 5 JUROR NO. 2: I just wanted to make sure that
 6 if I were that it would not be disruptive for everyone.
 7 MR. HULL: Well, I appreciate that. There's
 8 never a wrong time to bring up a concern because that's
 9 the whole point, I believe, why we're asking these
 10 questions is trying to get a fair and impartial jury
 11 that's in a position to try the case fairly. And a
 12 medical condition could impact that one way or the other.
 13 So it's a good time to bring it up.
 14 Any other nurses? People related to nurses or
 15 are nurses?
 16 Officer or ex-Officer Brookshire's case brings
 17 up an interesting point which had crossed my mind. And I
 18 thought I was just being paranoid, but, maybe, I am. The
 19 questionnaire asks: Are any of you related to law
 20 enforcement? But it doesn't ask: Are any of you? Have
 21 you been law enforcement? And I was looking at that
 22 question. And Mr. Brookshire's name -- I guess it's
 23 mister now and not officer -- seemed familiar to me.
 24 Although if you remember 19 years ago as well as that,
 25 your memory is better than mine. But are any of you law

1 enforcement or ex-law enforcement besides potentially, I
 2 mean, but not related. There was a question on that. And
 3 I notice there's some firefighters among you. The
 4 firefighters among you, were you involved in law
 5 enforcement? And there's some military among you or
 6 relations to military. Are any of the military relations
 7 military police?

8 JUROR NO. 22: My husband was.

9 MR. HULL: And he was in the Marines? Do you
 10 think you would be starting from a law enforcement sort of
 11 perspective because your husband was military police as
 12 opposed to more of a neutral arbiter of the facts type
 13 perspective of a juror because of that?

14 JUROR NO. 22: No.

15 MR. HULL: And were you a firefighter?

16 JUROR NO. 22: No.

17 MR. HULL: I thought maybe. You know, you
 18 look through these things, of course, I put everything
 19 down -- little notes down with peoples' names on them.
 20 And then when they said everybody is going to be a number,
 21 I was madly trying to correlate numbers to names and
 22 going, "Oh, my." Okay. I'll remember this next time,
 23 though, they're using numbers now. Okay.

24 So do you think you can be fair, Ma'am?

25 JUROR NO. 22: Yes, I do.

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1 MR. HULL: Now, Juror No. 2's response brings
 2 me to another question. It's a fairly broad question.
 3 Are any of you sitting here right now going, "Gee, I hope
 4 they get to that question. It's really going to impact
 5 how I can be a juror in this case." Is anybody concerned
 6 for any reason that hasn't been touched upon that they
 7 couldn't be an impartial juror for some reason and it
 8 hasn't been asked about? Thank you for your time.

9 I would pass the panel for cause, Your Honor.

10 THE COURT: Thank you.

11 At this point, Members of the Prospective
 12 Panel, the attorneys will exercise their preemptory
 13 challenges. We do that in my chambers. And that takes
 14 usually a minimum of 20 minutes. So I'm going to ask you
 15 to reconvene in this courtroom no later than ten minutes
 16 to 12:00 by that clock.

17 And the attorneys please meet in my office no
 18 later than ten minutes from now for exercise of
 19 preemptories.

20 Again, no one talk about the case among
 21 yourselves or with anyone else nor form or express any
 22 opinion about the case.

23 We're in recess.

24 (Recess taken.)

25 (Preemptory challenges done in Chambers.)

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1 THE COURT: Please be seated, those of you who
 2 can be seated.

3 We're on the record in State v. Cook. And the
 4 attorneys have exercised preemptory challenges in
 5 chambers. And so I'll be calling the numbers of the 13
 6 persons who will serve as trial jurors. As I call your
 7 number, please take a seat where Mr. Hrehor indicates to
 8 take it.

9 So trial Juror No. 1 is Juror 66, No. 67,
 10 No. 3, No. 23, No. 53, No. 27, No. 19, No. 2, No. 57,
 11 No. 10 -- I'm sorry -- No. 29. I take that back. Juror
 12 10 is No. 29. Twenty-nine is the next one. Number 15

13 THE BAILIFF: Take your time.

14 THE COURT: Number 8, and No. 18.

15 The rest of you whose numbers have not been
 16 called, I thank you for your service this morning. And
 17 many of you may wonder, "What did I do for a thanks? I
 18 ~~just came here and sat and didn't say a word.~~ But your
 19 willingness to be here ensured that we had an adequate
 20 panel in case there were challenges for cause and there
 21 were very few in this case today. So even your being here
 22 was very helpful and doing your duty. And I thank you for
 23 that. This means that you do not need to call back in.
 24 Your jury service is now satisfied for a two-year period,
 25 I think, by virtue of having come here today. So I thank

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1 you for that. And you are excused.

2 (The prospective jurors left the courtroom.)

3 THE COURT: All right. Members of the Jury,
 4 you'll notice from time to time as you come and go from
 5 the courtroom, the Court and staff and persons in the
 6 Court will stand for you. That's in honor of your
 7 service as jurors. When you file into the room from the
 8 Jury room, just go ahead and be seated. We're standing
 9 for you. You don't need to stand for yourselves.

10 The trial schedule, as I indicated, is expected
 11 to go into Friday of this week. There will not be court
 12 tomorrow because of election day. The trial day will
 13 usually end at around 3:15 or 3:30 in the afternoon.
 14 That's because the Court has other matters scheduled at
 15 3:30 each day. Wednesday morning and the rest of the week
 16 we'll probably begin our trial day at about 8:30 in the
 17 morning. Is that problem for anyone in terms of getting
 18 ~~here at that time? Seeing no problems, we'll start at~~
 19 8:30. We'll take our regular morning break, 15 minutes or
 20 so, I will give you today and other days an hour and 15
 21 minutes for lunch. And we may or may not take an
 22 afternoon break depending how if we go from 1:15 right to
 23 3:15 there may not be a need for break, but we'll move
 24 this along as we can.

25 Juror No. 2, make sure you let Mr. Hrehor know

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1 what you need to accommodate the diabetes issue. But as
 2 far as the Court is concerned, if you have to stand up at
 3 any time, if you have to eat something, if you need to let
 4 us know that you need a break, do not hesitate. We will
 5 just work around whatever those needs are.
 6 So you will be in recess now until 1:15.
 7 Mr. Hrehor will tell you how and where to collect after
 8 the lunch break to gather in the Jury room. Come back and
 9 sit in these seats. But I'm going to sound like a broken
 10 record over the next few days in telling you do not talk
 11 about the case, nor form or express any opinion about it
 12 until the entire case is over. Please enjoy your lunch.
 13 THE CLERK: The oath.
 14 THE COURT: Oh, I'm sorry. Yes. Thank you for
 15 that. You need to take one more oath.
 16 THE CLERK: Please stand and raise your right
 17 hand.
 18 (The Jury is sworn by the Clerk of Court.)
 19 THE COURT: Thank you for that.
 20 Now you are excused for your lunch hour.
 21 JUROR NO. 67: Parking. Will it be easier for
 22 us to park in the parking lot?
 23 THE COURT: Talk to Mr. Hrehor about that.
 24 JUROR NO. 67: That's who I was trying to get.
 25 I didn't think you would acknowledge me, though.

1 (Lunch recess taken.)
 2 THE COURT: We're on record in State v. Cook.
 3 And the Jury is not present, but Counsel is here. So I
 4 want to inquire of Counsel if there are any objections to
 5 the Court's proposed preproof stock instructions.
 6 MS. GARDNER: The State doesn't have an
 7 objection to them.
 8 MR. HULL: No, Your Honor.
 9 THE COURT: During an informal chambers
 10 conference there was discussion about the State's notice
 11 of intent to use 404(b) evidence. It appears that that
 12 document was signed on 28 October by Ms. Gardner. I
 13 haven't seen it in the Court's file yet, but it should get
 14 there sooner or later. But copies were made for the
 15 Court, and I appreciate that.
 16 There are four items essentially that the State
 17 is intending to introduce pursuant to Rule 404(b). Item
 18 No. 1 was the Defendant's own statements where he claimed
 19 to have followed the named victim for days prior to the
 20 alleged rape. Apparently there's a witness that's going
 21 to testify that Mr. Cook made those statements. In the
 22 informal chamber discussion it was really discussed that
 23 this is not necessarily really 404(b) and is an admission
 24 of a party opponent against interest and probably
 25 admissible in that regard and then for the Jury to

1 THE COURT: We are off the record now.
 2 (The Jury left the courtroom.)
 3 THE COURT: All right. We're back on the
 4 record in State v. Cook.
 5 Counsel, if you could please be in court at
 6 five minutes after 1:00, we can put on the record any
 7 objections to the preproof stock instructions. We can
 8 also then take up some of the issues discussed in chambers
 9 and put those on the record at five minutes after 1:00,
 10 please.
 11 MR. HULL: Okay.
 12 MS. GARDNER: Also, if I could just put on the
 13 record that, in the mid morning break that we had -- um --
 14 a couple of hours ago, I did contact my office, who had
 15 been in contact with Mr. Sawley. And he's been informed
 16 to make himself available and was willing to make himself
 17 available anytime. We gave Mr. Hull his cell phone number
 18 again. And so that should be -- he should be available
 19 anytime Mr. Hull decides to call him.
 20 THE COURT: And, Mr. Hull, if you need the
 21 assistance of the prosecutor to arrange an interview of
 22 Mr. Sawley or whatever it is you want to do with that,
 23 make sure you inquire about that as well.
 24 MR. HULL: Thank you, Your Honor.
 25 THE COURT: All right. Then we are in recess.

1 determine the credibility they give to that statement.
 2 Is that the Defendant's position on No. 1?
 3 MR. HULL: On No. 1, yes, Your Honor.
 4 THE COURT: All right. On No. 4, skipping to
 5 No. 4, alleged evidence that the Defendant had threatened
 6 to harm witness Paul Nelson's family. Those statements
 7 were made subsequently allegedly to Mr. Cook's arrest.
 8 And, again, I understood that the defense was not
 9 objecting to the admissibility of that statement as well?
 10 MR. HULL: That's correct, Your Honor.
 11 THE COURT: And that would be without limiting
 12 instruction at all on that?
 13 MR. HULL: Your Honor, I believe it is part and
 14 parcel of Mr. Nelson's testimony or contention. It's not
 15 true, but I don't see that it's a part of an alleged
 16 confession.
 17 THE COURT: All right. Very well. No. 2,
 18 then, going back toward the front, Defendant's own
 19 statements where he claimed to have committed rape in the
 20 past to other adult female victims. And the State is
 21 seeking to introduce that pursuant to 404(b). I'll hear
 22 from the State about -- I think there's more to that -- to
 23 other adult victim female victims -- but never have been
 24 caught.
 25 I'll hear the State's argument as to why that

1 is admissible 404(b) evidence.
 2 MS. GARDNER: That is a statement that went
 3 along with the other statements that Mr. Cook was making
 4 to Mr. Nelson, his cellmate. And the State believes that,
 5 while he was never charged -- um -- and we understand that
 6 this is a statement that supposedly Mr. Cook made to
 7 somebody else -- it goes to his state of mind and his
 8 opportunity, his motive in this case. When you take
 9 everything into context, not only that statement standing
 10 alone but the subsequent statements that Mr. Cook made to
 11 Mr. Nelson about harming his wife, having his wife and
 12 daughter raped if they -- if he continued in testifying
 13 against him it doesn't -- it's not intended to show that,
 14 well, he says he's raped before so he's raped again. It
 15 goes to show that he is apparently bragging about his
 16 ability to get away with this crime in the past. And
 17 that's exactly what he's trying to do again in first
 18 telling Mr. Nelson about these allegations and then
 19 telling Mr. Nelson, "If you talk about what I have
 20 confessed to you, the same is going to happen to your
 21 family." So for those purposes the State believes that
 22 it's relevant and should be allowed in under 404(b) even
 23 though it's technically not an act. It's just a claim of
 24 Mr. Cook's to bolster himself.
 25 THE COURT: Mr. Hull?

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1 this is another example of basically how he was
 2 portraying himself to his cellmate in the period of time
 3 that they resided together. So I don't believe that it's
 4 more prejudicial than probative. I think it was
 5 probative in the context of all the other statements he
 6 was making.
 7 THE COURT: All right. The Court is going to
 8 exclude the evidence that is contained in notice of intent
 9 subsection 2. Essentially the evidence that defendant has
 10 made statements where he claimed to have committed rape in
 11 the past to other adult female victims but never having
 12 been caught. The Court characterizes that as "I've done
 13 it before and got away with it" type of alleged statement
 14 made by the Defendant. The Court finds that, based on the
 15 arguments before the Court at this stage, that that is
 16 more really propensity evidence than it is anything else.
 17 And it could really only be offered to the Jury for the
 18 conclusion they could draw that he's done it before and
 19 gotten away with it and claims to have done it before and
 20 gotten away with it. And, therefore, they can conclude
 21 that he did it this time and would like to get away with
 22 it. The Court views that as propensity evidence.

23 In addition, any kind of claiming by the
 24 Defendant, A, it may not be true, or, B, it may be true
 25 that he made the statement, but even if he made the

1 MR. HULL: Your Honor, the defense's position
 2 is it's propensity evidence. It's far more prejudicial
 3 than probative of any real issue in the trial. And that
 4 it's inflammatory certainly and runs the risk of jurors
 5 concluding, well, this guy says he did it in the past. It
 6 just doesn't serve any purpose that outweighs its
 7 prejudicial value. My position is it has no probative
 8 value. But whatever slight probative value the Court may
 9 find that it has is certainly outweighed by any prejudice
 10 of the statement.

11 THE COURT: All right. Any reply to that,
 12 Ms. Gardner?

13 MS. GARDNER: I'm sorry?

14 THE COURT: More prejudicial than probative
 15 argument. Any reply?

16 MS. GARDNER: Well, Your Honor, there's going
 17 to be the opportunity. Mr. Nelson is going to be on the
 18 stand. He's the only one that has heard these statements
 19 being made. And the Jury can believe or not believe
 20 Mr. Nelson. I'm sure the defense is going to try to
 21 portray that Mr. Nelson is lying about everything that
 22 Mr. Cook told him. So it's not like we're coming in here
 23 with proof or some type of evidence of another rape --
 24 um -- we're coming in here with Mr. Cook's numerous
 25 statements, admissions that he made to his cellmate. And

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1 statement, the Jury could also as well infer that he made
 2 this statement in a jail milieu where bragging and tough
 3 talk may be a matter of status in a particular jail
 4 situation. And that is not an admission that he has
 5 actually done these things. Just that he talks tough and
 6 talks about bad things, if they believe that it was made
 7 at all. And, therefore, it really does have very minimum
 8 probative value. And the potential prejudice is huge.
 9 And so under a 403 analysis, the Court will also find that
 10 the prejudicial effect substantially outweighs the
 11 probative value to the point that a fair trial would be
 12 endangered if this evidence was admitted.

13 The Court further goes on to look at all of the
 14 many -- the list of reasons wherein 404(b) evidence may be
 15 admitted to prove motive or opportunity. And bragging
 16 that he's done it before and got away with it certainly
 17 does not establish a motive in this case. It doesn't

18 establish an opportunity. It doesn't establish his
 19 intent. I mean, this was a general intent crime. He
 20 either intended to do it or he didn't. It doesn't
 21 establish that he's done it before, that somehow he then
 22 prepared in the same way this time that he did in the past
 23 or that he used the same modus operandi or that he used
 24 the same planning or gained knowledge in the past of how
 25 to do it, and, therefore, has knowledge in this instance,

1 if the Jury believes that he did or does it disprove
 2 accident and mistake. So for all of those reasons
 3 subsection 2 will be excluded.

4 Now, subsection 3 of the 404(b) notice is
 5 evidence purporting to be that the Defendant made
 6 statements regarding his intentions of killing the victim
 7 of the alleged rape or the alleged victim of the rape in
 8 this case both during the commission of the crime and
 9 subsequent to the crime as well.

10 So, Ms. Gardner, I'll let you speak to that
 11 one.

12 MS. GARDNER: Again, this testimony would come
 13 from both Mr. Nelson and Mr. Sawley. In part from
 14 Mr. Sawley.

15 The first statement is the one where Mr. Cook,
 16 in custody at the public safety building, said in the
 17 presence of Mr. Nelson on at least one occasion and then
 18 on a separate occasion in a van load of transportees
 19 coming to the courthouse -- and that was in Mr. Sawley's
 20 presence -- that, if he had known that the victim, that
 21 this girl, was going to report this rape to the police, he
 22 would have just killed her that evening and put her body
 23 in a Dumpster in an alley.

24 The second statement was one witnessed by
 25 Mr. Nelson only. And that was -- um -- Mr. Cook's

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1 relevant or probative of what actually did happen when it
 2 is an admission that he did in fact commit rape. The
 3 statement of the same sort attributed to Mr. Sawley I
 4 would object on the same grounds and also on the grounds
 5 that Mr. Sawley has only recently been disclosed as a
 6 witness and that his testimony should be precluded because
 7 of the late disclosure of that testimony. But these --
 8 again, these statements are much more prejudicial than
 9 probative of any point that the Jury needs to determine.

10 What Mr. Cook's statements may or may not have
 11 been about what he would have done if he would have known
 12 something he didn't know at the time don't prove anything
 13 in particular. And they are very prejudicial in that
 14 people are saying Mr. -- uh -- said he would have killed
 15 her if he would have known other things. So they're
 16 speculative statements. They're not probative of anything
 17 in particular that needs to be proved in this case. And
 18 they're highly prejudicial in that -- well, the other one
 19 is prejudicial, too, but it is probative.

20 So that would be my position on it, Your Honor.
 21 There is no substantial probative value to the speculative
 22 statements about what he would have done if other
 23 circumstances have occurred. And that it would be
 24 improper to admit them due to their prejudicial nature.

25 THE COURT: Thank you.

1 statements w in custody of the public safety building
 2 that he needed to get out of jail so he could prevent
 3 Ms. Whitten from testifying. And those were comments made
 4 in addition to Mr. Nelson actually observing Mr. Cook
 5 looking around when they were outside, looking around at
 6 the fence top and looking in a way that Mr. Nelson
 7 believed furthered Mr. Cook's intentions of escaping and
 8 trying to find a way to escape in order to prevent his
 9 victim from testifying and, in Mr. Nelson's opinion,
 10 harming his victim to a point that would have prevented
 11 her testimony.

12 THE COURT: Mr. Hull, your response, please.

13 MR. HULL: Thank you, Your Honor.

14 The statement attributed to Mr. Nelson that he
 15 needed to get out to prevent the alleged victim from
 16 testifying, I believe, is an admission against interest or
 17 a part of a confession type statement. So I would feel
 18 that that would be admissible evidence.

19 The statement made to Mr. Nelson that, if he
 20 would have known that she was going to the police, he
 21 would have killed her I believe is inadmissible evidence
 22 because I don't believe it's part of a confession. It's
 23 merely a -- if one were to conclude that the statement
 24 were made, it's simply -- "If something else would have
 25 happened, I would done it. And it's just -- it's not

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1 Ms. Gardner, your reply.

2 MS. GARDNER: I obviously disagree, Judge. I
 3 think that he's saying, "If I knew she was going to report
 4 me for raping her, I would have just killed her" is an
 5 admission. And it's an admission to more than one person
 6 Mr. Sawley's testimony would simply corroborate
 7 Mr. Nelson, who I'm sure his credibility is going to be
 8 attacked, by having a second person that heard the exact
 9 same statement. I would think that Mr. Sawley's
 10 recollection of Mr. Cook's confession or admissions would
 11 also -- should also come in. I notified defense counsel
 12 as quickly as I could of Mr. Sawley's existence. I didn't
 13 just find out about him yesterday and report it or at the
 14 last minute. I actually let the defense counsel know as
 15 soon as I could and also verbally gave him the person's
 16 cell phone number last week and again today.

17 His testimony is not going to be that long.
 18 It's going to be pretty quick. I mean it's just that one
 19 statement that he heard -- um -- but at any course I don't
 20 think it's prejudicing the Defendant any more than it is
 21 the State to have found out or discovered this evidence
 22 last week. It's several days before trial.

23 THE COURT: My understanding for the record was
 24 that the prosecution discovered the existence of
 25 Mr. Sawley and his possible statement on Wednesday,

1 October the 29th.
 2 MS. GARDNER: Yes.
 3 THE COURT: And disclosed Mr. Sawley's name and
 4 ability to contact Mr. Sawley on Thursday, October 30?
 5 MS. GARDNER: If that was when I signed the
 6 discovery, then, yes, Judge.
 7 THE COURT: That's what I thought was said in
 8 chambers, but I want to make a record of that.
 9 What's your memory of it?
 10 I became aware of Mr. Sawley's existence on
 11 Thursday. I was calling about a second supplemental
 12 witness list. And I couldn't identify a couple of people
 13 at the end of that list. And when I was in the process of
 14 inquiring about those people, the prosecutor told me about
 15 Mr. Sawley.
 16 THE COURT: All right.
 17 MS. GARDNER: Just for the record we signed the
 18 discovery on October 29th. The defense counsel doesn't
 19 have a fax. So when I was talking to him realized that he
 20 doesn't have a fax he probably hadn't seen that yet. And
 21 that's when I verbally told him, "We have this other
 22 witness, and here's his phone number."
 23 THE COURT: Well, in terms of the late
 24 disclosed possible witness named Mr. Sawley, S-a-w-l-e-y,
 25 I believe, the Court is going to find that it is lately

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1 Is the context of that statement, Ms. Gardner,
 2 in the same discussion of I committed on the alleged
 3 victim? And I'm paraphrasing. I don't know the exact.
 4 But the subject matter of an admission that he committed
 5 rape and had he known she would go to the police he would
 6 have killed her right then and there? Or is the context
 7 of it that at one time he admitted to having committed
 8 rape against the alleged victim. And at another time just
 9 simply opined that: "Had I known she would go to the
 10 police and report me, I would have killed her?"
 11 MS. GARDNER: My understanding, Judge, is that
 12 the context was all in the same conversation where he was
 13 describing to Mr. Nelson how he had forcibly raped this
 14 victim in the Motel 6 and then in that same conversation
 15 made the statement that: "If I had known she was going to
 16 go to the police, then I would have killed her."
 17 THE COURT: Is the context of the statement one

18 where he admitted allegedly contemplating at the time of
 19 the commission of the rape "Maybe I should kill her right
 20 now" so that she wouldn't go to the police? Or is the
 21 context one of hindsight, "I should have killed her" so
 22 that she couldn't have gone to the police?
 23 MS. GARDNER: In hindsight.
 24 THE COURT: All right. I'm not going to rule
 25 on the admissibility of that particular aspect. I want

1 disclosed, but it's disclosed upon receipt by the State.
 2 And this happens from time to time. The State receives
 3 evidence. Their duty is to in a timely fashion then
 4 disclose that evidence to the other side. In an attempt
 5 to try to help Mr. Hull, because it is late disclosed to
 6 him, I have asked the prosecution to make Mr. Sawley
 7 available as much at Mr. Hull's convenience as possible.
 8 And it sounded like, from the hearing right before lunch
 9 that the prosecution has done that. And Mr. Hull, if he
 10 chooses to, will have an opportunity to interview
 11 Mr. Sawley before his expected testimony on Wednesday of
 12 this week. So the late disclosure will not nullify the
 13 ability of Mr. Sawley to testify based in those regards.
 14 Now, the State, is the context -- well, first
 15 of all, counsel for the Defendant agrees that any
 16 statement made allegedly by Mr. Cook that he needs to get
 17 out of jail in order to harm the alleged victim to keep
 18 her quiet is an admissible statement of a party opponent
 19 against interest, an admission of a party opponent.
 20 Did I say that right, Mr. Hull?
 21 MR. HULL: Yes, Your Honor.
 22 THE COURT: You concede that.
 23 The other area, then, is the statement that:
 24 "Had I known she would go to the police, I would have
 25 killed her at the time of the rape."

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1 to think about that a little more. I want to hear the
 2 witness's testimony. And then we'll take that up outside
 3 the presence of the Jury to get the exact context from
 4 that particular witness. I'll tell counsel I'm inclined
 5 to exclude that evidence if in fact it turns out to be a
 6 context of in hindsight "I wished I had done things
 7 differently" type of a comment rather than "At the time I
 8 was committing this offense, I thought about doing it at
 9 that time". But I'm going to reserve ruling on that.
 10 Any questions by either party about what is
 11 allowed and what is not allowed under 404(b)?
 12 MS. GARDNER: Not from the State, Judge.
 13 MR. HULL: Not under the 404(b) evidence,
 14 Your Honor.
 15 THE COURT: Now, there was also brought up in
 16 chambers the issue whether parties can impeach witnesses
 17 with prior criminal felony convictions. And my

18 understanding is that witness Nelson has a recent
 19 possession of methamphetamine felony conviction, that
 20 witness Nelson also has a 2003 felony conviction or two
 21 for theft-related offenses. And there was something more
 22 it seemed like. And I'll allow either counsel to fill in
 23 the record of what other offenses Mr. Nelson may have been
 24 convicted of that are felonies.
 25 MS. GARDNER: I can tell you, Judge, from the

1 record. In addition there is a 2C -- a 1984, sorry --
 2 second degree burglary in Oklahoma and a 1981 attempted
 3 murder in Bismark, North Carolina.
 4 THE COURT: All right. In chambers the Court
 5 had intended to allow Mr. Nelson to be impeached by the
 6 existence of a felony record. I would leave it to the
 7 prosecution as to whether they choose to introduce the
 8 time of that felony or the nature of that felony. But
 9 either party without leave of the Court may introduce
 10 evidence that he has been convicted of a felony.
 11 Is there any record you would like to make
 12 about that, Mr. Hull?
 13 MR. HULL: Your Honor, the only record I would
 14 like to make is that certainly the 2003 convictions for
 15 theft are within the ten-year limit. And there is no need
 16 for a written notice ahead of time. My position would be
 17 that it should be allowed into evidence that he was
 18 convicted and convicted of theft felonies because they are
 19 crimes that go to his reliability as a witness.
 20 As well, Your Honor, as I indicated in
 21 chambers, I became aware of the specifics of Mr. Nelson's
 22 prior record over the weekend in a mailing that was sent
 23 to me by the prosecution after indicating to the
 24 prosecution I had not received his record previously. And
 25 that certainly attempted murder is a crime that I believe

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1 prejudicial than probative type analysis of 403. And so
 2 at the risk of sounding like a football game, upon further
 3 review I'm determining that the 2003 conviction for theft
 4 is probative -- highly probative of the credibility of a
 5 witness. And the fact of the nature of that conviction,
 6 although prejudiced to certainly the party who's calling
 7 that witness, that prejudice does not substantially
 8 outweigh the probative value of it.
 9 So, Ms. Gardner, you can make any record you
 10 want on the Court's ruling that he can be impeached with
 11 the existence of a felony and the nature of the felony.
 12 MS. GARDNER: You know, Judge, I think I'm
 13 going to accept that ruling. And I'm not going to argue
 14 against it so long as we understand that this is going to
 15 be formulated in the way of this was the -- um -- time
 16 period -- we're going to exclude any other felonies, I
 17 guess is what I'm saying. We're just going to focus on
 18 that one felony as if he never had any other felonies.
 19 THE COURT: The Court is going to exclude
 20 impeachment of the 1980's era burglary and attempted
 21 murderers.
 22 MR. HULL: Your Honor, there's a concealing
 23 stolen property, 2003, Lawton, Oklahoma, and a grand
 24 larceny, 2003, Beaver, Oklahoma.
 25 THE COURT: So you'll be asking the existence

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1 would go to () credibility of a witness in that the
 2 disregard for the well-being of humans is certainly
 3 manifested by that. And especially in the context here
 4 that we're finding ourselves where Mr. Nelson is making
 5 accusations about what my client said to him and our
 6 position would be to curry favor or potentially benefit
 7 himself and his sentence that the attempted murder in '83,
 8 the conviction and the nature of the conviction, should be
 9 admitted even though written notice hasn't been requested
 10 or made as required by the rule due to the late disclosure
 11 of the record. So that would be the record I would like
 12 to make, Your Honor, but I do understand the Court's
 13 ruling.
 14 THE COURT: All right. Ms. Gardner, I'll allow
 15 you to make a record as well. And after a review of Rule
 16 609 subsection A, I'm going to change my proposed ruling
 17 here a little bit because Rule 609(a) says that, for the
 18 purpose of attacking the credibility of a witness,
 19 evidence of the fact that the witness has been convicted
 20 of a felony and the nature of the felony shall be admitted
 21 if elicited from the witness or if established by public
 22 record. Now, further down in subsection A it does
 23 contemplate that the Court can allow the existence of the
 24 fact of a felony conviction but not allow the nature of
 25 that conviction. And the Court has to make a more

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1 of two felonies both theft related?
 2 MR. HULL: That's the clarification I needed
 3 from the Court. Because those are the two that it seems
 4 to me are clearly within the ten years. Clearly the type
 5 of convictions that go to credibility.
 6 THE COURT: I contemplated the evidence, yes,
 7 that there are two felony evictions both theft related.
 8 The Court is intending to exclude the 1983 or early '80-
 9 era convictions because, A, they are not felonies that are
 10 necessarily determinative of credibility. I mean, one may
 11 open and notoriously attempt to commit murder and confess
 12 to it and not attempt to hide it at all and have nothing
 13 to do with the believability or the credibility, and the
 14 Court just doesn't know the circumstances. But beyond
 15 that they are so old that their probative value are
 16 substantially outweighed by the unfair prejudice.
 17 MR. HULL: And there's one other thing that I
 18 wanted to raise, Your Honor.
 19 MS. GARDNER: If I could, I just wanted to -- I
 20 don't know if those -- I think I mentioned this in
 21 chambers, Judge. Those could very well be the same crime.
 22 It's hard to tell from reading the NCIC. This may be a
 23 crime that originated in one area of Oklahoma, not being
 24 familiar with Oklahoma whether that's a county or a city,
 25 and then wound up as one felony conviction for the same

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1 crime of larceny or concealing stolen property -- um --
2 that's something that probably the only person that could
3 really clarify that for me is the witness, himself, before
4 he testifies.

5 THE COURT: Well, then, I'll allow that
6 question to be asked whether it was one felony or two
7 felonies. And he can testify to that.

8 MS. GARDNER: And then I know this is getting a
9 little bit ahead, but on the same subject Mr. Cook has
10 some convictions, also, that go to dishonesty, theft, more
11 recently. But it was a petty theft. Then he's got a
12 burglary conviction that's over ten years old. So I'm
13 going to be raising that later if he does decide to
14 testify; so --

15 MR. HULL: Well, he will be testifying,
16 Your Honor. And certainly the rule doesn't contemplate
17 misdemeanor convictions. And the other burglary was over
18 ten years ago. And by the State's own arguments, the
19 burglary for Mr. Cook should not be allowed because it was
20 an '88 conviction.

21 THE COURT: Well, I am inclined to not allow
22 any convictions for any crimes less than a felony offense.
23 And I understand you might want to take it up later, but
24 if these convictions are admissible, I can imagine where
25 the defense may want to mention it in their opening

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1 statement and would need to know about that.

2 Ms. Gardner, is there any reason -- well, when
3 was the burglary conviction?

4 MS. GARDNER: 1988.

5 THE COURT: All right. That clears it up for
6 the Court. The Court is going to find that a 1988
7 burglary conviction, without any knowledge as to whether
8 it was a burglary that had the specific intent to commit
9 theft or the specific intent to commit another felony, is
10 probative of credibility. But the fact that it's 20 years
11 old in the prejudicial effect of that outweighs the
12 lessened probative value because of the age to the point
13 it's unfair prejudice that will be not be allowed.

14 MR. HULL: The other issue on prior record,
15 Your Honor, that I thought we should clarify prior to
16 opening statements is that it's the Defense's contention
17 that Mr. Nelson is fabricating conversations to curry
18 favor and potentially get his sentence reduced on the
19 possession of methamphetamine felony. And I understood
20 the Court to say that we shouldn't inquire about the
21 nature of that conviction.

22 The latest element in that saga, though, is
23 that Mr. Nelson has been sentenced to three to seven
24 years. And has sent a letter to his attorney which has
25 been filed in the court -- in his court file along with a

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1 Rule 35 motion requesting again that efforts be made to
2 reduce his sentence because of the medical problems he's
3 suffering. And he again mentions that he has been told by
4 the investigator that he's a very important witness in the
5 Cook case and that maybe he could get some advantage
6 because of that as far as an early parole or an early
7 release. Now, I'm perfectly capable of inquiring about
8 that in that letter without saying it's a felony and
9 without saying it's possession of methamphetamine, but
10 there's a lot of the things in there to me, you know, and
11 maybe to a lot of people sound like he's in prison and
12 he's trying to -- it would come up he was sentenced to a
13 prison sentence and that he's attempting to get that
14 prison sentence reduced. Because I believe the length of
15 the sentencing is important because he talks about needing
16 this medical attention within a certain amount of time or
17 he'll lose his leg. At least that's what he's testified
18 to previously. And that's the sort of statement he made
19 to investigators from law enforcement. So I don't want to
20 violate any of the Court's rulings, but I don't know how
21 to avoid asking him about that he was sentenced, that he's
22 attempting to reduce that sentence -- the length of the
23 sentencing -- because it all plays into his fear of him
24 losing his leg, which to the defense is a strong motive
25 for him to curry favor whether that be true allegations or

1 false allegations.

2 THE COURT: Ms. Gardner?

3 MS. GARDNER: Well, I don't know if Mr. Hull
4 has to get into what the length of his sentence is. I
5 don't think that's going to get anywhere. Simply just
6 referencing this is the theory that had some motive to be
7 released from incarceration would get it. I mean, ask him
8 directly. "Are you trying to seek an early release from
9 incarceration?" Without getting into the number of years.

10 THE COURT: I'm going to need to see the copy
11 of that letter, I think, before I rule on that. Can we do
12 that at the time before Mr. Nelson testifies?

13 MR. HULL: I have a copy in my file, Your Honor
14 -- um --

15 MS. GARDNER: I don't believe I have ever
16 received a copy of that letter.

17 MR. HULL: I wasn't intending on introducing it
18 into evidence, Your Honor. It's just if he needs to
19 refresh his recollection about what he wrote his lawyer.

20 THE COURT: It will give the Court a context to
21 what you're talking about, though.

22 MR. HULL: But I only have the one copy.

23 THE COURT: Well, at the next break can we make
24 a copy for the Court and bring it up before Mr. Nelson's
25 testimony?

1 MR. HULL: Sure.

2 THE COURT: All right. So as of right now

3 certainly the existence either of Mr. Sawley or Nelson the

4 fact they were in jail to allegedly hear these admissions,

5 that that would be admissible, of course.

6 MR. HULL: Sawley, too, Your Honor?

7 THE COURT: Was he in jail at the time?

8 MR. HULL: Well, Your Honor, you haven't -- the

9 only statement attributable to Sawley is one of "If

10 something else had been different, I would have killed

11 her."

12 THE COURT: Oh.

13 MR. HULL: So that I don't know that we've had

14 a definite enough ruling to start bringing up Mr. Sawley

15 yet.

16 THE COURT: All right. I understand.

17 Anything else before we bring the Jury back?

18 MS. GARDNER: No.

19 MR. HULL: Not that I can think of.

20 THE DEFENDANT: Can I use the bathroom?

21 THE COURT: Yes, you may.

22 THE DEFENDANT: Thank you.

23 THE COURT: We'll be in recess, then, until the

24 Bailiff lets us know you're ready to go.

25 (Recess taken.)

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1 this case, I want to go over with you what will be

2 happening. I will describe how the trial will be

3 conducted and what we will be doing. At the end of the

4 trial, I will give you more detailed guidance on how you

5 are to reach your decision.

6 You have heard the Information, or the charging

7 document, read aloud, and the fact that the Defendant has

8 pled not guilty to this charge. The Information is simply

9 a description of the charge; it is not evidence, and you

10 should not be influenced or biased by the fact that such a

11 charge has been filed.

12 Because the State has the burden of proof, it

13 goes first. After the State's opening statement, the

14 defense may make an opening statement, or may wait until

15 the State has presented its case.

16 The State will offer evidence that it says will

17 support the charges against the Defendant. The defense

18 may then present evidence, but is not required to do so.

19 If the defense does present evidence, the State may then

20 present rebuttal evidence. This is evidence offered to

21 answer the defense's evidence.

22 After you have heard all the evidence, I will

23 give you additional instructions on the law. After you

24 have heard the instructions, the State and the defense

25 will each be given time for closing arguments. In their

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1 THE COURT: Ready for the Jury to come back in?

2 MS. GARDNER: Judge, one motion, Judge, for

3 exclusion of witnesses on both sides, the defense and the

4 prosecution.

5 THE COURT: Your position, Mr. Hull?

6 MR. HULL: I would leave it up to the Court.

7 THE COURT: All right. Witnesses will be

8 excluded other than when they're testifying. I leave it

9 to counsel to monitor their own witnesses to be sure they

10 are not present.

11 MR. HULL: Go outside and don't discuss the

12 case.

13 THE COURT: And we may bring in the Jury, then.

14 (The Jury entered the courtroom.)

15 THE COURT: The record should reflect the Jury

16 has returned, and they're seated appropriately.

17 Members of the Jury, we're getting a quite bit

18 later start this afternoon than what I had told you. Rest

19 assured the Court and counsel were working on pretrial

20 matters from about five minutes after 1:00 until now. We

21 didn't just forget about you. And the clearing up some of

22 those matters early on does help the case proceed more

23 smoothly; so it was time well spent. And I thank you for

24 your patience.

25 "Now that you have been sworn as jurors to try

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1 closing arguments, they will summarize the evidence to

2 help you understand how it relates to the law. Just as

3 the opening statements are not evidence, neither are the

4 closing arguments. After the closing arguments, you will

5 leave the courtroom together to make your decision.

6 During your deliberations, you will have with you my

7 instructions, the exhibits admitted into evidence and any

8 notes taken by you in court.

9 Under our law and system of justice, the

10 Defendant is presumed to be innocent. The presumption of

11 innocence means two things.

12 First, the State has the burden of proving the

13 Defendant guilty. The State has that burden throughout

14 the trial. The Defendant is never required to prove his

15 innocence, nor does the Defendant ever have to produce any

16 evidence at all.

17 Second, the State must prove the alleged crime

18 beyond a reasonable doubt. A reasonable doubt is defined

19 as follows: It is not mere possible doubt, because

20 everything relating to human affairs, and depending on

21 moral evidence, is open to some possible or imaginary

22 doubt. It is the state of the case which, after the

23 entire comparison and consideration of all the evidence,

24 leaves the mind of the jurors in that condition that they

25 cannot say they feel an abiding conviction, to a moral

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1 certainty, of the truth of the charge.
 2 Your duties are to determine the facts, to
 3 apply the law set forth in my instructions to those facts,
 4 and in this way to decide the case. In so doing, you must
 5 follow my instructions regardless of your own opinion of
 6 what the law is or should be, or what either side may
 7 state the law to be. You must consider them as a whole,
 8 not picking out one and disregarding others. The order in
 9 which the instructions are given has no significance as to
 10 their relative importance. The law requires that your
 11 decision be made solely upon the evidence before you.
 12 Neither sympathy nor prejudice should influence you in
 13 your deliberations. Faithful performance by you of these
 14 duties is vital to the administration of justice.

15 In determining the facts, you may consider only
 16 the evidence admitted in this trial. This evidence
 17 consists of the testimony of the witnesses, the exhibits
 18 offered and received, and any stipulated or admitted
 19 facts. The production of evidence in court is governed by
 20 rules of law. At times during the trial, an objection may
 21 be made to a question asked a witness, or to a witness
 22 answer, or to an exhibit. This simply means that I am
 23 being asked to decide a particular rule of law. Arguments
 24 on the admissibility of evidence are designed to aid the
 25 Court and are not to be considered by you nor affect your

1 evaluate testimony. You bring with you to this courtroom
 2 all of the experience and background of your lives. In
 3 your every day affairs you determine for yourselves whom
 4 you believe, what you believe, and how much weight you
 5 attach to what you are told. The same considerations that
 6 you use in your every day dealings in making these
 7 decisions are the considerations which you should apply in
 8 your deliberations.

9 In deciding what you believe, do not make your
 10 decision simply because more witnesses may have testified
 11 one way than the other. Your role is to think about the
 12 testimony of each witness you heard and decide how much
 13 you believe of what the witness had to say.

14 A witness who has special knowledge in a
 15 particular matter may give an opinion on that matter. In
 16 determining the weight to be given such opinion, you
 17 should consider the qualifications and credibility of the
 18 witness and the reasons given for the opinion. You are
 19 not bound by such opinion. Give it the weight, if any, to
 20 which you deem it entitled.

21 If during the trial I may say or do anything
 22 which suggests to you that I am inclined to favor the
 23 claims or position of any party, you will not permit
 24 yourself to be influenced by any such suggestion. I will
 25 not express nor intend to express, nor will I intend to

1 deliberations. If I sustain an objection to a question or
 2 to an exhibit, the witness may not answer the question or
 3 the exhibit may not be considered. Do not attempt to
 4 guess what the answer might have been or what the exhibit
 5 might have shown. Similarly, if I tell you not to
 6 consider a particular statement or exhibit you should put
 7 it out of your mind, and not refer to it or rely on it in
 8 your later deliberations.

9 During the trial I may have to talk with the
 10 parties about the rules of law which should apply in this
 11 case. Sometimes we will talk here at the bench. At other
 12 times I will excuse you from the courtroom so that you
 13 could be comfortable while we work out any problems. You
 14 are not to speculate about any such discussions. They are
 15 necessary from time to time and help the trial run more
 16 smoothly.

17 Some of you have probably heard the terms
 18 "circumstantial evidence," "direct evidence" and "hearsay
 19 evidence." Do not be concerned with these terms. You are
 20 to consider all the evidence admitted in this trial.

21 However, the law does not require you to
 22 believe all the evidence. As the sole judges of the
 23 facts, you must determine what evidence you believe and
 24 what weight you attach to it.

25 There is no magical formula by which one may

1 intimate, any opinion as to which witnesses are or are not
 2 worthy of belief; what facts are or are not established;
 3 or what inferences should be drawn from the evidence. If
 4 any expression of mine seems to indicate an opinion
 5 relating to any of these matters, I instruct you to
 6 disregard it.

7 Do not concern yourself with the subject of
 8 penalty or punishment. That subject must not in any way
 9 affect your verdict. If you find the Defendant guilty, it
 10 will be my duty to determine the appropriate penalty or
 11 punishment.

12 I will permit you to take notes during the
 13 trial. Your notes will serve as an aid to memory and may
 14 be used during your deliberations. You are instructed,
 15 however, not to take notes during opening statements or
 16 during objections made to evidence.

17 You should not allow yourselves to become so
 18 consumed in the taking of notes that you miss the oral
 19 testimony or fail to observe the demeanor of the witnesses
 20 on the stand.

21 Your notes should not contain personal
 22 reactions or philosophical comments, but rather should be
 23 limited to a brief factual summary of testimony you deem
 24 important. You should take no notes during breaks; notes
 25 may be made only in open court while witnesses are

1 testifying. When court recesses 1 the day, your notes
 2 will be kept in the custody of the Bailiff.
 3 During the jury's deliberations you may use the
 4 notes to refresh your recollection of the testimony and
 5 you may compare your notes with other jurors and discuss
 6 them. You should not view your notes as authoritative
 7 records, however, nor should they be shown to other jurors
 8 in a direct attempt to influence them.
 9 If you do not take notes, you should rely on
 10 your own memory of what was said and not be overly
 11 influenced by the notes of other jurors. In addition, you
 12 cannot assign to one person the duty of taking notes for
 13 all of you.
 14 During your deliberations, you will be entitled
 15 to have with you my instructions concerning the law that
 16 applies to this case, the exhibits that have been admitted
 17 into evidence, and any notes taken by you in the course of
 18 the trial proceedings.
 19 When the trial is complete, any juror notes
 20 will be destroyed. At no time will juror notes be read by
 21 the Court, its staff, the attorneys, or any other persons.
 22 It is important that as jurors and officers of
 23 this court you obey the following instructions at any time
 24 you leave the jury box, whether it be for recesses of the
 25 Court during the day or when you leave the courtroom to go

1 courtroom on your own. Do not go any place mentioned in
 2 the testimony without an explicit order from me to do so.
 3 You must not consult any books, dictionaries,
 4 encyclopedias or any other source of information unless I
 5 specifically authorize you to do so.
 6 Fifth, do not read about the case in the
 7 newspapers. Do not listen to radio or television
 8 broadcasts about the trial. You must base your verdict
 9 solely on what is presented in court and not upon any
 10 newspaper, radio, television, or other account of what may
 11 have happened."
 12 Ms. Gardner, you may make your opening
 13 statement on behalf of the State.
 14 MS. GARDNER: Thank you.
 15 You're going to hear from numerous witnesses in
 16 this case. And the primary witness you're going to hear
 17 from is Danielle Whitten, who's 23 years old. She grew up

18 here in this area. She has family in this area. She
 19 graduated from high school from this area. She has a
 20 boyfriend who lives in this area. Sometimes he travels
 21 out of town to work. Her boyfriend lived with his
 22 parents at the time of this incident. And she lived with
 23 her father at the time of this incident.
 24 Going back to April of this year, when the
 25 incident occurred, there was a situation involving

1 home at night
 2 First, do not talk about this case either among
 3 yourselves or with anyone else during the course of the
 4 trial. You should keep an open mind throughout the trial
 5 and not form or express an opinion about the case. You
 6 should only reach your decision after you have heard all
 7 the evidence, after you have heard my final instructions,
 8 and after the final arguments. You may discuss this case
 9 with the other Members of the Jury only after it is
 10 submitted to you for your decision. All such discussion
 11 should take place in the Jury room.
 12 Second, do not let any person talk about this
 13 case in your presence. If anyone does talk about it, tell
 14 them you are a juror on the case. If they won't stop
 15 talking, report that to the Bailiff as soon you are able
 16 to do so. You should not tell any of your fellow jurors
 17 about what has happened.
 18 Third, during this trial do not talk with any
 19 of the parties, their lawyers, or any witnesses. By this,
 20 I mean not only do not talk about the case, but do not
 21 talk at all, even to pass the time of day. In no other
 22 way can all parties be assured of the fairness they are
 23 entitled to expect from you as jurors.
 24 Fourth, during this trial do not make any
 25 investigation of this case or inquiry outside of the

1 Danielle's dog. And the dog usually stayed at her
 2 boyfriend's house because her father had a couple of dogs,
 3 and they didn't get along. So the dog stayed at the
 4 boyfriend's house, at his parents' house, except when he
 5 had to leave town to go to work. This particular
 6 situation she did not want to put the dog in a kennel
 7 while he was out of town. And so he just made
 8 arrangements and rented a Motel 6 -- a room for her to
 9 stay with her dog while he was out of town. And that was
 10 the Motel 6 on Appleway here in Coeur d'Alene where she
 11 stayed.
 12 She was supposed to stay for four days. On the
 13 third day of her stay -- that was April 8th of this
 14 year -- she decided to walk down to the liquor store on
 15 Appleway, a few blocks down near Government and Appleway.
 16 While at that liquor store she was approached by somebody
 17 she knew, Sean Cook, the Defendant. She's known Mr. Cook

18 since high school. Hadn't seen him for many months. But
 19 they started to talk. He asked her where she was staying.
 20 And she told him. She told him what her room number was.
 21 And they agreed that he would come over later on, after a
 22 couple of hours, after he went and he was going to shower
 23 and come over. And they were going to catch up on what
 24 they had both been doing over the past several months
 25 since they had seen each other last.

1 He showed up a couple of hours later. And he
 2 comes into the room. And they talked. He brought a
 3 bottle of some hard liquor. According to Danielle it
 4 wasn't that big of a bottle. It was a smaller sized
 5 bottle. And he only had about a shot of whatever the
 6 alcohol was in that bottle left. And he consumed that
 7 while they were in the hotel room. He also brought a six-
 8 pack of beer, and she had one beer. And she drank part of
 9 one of those beers.

10 And then Sean had the idea that he could go
 11 next door to this bar -- um -- pool bar called the Mouse
 12 Trap and play some pool. And so she likes to play pool.
 13 They walked next door to the Mouse Trap.

14 Over there she had a shot of tequila and what
 15 she describes as the neck of a bottle. In other words, a
 16 swallow of beer that's in the neck of a bottle of beer.
 17 Neither of them had much to drink there. They played one
 18 game of pool. About an hour later they returned to the
 19 hotel room. And Mr. Cook has had, maybe, a beer. She's
 20 had, like I said, that shot of tequila. And she's
 21 definitely got her wits about her. She's feeling a little
 22 buzzed, but she's not intoxicated.

23 So they return back to the hotel room and they
 24 continue their discussion. Again, same as previously,
 25 she's sitting on the bed. It's, of course, a one room.

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1 There's a table with two chairs. And it sits right next
 2 to the bed. You'll see photographs of that hotel room.
 3 And you'll see how small it is. But essentially he's
 4 sitting in a chair in front of where she's sitting on the
 5 bed. And they're talking.

6 During this discussion Mr. Cook gets up and
 7 moves over to the bed. And he's sitting next to her. And
 8 abruptly, at one point in their discussion, he takes his
 9 hand, and he puts it on her leg, on her thigh. She gets
 10 really uncomfortable at this point. They have no physical
 11 relationship. Have not had a physical relationship. She
 12 picks up his hand and puts it aside and says: "No. I
 13 have a boyfriend." And she starts to stand up at that
 14 point to remove herself from being so close to him as she
 15 now realizes that he has some other intentions.

16 She starts to stand up. And he grabs her leg.
 17 He's sitting on her left side. He grabs her left leg, the
 18 one that's closest to him. He grabs at the thigh, and he
 19 pulls her back with it. And while she's following, he's
 20 around in front of her. And he's got both of her thighs
 21 and he's shoving her back. And she falls back onto her
 22 back onto the bed. And now he's pushing her down on the
 23 bed. He's got his right arm, forearm, over her chest
 24 holding her down. And he's using his left hand, and he's
 25 unbuttoning her jeans. And he's trying to pull them down.

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1 All during this time she's trying to resist, trying to
 2 push back up telling him: "No. No. Sean, no." He
 3 ignores that. He lays on top of her once he gets her
 4 jeans and her underwear off. And he penetrates her vagina
 5 with his penis. He then flips her over. Pulls out of
 6 her, flips her over. And he's got his elbow in the back
 7 of her neck holding her down. And during this time she's
 8 still telling him: "No. Stop it." He then penetrates
 9 her again now from behind with his elbow holding her down
 10 by her neck.

11 You're going to not learn from Danielle
 12 specifically what it was he was holding her down with when
 13 he was behind her. She didn't know. She just knew it was
 14 something that was hard. And it hurt her neck. You're
 15 going to hear that detail from somebody else that Mr. Cook
 16 spoke with after he was arrested for this rape.

17 Danielle will tell you that, as abruptly as
~~18 this started, it stopped. And he went into the bathroom.~~
 19 Made some comment about going to the bathroom. As she is
 20 watching him head towards that bathroom, she's getting her
 21 cell phone. And as soon as that door closed she's dialing
 22 the only number she could think of at the time in this
 23 type of trauma. She thinks of a friend of hers that's
 24 just down the street about a mile and a half down in
 25 downtown Coeur d'Alene, who's working. A friend named

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1 to leave at that point. Instead he doesn't leave. He
 2 immediately sets to straightening up the bed that he had
 3 just raped her on. He's picking up the pillows and the
 4 covers that fell off during the struggle. He's
 5 straightening everything out the best he can. And Hoss
 6 arrives, like I said, about ten minutes after she hung up
 7 with him.

8 At some point in this conversation, a few
 9 minutes go by and Hoss is trying to figure out what's
 10 going on. He's watching Mr. Cook seemingly very relaxed.
 11 And his friend, Danielle, seemingly very upset trying to
 12 assess what's going on. And several minutes into the
 13 conversation he just turns to Danielle and says: "Well,
 14 are you ready to leave now?" As if they had planned to go
 15 somewhere. She says: "Yes." So they get ready to leave.
 16 Mr. Cook gets the hint, and he leaves, also. As they're
 17 driving away, Hoss and his brother and Danielle are
 18 driving away, they see Mr. Cook is still in the parking
 19 lot of that hotel still sitting there in his car. He
 20 hasn't left.

21 They go to a convenience store. Danielle, once
 22 they get her in the car, she says: "I need some
 23 cigarettes." They took her to a convenience store.
 24 During this time Hoss is looking at her. He's hearing her
 25 sort of whimpering like she's crying. And she's breathing

1 a.m. Hoss brings her back there. She stays long enough
 2 to shower, to pack up her belonging, and leave. She
 3 doesn't want to have Mr. Cook return to that hotel room
 4 when they're there. She gets out as soon as she can.

5 Detective Martin of the Coeur d'Alene Police
 6 Department contacts Mr. Cook some days later. And
 7 Mr. Cook says, yeah, he had sex with Danielle. It was
 8 consensual. She agreed to that. So now the question
 9 becomes: Did Mr. Cook rape her? Or did they just have
 10 sex, consensual sex.

11 So normally that would be end of the story, but
 12 Mr. Cook has given more evidence for you to look at. And
 13 that's in his discussions that he had with his cellmate
 14 while he was at the public safety building in custody for
 15 this crime. That cellmate was Paul Nelson. Paul Nelson
 16 is going to come in here and testify as to what Sean Cook
 17 told him.

18 ~~As cellmates do sometimes, they talk about why~~
 19 they're in there. And Mr. Cook talked a little bit too
 20 much to Mr. Nelson. He told him details about this
 21 incident. He told him that, yes, he did rape this girl.
 22 He told him that it occurred at the Motel 6. He told him
 23 how he held her down, that he had her from behind, and he
 24 held her down with his elbow in her neck. That's why
 25 Danielle didn't know specifically what it was she was

1 heavy. But she's behind him; so he can't really see her
 2 face. And he asks her several times: "What is wrong?"
 3 "Nothing. Just take me to the convenience store." He
 4 asks her in his recollection five times during that trip.
 5 Finally the sixth time he asks her, she breaks down. And
 6 she's now really sobbing. Really crying.

7 They're in her motel room. And he tells her
 8 what -- the brother who's out in the car she tells him
 9 everything. She tells him everything that just happened
 10 and why she called him. He encourages her to call the
 11 police. He, in fact, calls the police. He escorts her to
 12 the Kootenai Medical Center where she undergoes the very
 13 painful sexual assault examinations that they conduct
 14 there to victims of sexual assault. The medical and the
 15 police note that she has bruises and some redness on her
 16 neck from where he had grabbed her on different locations
 17 and pressed on her during the rape. They collect
 18 evidence. They collect a beer bottle that ultimately
 19 comes back with his fingerprints on it. Apparently he
 20 ejaculated on her panties and jeans but not inside of her.
 21 And you will see the test results from that, that the
 22 clothing that she turned over to the police had semen on
 23 them -- the panties and the jeans, but her own body didn't
 24 have semen on it.

25 She returns to the motel room about 6:00/6:30

1 being held by. She just knew that it hurt. Mr. Nelson
 2 knew because Mr. Cook told him how he did this. He told
 3 Mr. Nelson that this wasn't just a random thing. He had
 4 followed this girl for several days. He knew that she was
 5 staying in that area. And he had followed her trying to
 6 figure out where she was staying and then saw her go into
 7 the liquor store and then made this look like an
 8 accidental meeting of old friends in the liquor store.

9 Now, Mr. Nelson will tell you he didn't go to
 10 the police with this. He was upset. His cellmate was
 11 telling him a lot of things. And he didn't know what to
 12 do with it. So he talked to his wife when she came to
 13 visit him. She was the one that said: "You need to tell
 14 this. This needs to be out." She, herself, will tell you
 15 she's been a victim of a rape before. She didn't want
 16 this to just not be told and the truth not to come out.
 17 So she was the one that contacted the jail, the watch
 18 commander, and said: "Please talk to my husband. He's

19 got some information that his cellmate is telling him that
 20 he needs to let you know about." And they did so.

21 That's how it came out from Mr. Nelson -- the
 22 truth. They were -- Mr. Nelson and Mr. Cook were being
 23 transported on the same day from jail to the preliminary
 24 hearing in this courthouse, Mr. Nelson as a witness,
 25 Mr. Cook as the Defendant in this charge. Mr. Cook and

1 Mr. Nelson were placed next to each other in holding
 2 cells. Separate cells but next to each other. They have
 3 lunch and have to wait for their transport over here. And
 4 when they did, Mr. Cook told Mr. Nelson: "I hear that
 5 you're going to be providing testimony against me today.
 6 If you do that, then your wife is going to be messed up.
 7 Your daughter is going to be raped. I'm going to have
 8 somebody follow them the next time they come visit. And
 9 they're going to be hurt. Think about that when you get
 10 up there to testify."

11 Mr. Nelson minutes later got up to testify.
 12 Mr. Nelson was less than forthcoming in his testimony. He
 13 testified very minimally just to the fact that, yeah, he
 14 says he forced her. And that was it.

15 The next day Mr. Nelson writes a letter. And
 16 he says: "I didn't tell you everything. And this is why.
 17 I was freaking out at that point. He had just threatened
 18 me, and I didn't know what to do. So I gave just a little
 19 bit of what I could say. And that was it." He'll tell
 20 you a lot more. He'll tell a lot more details. He's
 21 ready to come in. And he's ready to tell you everything
 22 he knows. In the end you'll find that Sean Cook did rape
 23 Danielle, and he is guilty of that. You should return a
 24 verdict of guilty. Thank you.

25 THE COURT: Mr. Hull, on behalf of Mr. Cook, do

1 you choose to make your opening statement at this time?

2 MR. HULL: Yes, Your Honor. Thank you.

3 THE COURT: Please do so.

4 MR. HULL: Good afternoon, Ladies and
 5 Gentlemen.

6 Sean Cook and Danielle Whitten had consensual
 7 sex on April 8th of this year. They've known each other
 8 for some years. They even lived in the same home together
 9 with a Miss Caan, Danielle with her boyfriend, Mr. Merton.
 10 And Sean is staying in the same house.

11 On April 8th Sean saw Danielle at the liquor
 12 store. They meet and hug. And they're asking each other
 13 what they've been doing. And Sean tells Danielle that
 14 he's been working and where he's staying. And Danielle
 15 tells him that because of her dog -- and it's sort of
 16 confusing how that all works -- but because she needs a
 17 place to keep her dog, a pit bull, apparently while her
 18 boyfriend it out of town, she's rented a room at the
 19 Motel 6. And she tells Sean the room number, and
 20 arrangements are made for Sean to go over there.

21 At the liquor store Danielle buys a bottle of
 22 tequila. In previous testimony in this matter she seems
 23 to be uncertain what size bottle of tequila, but she buys
 24 some tequila. And Sean buys some liquor there at the
 25 liquor store. That's about 3:00 in the afternoon.

1 Late that day, in the evening, apparently, Sean
 2 goes over to the motel. He does bring a six-pack. They
 3 have some drinks. They talk for some substantial period
 4 of time. And then they go over to the Mouse Trap, have
 5 more to drink, play pool. Danielle invites him back to
 6 the motel. And after some more discussion and some
 7 drinking, they engage in consensual sex.

8 During this sex after about 15, 20 minutes,
 9 Danielle complains about getting sore and could Sean stop.
 10 So Sean stops. He goes into the bathroom. On his way
 11 into the bathroom, he notices that Danielle is on the
 12 phone. And Danielle makes the comment about calling Hoss
 13 Dillon. Sean goes in the bathroom for a couple of
 14 minutes, has the door closed. Danielle is there when he
 15 gets out, has gotten dressed. And Sean says: "Well, you
 16 know, Dillon knows Mertins, your boyfriend. We better
 17 make this bed." So the two of them make the bed. There
 18 isn't any evidence that, during this phone call to Hoss

19 Dillon, that Danielle Whitten says anything about being
 20 raped. Later Hoss and his brother, two young males in
 21 their twenties, show up at the motel room. Danielle
 22 Whitten opens the door, and they come in. And Danielle
 23 Whitten returns to the bed and sits down on the bed near
 24 where Sean Cook is sitting. And Sean Cook is described by
 25 Mr. Dillon as appearing relaxed and happy, offering people

1 did not ejaculate. That he sudde stopped and went into
2 the rest room.

3 At the hospital where she is taken by
4 Mr. Dillon, statements are recorded by the staff there
5 where she indicates she was mildly choked and that
6 Mr. Cook did ejaculate in her. The nurse -- a nurse
7 that's there notices slight redness on her neck. And they
8 have some photographs that are a little difficult to see.
9 And a dime-sized bruise on her knee. The doctor inspects
10 Danielle. He finds no -- I want to get it right because
11 they use -- the doctor on the neck notes no bruises or
12 abrasions is what is in Dr. Shaw's report about the neck.
13 Dr. Shaw notes in his further exam of what he calls the
14 genitourinary area no lacerations, bruises or abrasions.
15 And he talks about the labia and the vagina.

16 Forensics which were taken of the things of
17 various items involved in this situation indicate that
18 Mr. Cook's fingerprint was on a plastic cup at the motel
19 room. There is no spermatozoa in the vagina of Danielle
20 Whitten. There is spermatozoa on the underwear and on the
21 jeans. It's undetermined whose spermatozoa that is.

22 Sean is contacted by the police. He doesn't
23 know what they want. Isn't super eager to talk to the
24 police, but he does go in and talk to them. And they
25 begin questioning him about Danielle Whitten. And he

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1 in the lobby that someone has distributed about this
2 offense and that they become aware of these allegations
3 against Mr. Cook. Mr. Nelson also indicates that he gets
4 a message from an inmate that has been to court and comes
5 back from that. Someone who he believes is the uncle of
6 Danielle Whitten about that he needs to come forward about
7 these alleged confessions that Mr. Cook made.

8 Mr. Cook never confessed to raping Danielle to
9 Paul Nelson. He didn't rape Danielle Whitten. He
10 certainly doesn't talk to Mr. Nelson about it.

11 Currently Mr. Nelson has been sentenced. And
12 recently has contacted his attorney in a letter indicating
13 that, perhaps, they could get his sentence reduced because
14 of his cooperation in the Cook case. And he, again, in
15 that letter expresses concerns about his medical condition
16 that he isn't going to get the appropriate medical
17 treatment while he's incarcerated. And, maybe, that can
18 all help him if there's a good word put in by the
19 prosecutor in the Cook case.

20 Mr. Cook didn't rape Danielle Whitten. And at
21 the end of the evidence, I'm going to ask you to acquit
22 him of rape. And I appreciate your attention in this
23 matter. Thank you.

24 THE COURT REPORTER: I need to change paper.

25 THE COURT: We'll be resting in place for just

1 says: "Well, you know, I saw her at the Motel 6 a while
2 ago." And they continue asking him about what went on
3 there. He says that he and Danielle had sex, but why do
4 they want to know about what's going on with him and
5 Danielle Whitten? And then much to his shock, he's told
6 that he's being accused of rape.

7 Sometime later he's arrested on the rape charge
8 and ends up in jail. One of his cellmates is a convicted
9 felon called Paul Nelson. Paul Nelson is in jail. He has
10 medical conditions which he feels if he doesn't get a
11 artificial hip he's going to lose his leg. In his
12 statements to police officers and his attorney and to
13 various people, he indicates that, if he doesn't get out
14 of jail, he's going to lose his leg. Certainly he doesn't
15 want to lose his leg. And he says that Sean Cook told me.

16 Now, there's some odd things about Mr. Nelson's
17 statements. One fact is that Sean admits that he talked
18 to Mr. Nelson about what he was charged with and some of
19 the details of what he was charged with. But he told him
20 that he didn't rape anybody. He didn't certainly want to
21 confess to something he didn't do. And telling people in
22 jail that you raped people isn't something he thinks is a
23 real wise idea.

24 Mr. Nelson indicates that his family, his
25 significant other or someone, gets -- there's fliers out

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1 a moment while the court reporter changes paper. And then
2 the State may call its first witness.

3 (Pause in proceedings.)

4 THE COURT: The State may call its first
5 witness.

6 MS. GARDNER: The State calls Danielle Whitten.

7 THE COURT: Ma'am, if you would please come
8 forward. And somewhere in the middle of the room here,
9 face Madam Clerk and raise your right hand.

10 ---o0o---

11 DANIELLE WHITTEN,
12 having been duly sworn by the Clerk of the Court, was
13 examined and testified as follows:

14 THE COURT: Ms. Whitten, you appear to be a
15 soft spoken person, so I'll ask you to speak more loudly
16 than you think you need to or speak right into the
17 microphone.

18 Go ahead, Ms. Gardner.

19 MS. GARDNER: Thank you.

20 DIRECT EXAMINATION

21 QUESTIONS BY MS. GARDNER:

22 Q. Ma'am, can you start by telling us your name
23 and spelling your last name for the record.

24 A. Danielle Whitten, W-h-i-t-t-e-n.

25 Q. Ms. Whitten, how old are you?

1 A. Twenty-four.
 2 Q. How old were you on April 8th?
 3 A. Twenty-three.
 4 Q. And where did you grow up?
 5 A. Um -- well, I've lived in Spirit Lake for,
 6 like, ten years.
 7 Q. Do you have family in the area?
 8 A. Yeah. My dad, brother.
 9 Q. Your dad, did he live in Spirit Lake, also?
 10 A. Yes.
 11 Q. Back in April of 2008, were you living with
 12 your father?
 13 A. Yes.
 14 Q. And did you have a boyfriend?
 15 A. Yes.
 16 Q. And what was your boyfriend's name?
 17 A. Ryan Martin.
 18 Q. And did he live in this area, also?
 19 A. He lives in Athol.
 20 Q. Was he living with his parents?
 21 A. Yes.
 22 Q. And did you have -- did you go to high school
 23 in this area?
 24 A. Yes. I went to Timberlake and then Mountain
 25 View in Rathdrum.

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1 where that dog would stay?
 2 A. He stays with my boyfriend.
 3 Q. And why is that?
 4 A. Because he doesn't get along with my dad's
 5 dogs.
 6 Q. All right. What kind of dogs does your dad
 7 have?
 8 A. Um -- black labs.
 9 Q. Okay. And so would your boyfriend sometimes
 10 work out of town?
 11 A. Yeah.
 12 Q. And what arrangement would you make?
 13 A. I would take the dog and stay in a hotel room.
 14 Q. All right. And did you ever consider a kennel
 15 for the dog or --
 16 A. Yeah.
 17 Q. And why did you not opt for that?
 18 A. Up until that date we never did because I
 19 would like to have my dog where I was rather than have him
 20 being in a kennel.
 21 Q. So had you stayed at a hotel prior to this
 22 April time?
 23 A. For the dog, no.
 24 Q. With the dog?
 25 A. No.

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1 Q. Did you ever meet Sean Cook in high school?
 2 A. Not at high school but while I was in high
 3 school, yes.
 4 Q. And was he a student there at the same time as
 5 you?
 6 A. No.
 7 Q. All right. How did you meet him? You say you
 8 were in high school at the time but not attending with
 9 him?
 10 A. Yeah. I met him through mutual friends.
 11 Q. All right. And do you know how old Sean Cook
 12 is?
 13 A. Not exactly, no.
 14 Q. Is he older than you?
 15 A. Yes.
 16 Q. How much older than you would you say?
 17 A. Um -- I don't know.
 18 Q. Would he have attended high school with you?
 19 A. No.
 20 Q. All right. Now, back in April did you have a
 21 dog?
 22 A. Yes.
 23 Q. And what kind of dog was it?
 24 A. I had a pit bull.
 25 Q. And did you have some arrangement as far as

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1 Q. What arrangement would you make with the dog
 2 prior to April?
 3 A. That was the first time he went out of town for
 4 work.
 5 Q. And so for how long was he out of town?
 6 A. Four days.
 7 Q. And so what kind of arrangements were made as
 8 far as the hotel room?
 9 A. He got the hotel room for me for four days so
 10 that I could have the dog.
 11 Q. And was that in April?
 12 A. Yes.
 13 Q. Now, which hotel did he rent?
 14 A. Motel 6 in Coeur d'Alene.
 15 Q. What road is that on?
 16 A. On Appleway, I think.
 17 Q. Had you ever stayed at that hotel before?
 18 A. Yes.
 19 Q. Was there anybody else renting the hotel room
 20 besides yourself with your dog?
 21 A. No.
 22 Q. And during that time did you see Sean Cook?
 23 A. Yeah.
 24 Q. All right. Which day of your stay did you see
 25 Sean Cook?

1 A. The third day, I believe.

2 Q. All right. And what were you doing while you

3 were staying there? Were you working? Going to school?

4 A. Neither.

5 Q. Neither.

6 What would you do during the day to occupy

7 yourself?

8 A. Um -- I don't know. I was usually at home with

9 my dad.

10 Q. Okay. Would you go to Spirit Lake with your

11 dad?

12 A. Yeah. I lived there.

13 Q. All right. So the dog would stay at the hotel

14 room?

15 A. Oh, no. During the days over at the hotel?

16 Q. Yes.

17 A. Oh, I just hung out with the dog.

18 Q. Okay. Did you ever go to the Mouse Trap?

19 A. I did the night with Sean.

20 Q. All right. Had you been there before?

21 A. Yes. But not while I was staying in the hotel

22 room.

23 Q. Okay. Tell us what the Mouse Trap has for

24 entertainment.

25 A. A pool.

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1 Q. Is that pretty much it?

2 A. Uh -- yeah.

3 Q. Okay. And you had played pool there before?

4 A. Yeah.

5 Q. Do they sell liquor there, too?

6 A. Yes.

7 Q. Is it what you would term a bar or a

8 restaurant?

9 A. It's a bar.

10 Q. And how close was the Mouse Trap to the Motel

11 6?

12 A. It's really close. It's pretty much, like,

13 almost in the parking lot of the Motel 6.

14 Q. How big is the parking lot at the Motel 6?

15 A. Pretty big.

16 Q. Okay. Bigger than this room?

17 A. Yeah.

18 Q. Bigger than this building?

19 A. No. No, I don't think so.

20 Q. Okay. But close to that parking lot is the

21 Mouse Trap?

22 A. Yes.

23 Q. So let's talk about April 8th, your third day

24 of your stay there. Is that about April 8th?

25 A. Yes.

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1 Q. How did you get to the liquor store?

2 A. I drove.

3 Q. And how far away was the liquor store from the

4 hotel?

5 A. It's was a couple of blocks. It's on Appleyway

6 and Government.

7 Q. What did you go to the liquor store for?

8 A. Liquor.

9 Q. What did you buy there?

10 A. I bought a bottle of tequila.

11 Q. Did you open that bottle of tequila after you

12 went to the liquor store?

13 A. I did not.

14 Q. Why not?

15 A. Because I was there by myself. I don't know.

16 Because I didn't really drink any.

17 Q. So what did you do with that liquor bottle

18 after you got back to your hotel?

19 A. I put it in my backpack.

20 Q. And did it stay there throughout your stay?

21 A. Yes, it did.

22 Q. At some point did you open it up?

23 A. Yeah, after my boyfriend got back from town

24 after we were already home a couple of days later.

25 Q. You drank it together?

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1 A. Yes.

2 Q. So you had met Sean Cook while you were in high

3 school?

4 A. Yes.

5 Q. About how old were you when you met him?

6 A. I was about 14 or 15.

7 Q. And how did you meet him?

8 A. Through mutual friends.

9 Q. Do you recall which friends you met him?

10 A. Not exactly, no.

11 Q. At some time prior to April, did you see

12 Sean Cook?

13 A. I don't believe so, no.

14 Q. Okay. Was there a time when you and Sean Cook

15 were living at the same place?

16 A. Yes. A couple of months before that.

17 Q. Tell us about that. Did you and Sean Cook

18 together go in to live at this place?

19 A. No.

20 Q. Tell us how it happened that you and Sean Cook

21 were living in the same place.

22 A. Um -- I don't know. Me and my boyfriend

23 started living with my our friend Eli. And Sean was

24 living there, too.

25 Q. Was this a house or an apartment?

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1 A. An apartment.
 2 Q. And how many bedrooms were there?
 3 A. Two.
 4 Q. So you and your boyfriend were living with Eli?
 5 A. Correct.
 6 Q. And Sean Cook was already living there when you
 7 moved in?
 8 A. I can't really remember if he was already there
 9 or not.
 10 Q. Okay. At some point while you were living,
 11 there, Sean Cook was also living there.
 12 A. Yes.
 13 Q. How long did Sean Cook live there?
 14 A. A couple of months, I think.
 15 Q. How long did you live there?
 16 A. The same.
 17 Q. Did you all move out the same day?
 18 A. Pretty much, yes.
 19 Q. And then you moved in with your dad. And your
 20 boyfriend moved in with his parents?
 21 A. Right.
 22 Q. What was your relationship like with Sean Cook
 23 prior to April?
 24 A. We were friends.
 25 Q. Had you ever had any romantic involvement with

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1 A. Um -- what we had been up to and, maybe,
 2 hanging out later.
 3 Q. And did you talk about maybe coming over to the
 4 hotel later?
 5 A. Yes.
 6 Q. And was that his idea or your idea or do you
 7 remember?
 8 A. It was pretty much. I don't know. We were
 9 just talking about hanging out.
 10 Q. Was he driving a vehicle?
 11 A. Yes.
 12 Q. And how do you know that?
 13 A. Because we walked outside together still
 14 talking.
 15 Q. What kind vehicle did he get into?
 16 A. I don't know. Like, a light brown car. A
 17 Mazda something.
 18 Q. A small car? Medium-size?
 19 A. Yeah, a small car.
 20 Q. All right. And so what were the arrangements
 21 specifically as far as meeting up later?
 22 A. He was going to call me. And then we were
 23 going to hang out, maybe.
 24 Q. Okay. And did you tell him what your hotel
 25 room was?

1 him?
 2 A. No.
 3 Q. Had you ever had a romantic interest in him?
 4 A. Not really.
 5 Q. On April 8th, then, at the liquor store, who
 6 saw who first? Did you see Sean first? Or did he come up
 7 to you?
 8 A. I don't know. I think it was, like, at the
 9 same time.
 10 Q. All right. And were you inside the liquor
 11 store?
 12 A. Yes.
 13 Q. And tell us about your conversation with Sean
 14 in that liquor store.
 15 A. Um -- I don't know. It's been a while since I
 16 had seen him and gave him a hug. Asked what he was up to.
 17 Talked for a couple of minutes. I don't know what we were
 18 doing.
 19 Q. Do you often greet your friends or
 20 acquaintances with a hug?
 21 A. Yes.
 22 Q. Was there any sexual intentions of yours in
 23 that hug?
 24 A. No.
 25 Q. What did you two discuss in that liquor store?

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1 A. Yes.
 2 Q. Had you arranged -- made arrangements that he
 3 was going to be coming over to the hotel room to pick you
 4 up.
 5 A. No. We discussed that he was going to call me.
 6 And then we were going to hang out. I figured he would
 7 probably come over.
 8 Q. And did he call you?
 9 A. No.
 10 Q. At some point did he show up at the hotel room?
 11 A. Yes.
 12 Q. How much later?
 13 A. Um -- several hours later. I saw him, like,
 14 late afternoon at the liquor store. And it was night when
 15 he got there.
 16 Q. Was it dark outside when he got there?
 17 A. Yes.
 18 Q. And so you took his showing up there as
 19 basically getting together to talk or go do something?
 20 A. Yes. Just hang out.
 21 Q. And did you let him into the hotel room?
 22 A. Yes.
 23 Q. Did you have any fear of him at that point?
 24 A. No.
 25 Q. Had you ever had any incident happen where he

1 frightened you?
 2 A. No.
 3 Q. Had you ever been alone with him before?
 4 A. Yes.
 5 Q. How many times would you say you've been alone
 6 with him in the past?
 7 A. Probably quite a few times when we were living
 8 together.
 9 Q. And so what did the two of you do when he came
 10 into the hotel room?
 11 A. We just -- he sat down at the table. And I sat
 12 in the bed. And we talked.
 13 Q. Okay. Could you tell us -- um -- the hotel
 14 room, what furnishings were in that hotel room?
 15 A. There was table, two chairs, a bed, a T.V., a
 16 nightstand.
 17 Q. Where was the table? Let me ask you this: Did
 18 the table have any chairs?
 19 A. Two.
 20 Q. And where was the table in relation to the bed?
 21 A. Um -- if you walked into the room, there was a
 22 bed. And the table was, like, two feet away, maybe.
 23 Q. Okay. Can you approach this board and just
 24 draw for us the bed and the table and where the chairs
 25 were. And then if you could mark with an "X" where he was

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1 Q. Did he drink directly from that bottle or from
 2 a cup?
 3 A. From a cup.
 4 Q. Where did he get the cup from?
 5 A. The room.
 6 Q. Was it a plastic cup? Glass?
 7 A. Yeah. Plastic cup.
 8 Q. And where did he get the -- did he bring beer
 9 or did you have beer there?
 10 A. He brought the beer.
 11 Q. How much beer did he bring?
 12 A. A six-pack.
 13 Q. When you were at the liquor store, did you see
 14 him buy anything?
 15 A. I can't really recall, but I'm pretty sure that
 16 he did buy something.
 17 Q. All right. But do you know whether the items
 18 that he brought with him were the ones?
 19 A. I don't know.
 20 Q. Okay. What kind beer was it?
 21 A. I don't know the brand name it was. I don't
 22 know exactly what kind of beer it was.
 23 Q. And at that point you had one of those beers?
 24 A. Yes.
 25 Q. Did you finish the beer?

1 seated and the you were seated on the bed.
 2 A. That's a door. That's where he sat. That's
 3 where I was sitting.
 4 Q. Okay. So how many feet would you say the two
 5 of you were from each other?
 6 A. Like, two feet.
 7 Q. Were you all the way up on the bed at that
 8 point or were your feet over the edge?
 9 A. I was all the way up against the wall.
 10 Q. And what did the two of you talk about?
 11 A. What we've been doing lately.
 12 Q. Did he talk about work?
 13 A. Yeah.
 14 Q. And how long did the two of you talk before
 15 leaving?
 16 A. Like, 25 minutes to an hour.
 17 Q. Did you drink or eat anything during that time?
 18 A. I did drink a beer. He drank the last of what
 19 was left of his bottle that he brought with him and the
 20 beer.
 21 Q. Okay. He brought a bottle with him? Do you
 22 know what that contained?
 23 A. I'm pretty sure it was Crown Royal.
 24 Q. And how much was in it when he arrived?
 25 A. Just, like, one shot.

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1 A. Yes.
 2 Q. And he had one of those beers?
 3 A. Yes.
 4 Q. Did he finish his beer?
 5 A. I don't know.
 6 Q. Do you know what you did with your beer after
 7 you finished it?
 8 A. Threw it in the garbage.
 9 Q. And do you know what he did with his beer?
 10 A. I don't.
 11 Q. And so at the end of your conversation and
 12 drinking -- um -- what did you decide to do?
 13 A. We decided to go to the Mouse Trap.
 14 Q. Whose idea was that?
 15 A. I don't recall exactly.
 16 Q. What were you going to do at the Mouse Trap?
 17 Did you talk about that?
 18 A. Um -- have a drink. Play some pool.
 19 Q. And how did you get to the Mouse Trap? Did you
 20 walk or drive?
 21 A. We walked.
 22 Q. And do you know what time it was that you
 23 arrived at the Mouse Trap?
 24 A. I do not.
 25 Q. Do you know how long you stayed?

1 A. Um -- like, half hour, minutes.
 2 Q. And during that time at the Mouse Trap what did
 3 the two of you do?
 4 A. We played a game of pool and drank.
 5 Q. What did you drink?
 6 A. I had a shot of tequila, and, like, the neck of
 7 a Corona.
 8 Q. And could you just tell us, for those who don't
 9 know, what you're talking about.
 10 A. Like the neck of the beer of the bottle.
 11 Q. So a swallow or two of a beer inside the neck?
 12 A. Yeah.
 13 Q. What happened to the rest of that beer?
 14 A. I just left it on the table.
 15 Q. On the pool table or what?
 16 A. No. The table we were sitting next to the pool
 17 table.
 18 Q. What did Mr. Cook have to drink?
 19 A. He had a shot, too, after that. I'm not
 20 entirely sure what he drank.
 21 Q. A shot of tequila?
 22 A. Correct.
 23 Q. All right. And he -- what did you say? I
 24 didn't quite catch that end. Did he have a beer or not?
 25 A. I'm not entirely sure what he drank after that

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1 we never talked about it again after we left.
 2 Q. Was Eli the one that you had lived with before?
 3 A. Uh-huh.
 4 Q. And he lived in Spirit Lake?
 5 A. She.
 6 Q. She? Okay.
 7 A. Yes.
 8 Q. Did she -- when the two of you -- when you and
 9 your boyfriend were living with Eli, was Eli with Mr.
 10 Cook? Boyfriend/girlfriend?
 11 A. No.
 12 Q. Was that residence in Spirit Lake?
 13 A. No. It was in Coeur d'Alene.
 14 Q. Okay. And you said that there were two
 15 bedrooms in that apartment. Who slept in which bedrooms?
 16 A. Me and Ryan slept in one. Eli slept in the
 17 other one.
 18 Q. Where did Mr. Cook sleep?
 19 A. On the couch.
 20 Q. So you talked about maybe going there, but
 21 something -- you changed your mind at some point?
 22 A. Yeah. We just didn't go out there.
 23 Q. Okay. Were you going to make that decision
 24 after you went to your hotel room and talked? Or was that
 25 going to be something you did after you left the Mouse

1 or if he drank anything.
 2 Q. Okay. And so you played how many games of
 3 pool?
 4 A. One.
 5 Q. And was it at the conclusion of that game of
 6 pool that you decided to leave? Or did you stay around
 7 after that?
 8 A. We left a little bit after that.
 9 Q. During that time that you were in the bar, pool
 10 hall, did you make any sexual advance towards Mr. Cook?
 11 A. No.
 12 Q. Did he make any towards you?
 13 A. No.
 14 Q. Did you kiss him?
 15 A. No.
 16 Q. Did you sit in his lap?
 17 A. No.
 18 Q. Now, after you left the Mouse Trap, what did
 19 you two do?
 20 A. Went back to the motel room.
 21 Q. All right. And did you have a discussion about
 22 what you were going to do when you went back to the hotel
 23 room?
 24 A. We had -- at the bar we had talked about maybe
 25 going and picking up our friend Eli from Spirit Lake, but

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1 Trap?
 2 A. I don't know. We discussed with her that we
 3 were going to pick her up. Then we just didn't later on.
 4 Q. Okay. So you returned to your hotel room with
 5 Mr. Cook?
 6 A. Yes.
 7 Q. And what did the two of you talk about?
 8 A. After we got back I don't know. Same thing we
 9 had been talking about. Just what we had been up to, I
 10 guess.
 11 Q. And how were you feeling as far as from the
 12 shot of tequila that you had? The beer that you had.
 13 A. I was little a buzzed.
 14 Q. Did you have your wits about you?
 15 A. Yeah.
 16 Q. You were intoxicated?
 17 A. No.
 18 Q. How did Mr. Cook appear? Did he appear any
 19 different?
 20 A. Not really, no.
 21 Q. And when you returned to the hotel room and you
 22 were talking again, did you sit in the same places you've
 23 indicated for us? Or were they different?
 24 A. The same.
 25 Q. All right. And your back was to the wall?

1 A. Yeah. I was kind of towards the middle of the
 2 bed more.
 3 Q. Okay. So your position this next time was more
 4 towards the center of the bed? Can you approach the board
 5 and draw that for us. I'll have you use -- we'll use the
 6 red here to show us where you were that next time.
 7 (Witness draws diagram on board.)
 8 Q. Was your back still situated against the wall?
 9 A. Yes.
 10 Q. All right. At some point in that discussion
 11 did he come over to the bed?
 12 A. Yeah.
 13 Q. How long had you been talking when he moved
 14 over?
 15 A. I don't know. Twenty minutes. Maybe, a half
 16 hour.
 17 Q. Okay. Was there anything that was going on
 18 your conversation that led up to him moving?
 19 A. No.
 20 Q. Thinking back on your discussion, was there
 21 anything that he said or you said before he moved?
 22 A. Um -- I don't recall exactly.
 23 Q. And so when he moved, where did he move to?
 24 A. Where the black "X" is.
 25 Q. All right. On the bed?

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1 A. Yeah.
 2 Q. Where you had first been sitting earlier?
 3 A. Um-hum.
 4 Q. And was his back to the wall?
 5 A. Yeah.
 6 Q. Did he say anything when he moved, like, "I
 7 want to change where I'm sitting" or anything like that?
 8 A. Not that I recall.
 9 Q. And after he moved, did he make any type of
 10 physical contact with you?
 11 A. Yeah. He put his hand on my leg.
 12 Q. How long had he been sitting there when he did
 13 that?
 14 A. Not long.
 15 Q. Less than a minute?
 16 A. Yeah.
 17 Q. Had the two of you continued talking when he
 18 moved?
 19 A. No.
 20 Q. Had the two of you continued talking between
 21 the time he moved over there and he put his hand on your
 22 leg?
 23 A. I don't recall exactly.
 24 Q. How did he make you feel when he put his hand
 25 on your leg?

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1 A. Kind of weird. So I scooted over and moved his
 2 hand off my leg.
 3 Q. You scooted over away from him?
 4 A. Towards, yeah.
 5 Q. Still along the wall of the bed, though?
 6 A. Yeah. And then I started to get up.
 7 Q. Okay. What distance did you move away from
 8 him?
 9 A. To the other side of the bed.
 10 Q. Okay. So in feet? Inches? How far would you
 11 say that was?
 12 A. About a foot, maybe. I don't know.
 13 Q. About how far?
 14 A. Like, a foot or something.
 15 Q. Okay. Now, can you describe for us how you
 16 removed his hand from your leg.
 17 A. I took my hand and moved it off.
 18 Q. Which hand was he putting on which leg?
 19 A. The right hand on my left leg.
 20 Q. And which part of your leg?
 21 A. My upper leg. My thigh.
 22 Q. Upper thigh? Lower thigh?
 23 A. My middle.
 24 Q. Did you say anything to him when you removed
 25 his hand?

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1 A. No.
 2 Q. Did you say anything to him about having a
 3 boyfriend?
 4 A. Yes. Shortly after that, yeah.
 5 Q. Okay. Shortly after that meaning shortly after
 6 you removed his hand?
 7 A. Yeah.
 8 Q. What did you say to him?
 9 A. I said: "I have a boyfriend."
 10 Q. Why did you tell him that?
 11 A. Because he started pulling me down, back down
 12 on the bed.
 13 Q. So he was pulling you back down when you said
 14 that?
 15 A. Yep.
 16 Q. Why did you tell him -- why did you think you
 17 having a boyfriend was relevant?
 18 A. Because he was pulling back down on the bed.
 19 Q. Did you think that he was wanting to be
 20 intimate with you?
 21 A. Yeah.
 22 Q. And had you told him before that you had a
 23 boyfriend?
 24 A. He knew I had a boyfriend.
 25 Q. Okay. So in telling him that you had a

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1 boyfriend, what was your intention telling him that?
 2 A. I don't know. I don't know. That I didn't
 3 want to do anything, I guess. Not have his hand on my leg
 4 or him grabbing me.
 5 Q. In your conversations that you had with Sean
 6 from the liquor store to that evening, had you talked
 7 about -- you said you were talking about what was going
 8 on. Did you talk about your boyfriend?
 9 A. Yeah.
 10 Q. What did you tell him about your boyfriend?
 11 A. We talked about what he was doing.
 12 Q. Did you tell him that your boyfriend was out of
 13 town?
 14 A. Yes.
 15 Q. Did you tell him anything specifically about
 16 how long he was going to be gone?
 17 A. Yeah.
 18 Q. And did you talk to him about any problems that
 19 you were having with your boyfriend?
 20 A. I don't recall.
 21 Q. Were there any problems with you and your
 22 boyfriend at that time?
 23 A. Um -- yeah.
 24 Q. Do you recall whether you would have shared
 25 those with Mr. Cook or not?

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1 Q. And how was his body positioned? Was it still
 2 on the bed at this point?
 3 A. Yeah.
 4 Q. Where did he grab you on your leg?
 5 A. The same part of my leg, like, my middle.
 6 Q. So he reached around to the front, or was it --
 7 A. Yeah. He was kind of sitting, like, getting up
 8 at the same time, like, on his knees.
 9 Q. Okay. How hard did he pull on that leg with
 10 that hand?
 11 A. Pretty hard. Made me sit back down.
 12 Q. At the point that you were sitting back down on
 13 the bed, did he do anything else with his hands?
 14 A. Yeah. He grabbed my other leg with his other
 15 hand.
 16 Q. So I kind of -- maybe, you can describe for us
 17 how he got from --
 18 A. He was sitting beside me. And I was going to
 19 sit up. And he grabbed my leg and got on his knees at the
 20 same time pulling me down. And he grabbed my other leg.
 21 And he's up on his knees. And then he pulled me down onto
 22 the bed.
 23 Q. At that point that he's on his knees and he's
 24 holding both of your legs, is he pulling them down to the
 25 bed?

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1 A. I t have.
 2 Q. Now, describe for us, you say you got up or you
 3 started to get up.
 4 A. Uh-huh.
 5 Q. Describe for us what you did.
 6 A. I slid toward the end of the bed and started to
 7 get up off the bed.
 8 Q. Okay. So you slid over. If you were on the
 9 far end, did you slide over to the side that was facing
 10 the table?
 11 A. No. The side by the wall.
 12 Q. The side by the wall. Okay. So the side
 13 furthest from the table.
 14 A. Yes.
 15 Q. Okay. Can you describe how he moved on that
 16 bed.
 17 A. Kind of, like, leaned over towards me.
 18 Q. How did he pull you? What was the first
 19 physical contact you felt?
 20 A. Grabbed my leg.
 21 Q. Do you remember with which leg he grabbed?
 22 A. Yeah. The same leg, my left leg.
 23 Q. Okay. Do you know which hand he used to grab
 24 your leg?
 25 A. His right.

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1 A. He's pulling me down on the bed.
 2 Q. And when he pulled you, are you still sitting
 3 or --
 4 A. No. I was laying down because he pulled me all
 5 the way down.
 6 Q. Okay. Where were his knees in relation to the
 7 rest of your body? Was he between your legs? On the side
 8 of them?
 9 A. He was pulling me down on the side.
 10 Q. So he was pulling you down. And you were on
 11 your back.
 12 A. Yeah. They were to the side.
 13 Q. To which side of you?
 14 A. The left side.
 15 Q. All right. And how long did he hold you down
 16 by your legs?
 17 A. Um -- not long once I was laying down.
 18 Q. Did you say anything to him during this
 19 besides, "I have a boyfriend"?
 20 A. No.
 21 Q. Was that after you said you had a boyfriend?
 22 A. Yeah. And I said: "No, Sean. I have a
 23 boyfriend, and no."
 24 Q. And did he say anything in response?
 25 A. No.

1 Q. Did you see his face at this point?
 2 A. I don't really recall.
 3 Q. Okay. So once you fall on your back, did he
 4 move his body? His hands any?
 5 A. Yeah.
 6 Q. Tell us where his hands went next.
 7 A. Um -- he had he moved his knee towards the
 8 outside of my legs and his arm across my chest.
 9 Q. Which arm was across your chest?
 10 A. The right one, I believe.
 11 Q. What was he doing with his left hand?
 12 A. He got into my pants.
 13 Q. What kind of pants did you have on?
 14 A. Jeans.
 15 Q. And did you have underwear on?
 16 A. Yes.
 17 Q. Did you say anything to him when he was trying
 18 to unbutton your jeans?
 19 A. "No."
 20 Q. You said, "No?"
 21 A. Yes. I said, "No."
 22 Q. And did he say anything in response?
 23 A. No.
 24 Q. Did he slow down or stop his efforts?
 25 A. No.

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1 Q. Okay. Where did they go?
 2 A. I don't know exactly.
 3 Q. And let's go back to when you originally had
 4 sat down on this bed. Was the bed made?
 5 A. Yes.
 6 Q. Were there pillows on it?
 7 A. Yes.
 8 Q. How many pillows would you say were on it?
 9 A. Two.
 10 Q. And had it been made up by the maid service
 11 beforehand?
 12 A. No. I made it.
 13 Q. At some point during this event, did the
 14 pillows come off the bed?
 15 A. Before this event?
 16 Q. During this incident.
 17 A. Yeah.
 18 Q. Okay. What about the cover sheets on the bed?
 19 A. Yes.
 20 Q. All of them?
 21 A. Everything.
 22 Q. Where did they wind up?
 23 A. On the floor.
 24 Q. All right. On which side of the floor?
 25 A. I don't know exactly.

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1 Q. What did he do next?
 2 A. Unbuttoned my pants and took them off.
 3 Q. Did you try to do anything to keep your pants
 4 from coming off of your legs?
 5 A. I was trying to hold onto them.
 6 Q. Were your hands at this point free?
 7 A. Somewhat. I mean, like, he had his arm across
 8 my chest right here.
 9 Q. Okay. Was that restricting your arm movement?
 10 A. A little bit, yeah.
 11 Q. How hard was he pressing on your chest?
 12 A. Pretty hard. I couldn't sit up.
 13 Q. Okay. Did it --
 14 A. I couldn't get up.
 15 Q. Did it affect your air, your breathing?
 16 A. A little bit.
 17 Q. And how long did it take -- guesstimate for us
 18 -- for him to get your pants and your underwear off.
 19 A. I don't know. A couple of minutes, maybe.
 20 Q. And did he take your pants and your underwear
 21 completely off or part off?
 22 A. Yes.
 23 Q. Okay. And were they in one movement? Like,
 24 the pants and the underwear together?
 25 A. Yeah.

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1 Q. So after he removed your pants, can you tell us
 2 what happened at that point.
 3 A. He unbuttoned his pants.
 4 Q. Huh?
 5 A. He unbuttoned his pants.
 6 Q. He unbuttoned his pants?
 7 A. Yeah.
 8 Q. What was he wearing?
 9 A. Jeans.
 10 Q. How is he positioned at this point?
 11 A. Same position with his arm across my chest.
 12 Q. And his knees were still to the side of you?
 13 A. All to the side. One on each side.
 14 Q. One on each side of you.
 15 A. Um-hum.
 16 Q. Okay. And did he remove his jeans completely?
 17 A. I don't believe so.
 18 Q. Did he have underwear on?
 19 A. I don't know exactly.
 20 Q. But do you remember specifically seeing him
 21 unbuttoning his jeans?
 22 A. Yeah, starting to.
 23 Q. Okay. And what happened next?
 24 A. He penetrated me.
 25 Q. With his penis?

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1 A. Yeah.
 2 Q. At some point did he change from that position?
 3 A. Yeah. Shortly after.
 4 Q. And can you describe for us how he changed your
 5 position.
 6 A. Rolled me over to my stomach.
 7 Q. How did he do that? What part of your body did
 8 he touch to roll you over?
 9 A. I don't recall exactly.
 10 Q. Were you saying anything during this time?
 11 A. I don't know.
 12 Q. Did you need a minute?
 13 A. Yeah.
 14 MS. GARDNER: Can we take a short break?
 15 THE COURT: We can take our afternoon recess at
 16 this point if you think it appropriate.
 17 MS. GARDNER: Okay.
 18 MR. HULL: Yes, Your Honor.
 19 THE COURT: Yes. We'll do that. You may step
 20 down.
 21 Members of the Jury, we will be in recess now
 22 until tomorrow morning.
 23 Again, do not talk about the case with anyone.
 24 Don't form an opinion or express an opinion about it. We
 25 will begin testimony tomorrow morning at 8:30 in the

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1 are in recess on this matter?
 2 MS. GARDNER: I just have an evidentiary
 3 question. As far as our next two items that I'm going to
 4 be submitting with this witness's testimony -- um --
 5 marking it or not marking it? Taking it back to my
 6 office? Or, I mean, I don't know if defense counsel would
 7 prefer I put it into the custody of the Court at this
 8 point or --
 9 THE COURT: The Court's preference would be, if
 10 it hasn't been marked yet or identified by any witness,
 11 for you to keep it and bring it back tomorrow.
 12 MS. GARDNER: I'm fine with that.
 13 THE CLERK: Wednesday.
 14 THE COURT: Wednesday.
 15 MS. GARDNER: Wednesday. Right. Okay.
 16 MR. HULL: Your link in the chain of custody
 17 will not be challenged.
 18 THE COURT: Very well. Anything from the
 19 defense?
 20 MR. HULL: No, Your Honor.
 21 THE COURT: All right. We are in recess until
 22 Wednesday at 8:30.
 23 (The proceedings were recessed at 3:16 p.m. to
 24 reconvene on November 5, 2008.)
 25 ---oOo---

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1 morning or close to that as we can.
 2 MR. HULL: Your Honor, tomorrow is election
 3 day.
 4 THE COURT: Thank you for that. Wednesday
 5 morning. I forgot about that. Thank you. No court
 6 tomorrow. Wednesday morning at 8:30 in the morning. So
 7 thank you for that.
 8 You are, therefore, excused.
 9 MR. HULL: Sorry to interrupt you, Your Honor,
 10 but I thought --
 11 THE COURT: Thank you for doing so. That was
 12 important.
 13 MR. HULL: -- I should.
 14 THE COURT: Thank you.
 15 MR. HULL: That made me nervous.
 16 THE COURT: No. Thank you for doing that.
 17 Persons who are in the gallery watching the
 18 trial, please be careful that you are not making any
 19 demonstrations that you agree with testimony, disagree
 20 with testimony in any way. There was a little too much
 21 head nodding at things you agree with and shaking at
 22 things you don't agree with. And that's inappropriate in
 23 court. So please be careful about that in future
 24 proceedings.
 25 Is there anything else from counsel before we

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1 ///
 2 (DAY NO.: 2 - November 5, 2008, 8:51 a.m.)
 3 P R O C E E D I N G S
 4 THE COURT: We are on the record in First
 5 District Court. This is the continuation of State v.
 6 Cook.
 7 The Jury is not present, although, Juror No. 12
 8 is present. And I've asked our good Bailiff to bring
 9 Juror No. 12 in. Because Juror No. 12 I have been
 10 informed that you've now determined that you recognized an
 11 observer at court that was watching.
 12 JUROR NO. 12: Two.
 13 THE COURT: Two of them watching court
 14 proceedings.
 15 I had indicated to the Bailiff that those
 16 individuals were not going to be witnesses, and,
 17 therefore, your knowledge of them probably would not make
 18 any difference. But I've been informed that you are
 19 feeling a bit of discomfort in terms of being able to be a
 20 fair or impartial juror based on your knowledge of those
 21 persons who are watching in court.
 22 JUROR NO. 12: That's correct.
 23 THE COURT: You don't have to go into great
 24 detail, but what is it that's making you feel
 25 uncomfortable by the fact that you know observers?

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1 JUROR NO. 12: I knew them socially. I knew
 2 them and liked them. And they're here with the Defendant
 3 supporting him, obviously, so that kind of puts some
 4 pressure on me knowing that they obviously care about him.
 5 And I know them and like them so --
 6 THE COURT: Well, how do you feel about your
 7 ability to set aside that friendship for these observers
 8 and their apparent support of the Defendant? Set that
 9 aside and being able to decide the case just on the facts
 10 and on the law as you've heard in court?
 11 JUROR NO. 12: I would like to say that I can,
 12 but I don't know that I can.
 13 THE COURT: Does the State have any questions
 14 for Juror No. 12?
 15 MS. GARDNER: Um -- has the facial expressions
 16 or the performance of any these people observing affected
 17 your ability to --
 18 JUROR NO. 12: Yes. Yes. I mean, they're
 19 making eye contact with me. And, yeah, it makes me
 20 uncomfortable.
 21 MS. GARDNER: Okay. I don't have any other
 22 questions.
 23 THE COURT: Does the defense have any
 24 questions?
 25 MR. HULL: No, Your Honor.

1 THE COURT: All right. Mr. Hull, you wanted
 2 to --
 3 MR. HULL: Your Honor, I would like to inquire
 4 specifically what was said in front of the other jurors?
 5 I mean, did you say that these people here made you
 6 uncomfortable?
 7 JUROR NO. 12: No. No.
 8 MR. HULL: I just need to know exactly what was
 9 said in front of the other jurors.
 10 JUROR NO. 12: What I told Mike was I have a
 11 concern. I know some people who are here in observing.
 12 And I wanted to make him aware so that anybody who needed
 13 to know would know. But I didn't explain the nature or
 14 the way that I knew them or how it made me feel at all.
 15 MR. HULL: But you believe you used the word
 16 "concerned"?
 17 JUROR NO. 12: Yes.

18 MR. HULL: Okay. Thank you.
 19 THE COURT: So you can be excused.
 20 JUROR NO. 12: Okay.
 21 THE COURT: And please do not mention anything
 22 to the other 12 about what has gone on in the courtroom or
 23 anything about this.
 24 JUROR NO. 12: Absolutely. Thank you.
 25 THE COURT: Okay. I'll let you make a further

1 THE COURT: I'm going to go ahead and excuse
 2 Juror No. 12. It's important that you be able to make
 3 these decisions based just on the facts. And I very much
 4 appreciate you bringing this up. This is certainly no
 5 criticism of you by excusing you. In fact, I applaud you
 6 for doing it this way.
 7 JUROR NO. 12: Thank you.
 8 THE COURT: One thing I do have ask to you is:
 9 Have you spoken about your knowledge of these individuals
 10 to any of the other jurors?
 11 JUROR NO. 12: When I told Mike the other
 12 jurors were present, yes.
 13 THE COURT: All right. So you told our Bailiff
 14 that you knew these people and other jurors heard you say
 15 that?
 16 JUROR NO. 12: Yes.
 17 THE COURT: Have you expressed in any way that
 18 you know these people and you like them and they're
 19 obviously for the Defendant?
 20 JUROR NO. 12: No.
 21 THE COURT: Okay. So as far as you know the
 22 other jurors just simply know that you know some
 23 observers.
 24 JUROR NO. 12: Yeah, they don't know the nature
 25 of anything.

1 record here.
 2 Anything you want to say now, Mr. Hull?
 3 MR. HULL: After not standing up. Sorry. I
 4 meant to.
 5 Your Honor, with what Ms. Gardner is saying and
 6 you're saying about what the observers have been saying
 7 and doing, like, maybe some nodding and inappropriate
 8 conduct, and with this juror being excused after saying
 9 she has a concern about people in the gallery, it seems to
 10 me that that could prejudice my client in the fact that
 11 they think that she associates with dangerous people.
 12 Well, that's not what happened here certainly as far as
 13 why this juror wanted to be excused. She wanted to be
 14 excused because she knew and liked these people. But my
 15 concern is that her expression of a concern and her being
 16 excused from the Jury is going to make -- potentially make
 17 the remaining jury feel that she was afraid of the people

18 that are here in support of Mr. Cook. And to me that
 19 seems to be potentially very prejudicial to Mr. Cook if
 20 that's the interpretation that they're left with.
 21 I don't know exactly how to remedy that unless
 22 the Court -- because I don't know that informing the Jury
 23 that she knew them and liked them is fair to the State.
 24 Because it would seem to me that, then, the opposite
 25 effect is in play that, well, you know, there's nice

1 people he hangs out with. So I feel that there should be
2 a mistrial declared because I don't know what sort of
3 impact that would have on a jury, but I'm very concerned
4 that if it's just left with no explanation that the Jury
5 could may well conclude she was excused out of fear. If
6 it's explained that she was excused because she felt
7 partial to people who know my client, then I don't see
8 that as a -- well, I would be fine with that from my
9 perspective as an attorney for my client. I just don't
10 think as far as a fair tribunal that would be appropriate.
11 Because then the State would be in a similar situation
12 where it has information -- extra evidence information.
13 That's extra, Judge, that's being presented to the Jury.
14 So I would request a mistrial in light of the comment that
15 was made in front the Jury panel that is impaneled to try
16 Mr. Cook.

17 THE COURT: Here's what the Court intends to
18 do. And then I'll ask for the parties input on that. I
19 intend to advise the jurors that Juror NO. 12 has been
20 excused. That she had been excused in their presence.
21 She did indicate a knowledge of observers in court. And
22 that knowledge has created a concern about her ability to
23 decide the case just on the facts and the law.

24 They have been previously instructed that
25 anything they see and hear in court other than from a

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1 there's any prejudice that warrants any type of mistrial
2 here. And I think that the instructions the Court intends
3 to give is acceptable so --

4 THE COURT: All right. Motion for mistrial
5 will be denied. And that instruction I'm going to
6 verbally give that particular instruction to the jurors.

7 MR. HULL: I wasn't requesting that it be a
8 written instruction given to the Jury. I just wanted to
9 make sure that what you said you were going to say is what
10 you actually said because it was quite long. And I just,
11 you know, was thinking it might be helpful to Your Honor
12 to have it written down what you're going to say and let
13 us have a copy of that. So we are clear what was said and
14 that it is what we discussed what was going to be said.

15 THE COURT: All right. I'll do my best to
16 repeat it in the same way I at least thought out loud
17 about it.

18 Any reason to not bring the Jury in?

19 MS. GARDNER: No, Your Honor.

20 MR. HULL: No, Your Honor.

21 (The Jury entered the Courtroom.)

22 THE COURT: The record should reflect that the
23 Jury has returned and are in their appropriate seats. And
24 I hope you had a good election day off and are ready to
25 resume.

1 witness or a exhibit is to be disregarded by them. The
2 concern that Juror No. 12 has expressed may have been a
3 concern in favor of the Defendant. It may have been a
4 concern against the Defendant. They are not to speculate
5 which of those it was. It just impacted her ability to be
6 an impartial juror. And they are to disregard anything
7 they have seen by observers and disregard -- and not
8 speculate about any reasons for the dismissal of Juror No.
9 12.

10 Does that satisfy the Defendant?

11 MR. HULL: Yes, Your Honor -- um -- is there
12 going to be a written instruction you're going to read so
13 that's what we're seeing?

14 THE COURT: I'm simply going to recite that to
15 the Jury. I don't intend to put it in written form, but I
16 think we have a record of it now or we will.

17 The State's position?

18 MS. GARDNER: Judge, I don't think that putting
19 it in writing would call additional attention to -- um --
20 what happened. And I really don't think that's called
21 for. And the jurors here have observed the same thing
22 that Juror No. 12 observed. And so, I mean, it's a -- I
23 don't think there's anything in her words that she was
24 concerned because she knew some of the observers says
25 anything to the other jurors. So I don't feel that

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1 We had a legal matter to take up before you
2 came in. You will note that Juror No. 12 has been excused
3 from this jury panel. Juror No. 12 apparently in the
4 presence of other jurors indicated that she knew some
5 observers that were in the courtroom during Monday's
6 testimony. She has expressed to the Court that the
7 knowledge of those observers created a concern for her in
8 terms of her ability to be able to decide this case just
9 on the facts and on the law that are presented in court.
10 Now, that concern, you should disregard what that concern
11 may have been. It may have been for the Defendant. It
12 may have been against the Defendant. And you are
13 instructed that you are not to speculate what that concern
14 may have been, just that it impacted her ability to be an
15 impartial juror.

16 You have previously also been instructed that
17 anything that occurs in the Court other than witness
18 testimony or exhibits that are admitted are to be
19 disregarded by you as well. So whatever may have been
20 seen in court other than from witness testimony or on an
21 exhibit is not evidence. And it's not to be considered by
22 you or have any part in your deliberations.

23 All right. Is the State ready to continue its
24 examination?

25 MS. GARDNER: The State is ready.

1 THE COURT: If you would call the witness in,
 2 please.
 3 MS. GARDNER: Danielle.
 4 THE COURT: Ms. Whitten, if you'd please come
 5 forward and resume your seat in the witness stand.
 6 You're reminded that you're still under oath
 7 from the oath that you took on Monday.
 8 Ms. Gardner, you may inquire.
 9 MS. GARDNER: Thank you.
 10 DIRECT EXAMINATION (Continued)
 11 QUESTIONS BY MS. GARDNER:
 12 Q. Danielle, I'm going to go back a little bit.
 13 I'm not going to start from where I left off two days ago.
 14 Can you start by -- we've been talking about
 15 Sean Cook. And so could you start by identifying for us
 16 -- for the Jury, where he's seated -- if he's in this
 17 courtroom, where he's seated and what he's wearing.
 18 A. Yeah. Right there with the white, long-sleeved
 19 shirt with the tie.
 20 Q. Okay. Now, this Motel 6 that you were at, this
 21 room, is that in Coeur d'Alene?
 22 A. Yes.
 23 Q. Is it Kootenai County, Idaho?
 24 A. Yes.
 25 MS. GARDNER: May I approach the Clerk.

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1 THE COURT: You may.
 2 MS. GARDNER: You might want to staple these
 3 together.
 4 THE CLERK: And make it one?
 5 MS. GARDNER: Yes.
 6 May I approach the witness.
 7 THE COURT: You may.
 8 BY MS. GARDNER:
 9 Q. I'm showing you four pages of pictures. Could
 10 you tell us if you recognize those pictures. Just look
 11 through all four pages before you respond.
 12 A. This is the motel room.
 13 Q. Okay. Are those pictures an accurate depiction
 14 of the hotel room and its contents that evening of this
 15 incident?
 16 A. Yes.
 17 Q. All right. Do you know when those photographs
 18 were taken?
 19 A. Um -- what time?
 20 Q. No. When, like, when in this series? Was it
 21 taken before the incident or after the incident?
 22 A. After.
 23 Q. All right. That same evening?
 24 A. Yes.
 25 Q. Were they taken before or after or during the

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1 time you that you were at the hospital?
 2 A. Um -- they were taken when I was on my way to
 3 the hospital, I believe.
 4 MS. GARDNER: Okay. I move for the admission
 5 of Exhibit 1 at this time. Do you need to see this?
 6 MR. HULL: Your Honor, I would like to voir
 7 dire in aid of objection if I may.
 8 THE COURT: You may.
 9 MR. HULL: And may I approach the witness.
 10 THE COURT: You may.
 11 VOIR DIRE EXAMINATION
 12 QUESTIONS BY MR. HULL:
 13 Q. Ms. Whitten, I'm showing you the front sheet of
 14 these that has four. Is that the condition the motel room
 15 was in when you left the motel?
 16 A. No.
 17 Q. And, again, the second page of four, was that
 18 the condition the motel room was in when you left?
 19 A. The bed, no.
 20 Q. The bed, it was different?
 21 A. Yes.
 22 Q. Okay. What about the trash can and the
 23 cabinets?
 24 A. I'm pretty sure those were the same.
 25 Q. And there's a third page here with an ashtray

1 and a table and some towels and a bathroom sink. Are
 2 those the condition of the motel room when you left?
 3 A. Yes.
 4 Q. Now, the last page is the bed. Is that the
 5 condition the bed was in when you left?
 6 A. Yes.
 7 Q. And the one in the bathroom, the way it was
 8 when you left?
 9 A. Yes.
 10 MR. HULL: Thank you for your time.
 11 Your Honor, I would object to the front page
 12 being admitted because she indicates that is not the
 13 condition the motel room was in when she left. And I
 14 would object to the top two pages of the bed being
 15 admitted because she indicates those aren't the condition
 16 of the bed when she left. I have no objection to those
 17 four pictures. Because she indicates those are the way it
 18 was. And I have no objection to the photos of the bed,
 19 which she indicates that was the condition of the bed when
 20 she left.
 21 THE COURT: All right. I'm going to excuse the
 22 Jury for just a moment. This should take just a moment.
 23 I want to hear legal argument on this issue. So don't get
 24 too comfortable. It shouldn't take too long.
 25 (The Jury left the Courtroom.)

1 THE COURT: All right. Before I hear legal
2 argument, though, I wanted to also ask our court security
3 that no one be allowed to sit in the front two -- on
4 either section in the front rows. That we leave those
5 open, please. If you could just move back one row. I
6 forgot to bring that up. And I didn't want to do that
7 with the Jury present. Sit wherever you would like, just
8 not in the front rows.

9 Okay. And now let's hear quick argument about
10 this admissibility of all of these photographs in
11 Exhibit 1.

12 MS. GARDNER: Um -- obviously, Judge, the bed
13 in that condition has been stripped down for evidence
14 purposes. The defense does not have an objection to the
15 second page top -- well, I'm sorry. Bottom two. Thank
16 you -- um -- I'm sorry. Let me go back here.

17 This bed is of the layers that were taken off
18 and the photographs were taken. If we see the very last
19 page of these photographs, though, Ms. Whitten was present
20 when the photographs were being taken. She's right here
21 in the picture of the first photograph. So she had to
22 have been present while the photographs were being taken.
23 And she has testified that this bed was in that same bed
24 position and condition that day. And then it's obvious
25 that the officer who took the pictures just simply removed

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1 MR. HULL: So I'm not just trying to delay this
2 until a later date. I just think the ones that portray
3 the way it was when Ms. Whitten left are relevant. The
4 ones that don't aren't.

5 THE COURT: When the first foundation is laid,
6 you can make that objection. And I'll rule on it at that
7 point.

8 MR. HULL: Thank you, Your Honor.

9 THE COURT: All right. Bring the Jury back in,
10 please.

11 (The Jury entered the Courtroom.)

12 THE COURT: The Jury has returned and is in
13 their appropriate spots.

14 Exhibit 1 is not admitted at this time and
15 subject to further possible foundation.

16 MS. GARDNER: Could we approach, Judge.

17 THE COURT: You may.

18 ~~(Bench conference had off the record.)~~

19 BY MS. GARDNER:

20 Q. Danielle, I have admitted the photographs that
21 I showed you previously as Exhibit 1. Can you tell us
22 whether or not those photographs are depicting the
23 condition of the hotel room and the items inside of that
24 hotel room at the time you left the hotel room to go to
25 the hospital?

1 one set of () cover, then the sheet, and the cover on the
2 mattress and then exposed finally the mattress itself. So
3 I'm not thinking this is so far removed from the
4 condition. It wasn't like any of the evidence was moved
5 or anything. It's just the layers were taken off. And
6 I'll have the officer also further explain that
7 progression.

8 THE COURT: We can do two things. I'm not
9 going to allow Page 1 and the top two pictures of Page 2
10 at this point. You could reserve admitting that evidence
11 until the officer lays the foundation for Page 1 and the
12 top two pictures of Page 2 if you want to.

13 MS. GARDNER: Okay. I can do that.

14 THE COURT: All right. So Exhibit 1 is not
15 admitted at this point subject to further foundation.
16 (Plaintiff's Exhibit No. 1 Rejected.)

17 MR. HULL: And, Your Honor, just to make a
18 record now to, perhaps, save time later. After things
19 have been moved around and stripped down for evidentiary
20 purposes, even if that foundation is laid, I'm going to
21 continue to object to those being admitted as evidence in
22 this matter because they don't accurately portray the room
23 as it was when the people involved in this accusation were
24 there.

25 THE COURT: All right.

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1 A. Yes.

2 THE COURT: For the record are these still
3 being called Exhibit 1?

4 MS. GARDNER: Yes.

5 THE COURT: And Exhibit 1 now was previously
6 the bottom two pictures of Page 2 and then Pages 3 and 4
7 is now Exhibit 1?

8 MS. GARDNER: Yes.

9 THE COURT: All right. Go ahead.

10 MS. GARDNER: I move for the admission of
11 Exhibit 1 at this time.

12 THE COURT: Any objection?

13 MR. HULL: No, Your Honor.

14 THE COURT: Exhibit 1 is admitted.

15 (Plaintiff's Exhibit No. 1 was admitted.)

16 MS. GARDNER: I need to refer to some blowups
17 of these pictures -- um --

18 MR. HULL: Your Honor, could we take up a
19 matter.

20 MS. GARDNER: I'm sorry.

21 MR. HULL: Perhaps, we should take a moment so
22 she can adjust her photo presentation to comply with what
23 the evidence has been.

24 THE COURT: Well, let's see if we can work this
25 out here.

1 MS. GARDNER: I would ti that we might want
 2 to excuse the Jury. I'm not really that --
 3 THE COURT: All right. Members of the Jury,
 4 I'm going to excuse you again for just a moment.
 5 Don't talk about the case or form any opinions
 6 during this break.
 7 (The Jury left the Courtroom.)
 8 MS. GARDNER: Sometimes when I pull this up and
 9 they come up with just, like, a little index. And that
 10 time, apparently, it didn't. I apologize, Judge.
 11 MR. HULL: I believe that anything that comes
 12 up on your screen at this time is going to come up on that
 13 screen from the looks of it.
 14 THE COURT: All right. We're off the record
 15 while we get the technical difficulties squared away.
 16 (Pause in proceedings.)
 17 (The Jury entered the Courtroom.)
 18 THE COURT: All right. The Jury has returned
 19 and is seated appropriately. And we're on the record.
 20 You may continue, Ms. Gardner.
 21 MS. GARDNER: Could we turn the light down a
 22 little bit so it's easier to -- if you could get that
 23 light right there if it's possible.
 24 Thank you, Judge.
 25 DIRECT EXAMINATION (Continued)

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1 BY MS. GARDNER
 2 Q. Danielle, do you recognize this photograph?
 3 A. Yes.
 4 Q. Can you tell us what it is?
 5 A. It's the garbage can in the bathroom.
 6 Q. In the bathroom?
 7 A. Yes.
 8 Q. And what is in that garbage can?
 9 A. Beer bottles.
 10 Q. All right. Were those part of the beer bottles
 11 that you discussed earlier in your testimony that were
 12 consumed that evening between you and Sean?
 13 A. Yes.
 14 Q. And how many beer bottles do you see there?
 15 A. Three.
 16 Q. And you previously testified that you had
 17 consumed some beer, also, at your hotel room. How many of
 18 those beer bottles was from your consumption?
 19 A. Um -- I drank one full one, so one of them.
 20 Q. Okay. Do you know what the other items are in
 21 that trash can?
 22 A. Cans.
 23 Q. All right. Do you know what they're cans of?
 24 A. Beer cans.
 25 Q. And do you know who consumed those beers and

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1 those beer cans?
 2 A. I did.
 3 Q. When did you consume those?
 4 A. The day before.
 5 Q. And between the day before and that evening did
 6 you have the maid service come by?
 7 A. No.
 8 Q. All right. Did you have your trash can emptied
 9 between the day before and that night?
 10 A. No.
 11 MR. HULL: Could I approach this from time to
 12 time to get a good look at it, Your Honor?
 13 THE COURT: You may.
 14 BY MS. GARDNER:
 15 Q. All right. Danielle, do you recognize this
 16 item?
 17 A. Yes.
 18 Q. What is that?
 19 A. A cup.
 20 Q. All right. Is there any significance to that
 21 cup?
 22 A. That was Sean's cup.
 23 Q. It was what?
 24 A. That was Sean's cup.
 25 Q. All right. Where was that cup located?

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1 A. On the table.
 2 Q. Is that the table that you testified about
 3 earlier where he was sitting?
 4 A. Correct.
 5 Q. What was he drinking from that cup?
 6 A. I believe ice.
 7 Q. You previously testified that he had drank a
 8 hard liquor of Crown Royal you think?
 9 A. Correct. I'm not sure if it was that exact
 10 cup.
 11 Q. So it could have been that cup or it could have
 12 been another plastic cup there?
 13 A. Yes.
 14 Q. And he consumed that Crown drink prior to your
 15 going to the Mouse Trap; is that correct?
 16 A. Correct.
 17 Q. And when you returned from the Mouse Trap, do
 18 you remember if he was drinking from a cup?
 19 A. I don't believe so.
 20 Q. So do you believe from the best of your
 21 recollection was that cup used before or after the Mouse
 22 Trap or both?
 23 A. I don't know if that cup was used after.
 24 Before he left he was eating ice out of that cup.
 25 Q. All right. And is this item from the same

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1 table or a different table as the one for?
 2 A. The same table.
 3 Q. Okay. And can you tell us what this is.
 4 A. Ashtray and toilet paper.
 5 Q. Were you using the toilet paper there?
 6 A. Yes.
 7 Q. Was he?
 8 A. No.
 9 Q. What were you using the toilet paper for?
 10 A. Because I was crying.
 11 Q. So this toilet paper was it put there after the
 12 incident?
 13 A. Yes.
 14 Q. What about the cigarettes in the ashtray? Were
 15 those all yours?
 16 A. No.
 17 Q. All right. Tell us what brand do you smoke.
 18 A. I usually smoke Marlboro Lights.
 19 Q. What brand -- um -- was Sean smoking?
 20 A. Yes.
 21 Q. What brand does he smoke?
 22 A. Marlboro Reds, I believe.
 23 Q. Was anybody else smoking in that room?
 24 A. Yeah.
 25 Q. Who?

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1 A. He had smoked when he showed up.
 2 Q. Do you know what brand they smoke?
 3 A. He usually smokes Camels.
 4 Q. Was this ashtray from -- was it empty when Sean
 5 initially came over that evening?
 6 A. No. There was probably one or two in there
 7 before.
 8 Q. Okay. Is this the same table as we have in our
 9 two prior pictures?
 10 A. Yes.
 11 Q. And are you able to tell us from looking at
 12 this picture whether there are caps or metal items there
 13 on that table?
 14 A. Yes.
 15 Q. What are those?
 16 A. The beer bottle tops.
 17 Q. Are you able to tell us from looking at that
 18 picture which beer bottle lid belonged to you and which
 19 belonged to Sean or to somebody else?
 20 A. No.
 21 Q. The chairs here -- um -- can you tell us how
 22 many chairs you see there in the picture?
 23 A. One.
 24 Q. Was there a chair on the opposite side of that
 25 table?

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1 A. Yes.
 2 Q. And can you tell us from looking at this
 3 picture if it was the chair Sean was sitting in?
 4 A. The one that you can see. Yes.
 5 Q. That one.
 6 And was that the same chair he sat in both
 7 before going to the Mouse Trap and after returning?
 8 A. Yes.
 9 Q. Now, have you seen this picture before today?
 10 A. No.
 11 Q. Can you tell us what that is.
 12 A. Towels.
 13 Q. Can you tell us -- let me point here -- what
 14 that is.
 15 A. No. I can't really see anything. It just
 16 looks like towels.
 17 Q. Okay. Were those towels placed by you?
 18 A. Um -- some of them were. I'm not sure if all
 19 of them were, but towels were placed there.
 20 Q. How long was Sean in the bathroom?
 21 A. About ten minutes or so.
 22 Q. Could you hear anything that was going on in
 23 there?
 24 A. No. I was talking on the phone.
 25 Q. Now, what is this a picture of?

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1 A. Like, right there.
 2 Q. You were sitting right there?
 3 A. Yes.
 4 Q. And when he moved onto the bed where did your
 5 position go?
 6 A. I was still, like, right there. Then I scooted
 7 this way.
 8 Q. All right. Were your legs still up on the bed?
 9 A. When I was scooting off?
 10 Q. Right.
 11 A. One of them was off of the bed.
 12 Q. Which one was off of the bed?
 13 A. My right one.
 14 Q. And show us again where you wound up with your
 15 right leg off the bed. Okay. How was your left leg on
 16 the bed? Was it extended fully or bent?
 17 A. No. It was bent.
 18 Q. Point to us which chair he was seated in when
 19 he was talking. All right. Point to us and show us how
 20 he moved onto the bed where he wound up?
 21 A. He sat right there.
 22 Q. Okay. And where were you sitting when he
 23 touched you? Put his hand on your leg? And then after
 24 you lifted his hand up, you said the comment about your
 25 boyfriend to him. And that was when you scooted your

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1 right leg off the bed?
 2 MR. HULL: Your Honor, I would object to the
 3 leading nature of the question.
 4 THE COURT: I'm going to overrule. I think
 5 it's restating the previous testimony, so it's not
 6 suggesting an answer that hasn't already been given.
 7 MR. HULL: I would object that it's cumulative.
 8 THE COURT: Overruled. Go ahead.
 9 BY MS. GARDNER:
 10 Q. All right. Could you show us with the pointer
 11 where when you scooted over to the bed, the beginning
 12 point where Sean was sitting on the bed and which
 13 direction he moved in?
 14 A. He was sitting over here. And he moved this
 15 way.
 16 Q. All right.
 17 A. Towards me.
 18 Q. At the point you testified prior about he was
 19 over you and he put his penis in you. Can you point to us
 20 where you were and where he was.
 21 A. I think we were both about, like, right here in
 22 the middle.
 23 Q. Okay. How did you get from the side of the bed
 24 to that position?
 25 A. He pulled me down.

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1 Q. Okay. Can you show us with the pointer where
 2 he was when he was pulling you down?
 3 A. He was about in the middle and pulling me
 4 towards him.
 5 Q. So at that point when you're in the middle
 6 where are your legs?
 7 A. When he was pulling me down?
 8 Q. When you wound up being pulled over to that.
 9 A. Well, one of them was over here. Then he
 10 grabbed my leg and grabbed my other one and pulled me like
 11 this way.
 12 Q. So you're sort of slanted or diagonal across
 13 the bed corner to corner? And so if you could show us
 14 with the pointer how your body was laying on the bed.
 15 Just draw a line. Okay. All right. So the top part of
 16 the pillow would be your head. And the bottom part would
 17 be your feet?
 18 A. A little bit lower on the bed than that.
 19 Q. And how was his body positioned at that point?
 20 A. Right over me.
 21 Q. Okay. So his head was even with your head?
 22 A. A little bit lower.
 23 Q. At that point when he was removing your jeans
 24 and your underwear, show us where your body was.
 25 A. The same place.

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1 Q. Across like that?
 2 A. Yeah.
 3 Q. Where did your jeans end up when you saw them
 4 next?
 5 A. They were on the floor where my shoe is.
 6 Q. Okay. And were his jeans on the floor when you
 7 or his pants on the floor when you went to go get your
 8 jeans?
 9 MR. HULL: Your Honor, we're beyond the point
 10 of any recapitulation of evidence at this point. And I
 11 would object to the leading nature of the question.
 12 THE COURT: I'm going to overrule on the form
 13 of that question. It was not unduly leading.
 14 THE WITNESS: I don't remember seeing his
 15 pants.
 16 BY MS. GARDNER:
 17 Q. Okay. Were your panties in the same position
 18 or the same place as your jeans or somewhere else?
 19 A. I could not find my panties.
 20 Q. Can you tell us just show us when he exited the
 21 bed which direction did he go to?
 22 A. This way.
 23 Q. So the bathroom --
 24 A. Towards the bathroom.
 25 Q. So the bathroom is where?

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1 A. Right next to the bed on the other side of the
 2 wall.
 3 Q. Show us with the pointer.
 4 Now, we started to talk yesterday about you
 5 said that he had turned you over, flipped you over.
 6 A. Um-hum.
 7 Q. Can you tell us, describe for us, how he turned
 8 you over.
 9 A. Just rolled me over.
 10 Q. Okay. Did he touch any part of your body to
 11 get your body to roll over?
 12 A. Yeah, I don't recall exactly. With my arms.
 13 Q. Your arms?
 14 A. Yeah.
 15 Q. Do you remember whether he touched your neck
 16 anytime during this evening?
 17 A. Yeah, right before.
 18 Q. Right before what?
 19 A. Right before he flipped me over.
 20 Q. How did he touch your neck?
 21 A. Pressing on my neck for a minute.
 22 Q. You're showing us with your hand up against
 23 your neck. Can you show us how he held your neck?
 24 A. (Witness indicated.)
 25 Q. All right. And that was just prior to him

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1 A. Like, straight up and down.
 2 Q. Okay. So a little bit over now towards the
 3 side. And where was his body when you were on your
 4 stomach?
 5 A. Over mine.
 6 Q. Was his head even with your head? Was it
 7 above?
 8 A. I couldn't see.
 9 Q. Was he applying any pressure to you when you
 10 were on your stomach?
 11 A. Yes.
 12 Q. Can you tell us where?
 13 A. The back of my neck and my head.
 14 Q. Can you tell us what he was applying that
 15 pressure with? What part of his body?
 16 A. Not exactly.
 17 Q. What did it feel like? Did it feel pointy?

18 Flat? Hard? Soft?
 19 A. At the time it felt like his hand.
 20 Q. And at other times what did it feel like?
 21 A. Just pressure.
 22 Q. Did it hurt?
 23 A. Yeah, kind of.
 24 Q. On the same scale one to ten, what was the pain
 25 like?

1 turning you over.
 2 A. (No response.)
 3 Q. Is that a yes?
 4 A. Correct.
 5 Q. Did he apply any pressure to your neck in
 6 turning you over?
 7 A. Not while turning me over.
 8 Q. Did he apply pressure to your neck prior to
 9 turning you over?
 10 A. Yes.
 11 Q. Can you describe that pressure for us.
 12 A. It was a lot on the side. More on the front.
 13 Q. Okay. Was it a -- did it hurt?
 14 A. Yes.
 15 Q. Can you describe how -- on a scale of one to
 16 ten, how was the pain?
 17 A. Seven.
 18 Q. Did you say anything to him at that point when
 19 he was applying that pressure?
 20 A. No. I was just scared.
 21 Q. And so somehow you wound up over on your
 22 stomach?
 23 A. Correct.
 24 Q. Can you show us where your body wound up when
 25 you were rolled over on your stomach?

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1 A. Probably about the same, seven.
 2 Q. And did you say anything at that point about
 3 the pain or anything?
 4 A. I couldn't really say anything.
 5 Q. How was your -- was your face into the mattress
 6 on the side?
 7 A. It was in the mattress.
 8 Q. Were you able to breathe?
 9 A. Yeah, a little bit.
 10 Q. Did you have some problems breathing?
 11 A. A little bit.
 12 Q. How long -- well, at that point when you're on
 13 your stomach and he's over you, what was happening?
 14 A. What do you mean?
 15 Q. Did he have -- was he doing anything to you?
 16 A. Yeah.
 17 Q. What was he doing?

18 A. Well, he penetrated me again.
 19 Q. The same as you testified previously?
 20 A. (Witness nods head.)
 21 Q. All right. And how long did that continue?
 22 A. I don't know exactly how long.
 23 Q. Did it seem to you to be less than a minute or
 24 more than a minute?
 25 A. More.

1 Q. Did it seem to you to be more than three
 2 minutes?
 3 A. Yeah, it seemed like a while.
 4 Q. And at some point did he stop that?
 5 A. Yes.
 6 Q. Do you know what caused him to stop?
 7 A. Yeah, he said he had to go to the bathroom.
 8 Q. He said he had to go to the bathroom?
 9 A. (Witness nods head.)
 10 Q. And then what did he do when he said that?
 11 A. He got up and went into the bathroom.
 12 Q. Did you notice -- did you turn and look at him
 13 when he was going into the bathroom?
 14 A. No.
 15 Q. Where were you looking?
 16 A. I was just still laying there until he got up.
 17 And then I got up.
 18 Q. And when you got up, where did you get off of
 19 the bed?
 20 A. On the side.
 21 Q. With the pointer.
 22 A. (Witness indicates.)
 23 Q. You slid over to that side?
 24 A. Right here.
 25 Q. And what was the first thing you did when you

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1 exited the
 2 A. I grabbed my phone.
 3 Q. Okay. Show us where your phone was.
 4 A. It was right there.
 5 Q. That's your cell phone or your --
 6 A. My cell phone.
 7 Q. And when he went into the bathroom did he close
 8 the door or keep it open?
 9 A. Closed the door.
 10 Q. Was that opened when he went in there?
 11 A. I believe so.
 12 Q. Where did you make that phone call?
 13 A. Over on the door, like, over here.
 14 Q. Okay. Did you open -- was the door exiting and
 15 entering the room?
 16 A. Um-hum.
 17 Q. Did you open that door?
 18 A. No.
 19 Q. Were you still -- um -- partially undressed?
 20 A. Yes.
 21 Q. All right. What clothing did you have on at
 22 that point?
 23 A. I had my shirt on at that point. And I had my
 24 pants in my hand.
 25 Q. Had you taken those shoes off prior to this

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1 incident? The beginning?
 2 A. Yes.
 3 Q. What about Sean? Did he have shoes on when he
 4 came into the hotel room?
 5 A. Yes.
 6 Q. Did he take his off?
 7 A. I don't recall.
 8 Q. Do you remember whether he had shoes on when
 9 the incident was occurring?
 10 A. I do not know if he had shoes on or not.
 11 Q. What kind of shoes did he have?
 12 A. Shoes.
 13 Q. Did you remember looking at his shoes?
 14 A. No.
 15 Q. Would you have taken notice of it if it was
 16 something besides tennis shoes?
 17 A. Probably not.
 18 Q. And what kind of pants was he wearing?
 19 A. Jeans, I think.
 20 Q. Did you see any items of his clothing in that
 21 motel room at any time off of him?
 22 A. Yes. His sweatshirt was on the back of the
 23 chair.
 24 Q. Which chair?
 25 A. The one that I -- this one.

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1 Q. The one he had previously been sitting in?
 2 A. Um-hum.
 3 Q. And when did he take that sweatshirt off?
 4 A. When he got to the room.
 5 Q. Did he have something on underneath that
 6 sweatshirt?
 7 A. Yeah, a shirt.
 8 Q. What kind of shirt?
 9 A. A T-shirt.
 10 Q. Who did you make that telephone call to?
 11 A. My friend Hoss.
 12 Q. And why did you call your friend Hoss?
 13 A. Because I wanted him to come over.
 14 Q. What were you feeling at that time?
 15 A. Afraid.
 16 Q. What was your demeanor at that time?
 17 A. I don't know. Strange. I don't know.
 18 Q. Were you crying?
 19 A. No.
 20 Q. Was your voice even?
 21 A. No.
 22 Q. How was your voice?
 23 A. Probably sounds like it does now kind of.
 24 Q. And did you know where Hoss was when you made
 25 that call to him?

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1 A. No. He was in town -- I knew that -- in Coeur
2 d'Alene.
3 Q. And how did you know that?
4 A. Because he lives in Coeur d'Alene. He was
5 working in Coeur d'Alene.
6 Q. All right. And when had the been the last
7 time you had spoken to Hoss?
8 A. The day before.
9 Q. And how did you speak to him? By phone? In
10 person?
11 A. By phone.
12 Q. And had Hoss been to that hotel room before?
13 A. I don't believe so.
14 Q. So when you called him, what did you tell him?
15 A. I asked him if he could come over.
16 Q. And did you say anything else?
17 A. No, not really.
18 Q. Okay. Do you remember saying --
19 A. I just said: "Please come over."
20 Q. Did you say anything to him -- um -- as far as
21 how quickly he should come over there?
22 A. I said just: "Please come over, like, now."
23 Q. Did you say anything about Sean in that
24 conversation?
25 A. No.

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1 A. I found my pants on the side of the bed.
2 Q. Okay. And you found them there?
3 A. No.
4 Q. All right. Did you look anywhere else in that
5 room for your underwear?
6 A. Just around the floor by the bed.
7 Q. And was the bed in that condition when you were
8 -- after you exited it and you were looking for your --
9 A. No.
10 Q. What was the condition of the bed?
11 A. There was nothing on the bed anymore.
12 Q. Was it a bare mattress?
13 A. Yes.
14 Q. Where were the pillows, for instance?
15 A. On the side.
16 Q. Show us with the pointer.
17 A. One was on the side. And one was on that side.
18 Q. Okay. Where was the comforter? The cover?
19 A. It was right here.
20 Q. Were there sheets underneath the cover?
21 A. They were all in a pile right there.
22 Q. Right in the same place where the comforter
23 was?
24 A. Yes.
25 Q. So after you put your jeans on did you keep

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1 Q. Did you tell him where you were?
2 A. Yeah.
3 Q. And did you say anything else to him?
4 A. No.
5 Q. So you said: "Please come over." And then you
6 told him where you were.
7 A. Yes.
8 Q. How long was that telephone conversation?
9 A. Maybe, like, a minute or two.
10 Q. Did you say anything else in that conversation
11 beside those two things?
12 A. No.
13 Q. Did he say anything to you?
14 A. No. He said, "Okay."
15 Q. When you completed that conversation and hung
16 up on your phone, had Sean emerged from the bathroom yet?
17 A. Not yet.
18 Q. Can you tell us after you hung up the telephone
19 did you remain undressed?
20 A. No. I put on my pants.
21 Q. Okay. Was that the very next thing you did?
22 A. Yes.
23 Q. All right. Did you look for your underwear?
24 A. Yes. For a second.
25 Q. Where did you look for your underwear?

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1 your shoes off or did you put them on?
2 A. I put them on.
3 Q. Is there a reason why you didn't leave the
4 hotel room at that point?
5 A. Yeah, Hoss was coming over. And I didn't have
6 anywhere to go.
7 Q. Did you have a car?
8 A. Yes.
9 Q. Was it out in the parking lot?
10 A. Yes.
11 Q. How long did it take before Sean came out of
12 the bathroom?
13 A. Not long. I was looking for my panties for a
14 minute. And then he came out of the bathroom.
15 Q. And did you say anything to him first? Or did
16 he say something to you first?
17 A. I said that Hoss was coming over.
18 Q. Why did you tell him that?
19 A. Because, maybe, he was going to leave if I said
20 that.
21 Q. All right. And what was his response?
22 A. He wouldn't say anything.
23 Q. What did he do if anything?
24 A. Um -- nothing really. He started making the
25 bed.

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1 Q. Tell us where he started as far as making the
 2 bed?
 3 A. On the side of the room.
 4 Q. Can you point for us where.
 5 A. Over here.
 6 Q. All right. So had he grabbed those -- any of
 7 those comforters or sheets?
 8 A. Yeah.
 9 Q. And the way that that bed is made, is that the
 10 way he made it?
 11 A. Yes.
 12 Q. Did you help him any?
 13 A. Yes.
 14 Q. Why did you help him?
 15 A. I don't know.
 16 Q. Did he put the pillows up there or did you?
 17 A. I don't recall exactly.
 18 Q. Did you tell him how to fold the sheets up at
 19 the top at the headboard of the bed?
 20 A. No.
 21 Q. Did you have any intention of covering up what
 22 had happened there?
 23 A. Well, I didn't want to think about it, I guess,
 24 or talk to him about it.
 25 Q. All right. Did you have any concern for what

233

1 A. Not that I recall, no.
 2 Q. How long after that telephone conversation did
 3 Hoss arrive?
 4 A. It was, like, 15 minutes.
 5 Q. What did the two of you do after you made the
 6 bed?
 7 A. Sat down. I don't recall exactly what we did.
 8 Q. Did you engage in any conversation while you
 9 were there before Hoss showed up?
 10 A. No. None that I can remember.
 11 Q. Could you have engaged in some casual
 12 conversation that, maybe, you just don't remember now?
 13 A. Maybe.
 14 Q. Did the two of you have any type of physical
 15 contact after Sean exited that bathroom?
 16 A. No.
 17 Q. Are you sure of that?
 18 A. Yes.
 19 Q. How long have you known Hoss?
 20 A. About five years.
 21 Q. And what is his relationship to you?
 22 A. Just a really good friend.
 23 Q. Does he have any relationship with your
 24 boyfriend?
 25 A. Yes.

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1 Hoss would do when he arrived if that bed wasn't made?
 2 A. No. I don't know.
 3 Q. So how much did you help him or assist him in
 4 making the bed?
 5 A. A little bit. He was mostly done when I
 6 started helping.
 7 Q. And what did you do as far as when you say
 8 helping him?
 9 A. I just straightened out the blankets.
 10 Q. On the whole bed or part of the bed?
 11 A. No. On the other side of the bed.
 12 Q. Go ahead and just show us with that.
 13 A. (Witness indicated.)
 14 Q. So the comforter was already on the bed. And
 15 you were just straightening it?
 16 A. Yeah.
 17 Q. Did say anything to him while he was
 18 straightening the bed?
 19 A. No.
 20 Q. Did the two of you have any kind of discussion
 21 of well, let's straighten the bed or --
 22 A. No.
 23 Q. All right. Did you say anything to each other
 24 after you made that statement that Hoss is coming over?
 25 Did he say anything to you? Did you say anything to him?

234

1 Q. And what is that relationship?
 2 A. They're really good friends as well.
 3 Q. All right. Is that how you met Hoss through
 4 your boyfriend?
 5 A. Yeah, no. I met Hoss before I started going
 6 out with Brian.
 7 Q. And Hoss has a brother?
 8 A. Correct.
 9 Q. What's his name?
 10 A. Hank.
 11 Q. And did you meet Hank the same time that you
 12 met Hoss?
 13 A. No.
 14 Q. When did you meet Hank?
 15 A. I've known Hank for, maybe, two years.
 16 Q. And did Hank show up at that hotel room with
 17 Hoss?
 18 A. Yes.
 19 Q. When they entered the hotel room did you say
 20 anything to them?
 21 A. Not really.
 22 Q. Did you say anything about what had happened?
 23 A. No.
 24 Q. And can you tell us why you did not say
 25 anything?

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1 A. Because I don't know. I didn't want to talk
 2 about it or anybody to know, I guess. I don't know.
 3 Q. How was Sean acting when they arrived?
 4 A. He was acting fine, I guess.
 5 Q. Was he acting like anything had happened?
 6 A. No.
 7 Q. How would you describe his demeanor?
 8 A. I don't know. He was just fine, like, nothing
 9 happened.
 10 Q. Was he seated when they arrived?
 11 A. Yes.
 12 Q. And where was he seated?
 13 A. (Witness indicated.)
 14 Q. In that chair.
 15 Now, what took place after Hoss and Hank
 16 arrived in that room?
 17 A. They came in. And we started talking. I don't
 18 know. They started talking to Sean.
 19 Q. Did anything seem unusual in that room in that
 20 conversation?
 21 A. No, not really.
 22 Q. And what did you do?
 23 A. I was just sitting on the bed.
 24 Q. All right. And where were you seated on the
 25 bed?

237

1 A. Shortly after they got there.
 2 Q. And how long was he gone with the dog?
 3 A. A couple of minutes.
 4 Q. And whose suggestion was it that he take the
 5 dog outside?
 6 A. His.
 7 Q. What was the dog doing? Anything unusual that
 8 he needed to go outside?
 9 A. I don't know. He hadn't been outside in a
 10 little bit -- in a little while.
 11 Q. So he wasn't scratching at the door or trying
 12 to get outside or anything?
 13 A. No.
 14 Q. So when Sean was absent from that room can you
 15 tell us exactly what it was you said?
 16 A. I said that I wanted him to leave. And I
 17 didn't want to be there and asked them if they could take
 18 me to get a pack of cigarettes.
 19 Q. And what was either of their response?
 20 A. Hank said, yeah. He could take me to get a
 21 pack of cigarettes. And then I said: "Well, I didn't
 22 want Sean to stay." So we discussed how we were going to
 23 say that we were going to see Paige (phonetic), Hank's
 24 girlfriend. She's pregnant.
 25 Q. Whose girlfriend was Paige?

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1 A. I'm sitting right here.
 2 Q. Did Sean make any type of physical contact with
 3 you while Hoss and his brother were there?
 4 A. No.
 5 Q. And where were Hoss and his brother during
 6 this conversation?
 7 A. Hoss was sitting right here. And Hank was
 8 sitting in the other chair.
 9 Q. And so your recollection was that you were just
 10 sitting there but not really participating in the
 11 conversation?
 12 A. Correct.
 13 Q. And how long -- um -- go back.
 14 At some point did Hoss indicate he wanted to
 15 leave?
 16 A. No, not really. I did.
 17 Q. What did you say or do?
 18 A. I just told him I wanted Sean to leave. And I
 19 wanted to not be there.
 20 Q. Did you say that with Sean present?
 21 A. No.
 22 Q. Okay. Where did you say that to him?
 23 A. Sean took the dog outside.
 24 Q. Okay. And at what point in the conversation
 25 did Sean take the dog out?

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1 A. Hank's.
 2 Q. And so was there any other discussion before
 3 Sean returned?
 4 A. No.
 5 Q. After Sean returned did either of the
 6 gentlemen, Hank or Hoss, say anything about leaving?
 7 A. Yeah. A couple of minutes afterwards Hank
 8 said: "Do you want to go see Paige?" And I was, like,
 9 yeah.
 10 Q. And what happened at that point?
 11 A. And Sean left.
 12 Q. And were you all there still when Sean left?
 13 A. Yes.
 14 Q. How long did you remain in the hotel room?
 15 A. Um -- a couple of minutes.
 16 Q. Okay. And did you then leave?
 17 A. Yes.
 18 Q. And did you discuss why you were going to be
 19 leaving after Sean had already left?
 20 A. No. They were just going to take me to get a
 21 pack of cigarettes.
 22 Q. Okay. So did you have any intentions of
 23 actually going to see Paige?
 24 A. No.
 25 Q. And who was driving that evening?

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1 A. Hank.
 2 Q. Can you tell us -- um -- when you exited the
 3 hotel room, could you see where Sean had parked from your
 4 hotel room?
 5 A. Yes.
 6 Q. Was the hotel a one story or a two story or --
 7 A. Two story.
 8 Q. And where was your hotel room?
 9 A. On the second floor.
 10 Q. Could you see Hank's car from your hotel room?
 11 A. No.
 12 Q. How was his car in relation to your hotel room?
 13 Did you have to walk a certain distance to see it?
 14 A. No. You could walk out --
 15 THE COURT REPORTER: I couldn't hear what you
 16 said.
 17 THE WITNESS: Once you walked out of the hotel
 18 room door you could see where I had the car in the parking
 19 lot.
 20 BY MS. GARDNER:
 21 Q. When you walked out of the hotel room did you
 22 see Sean's car?
 23 A. Yes.
 24 Q. And was it still there?
 25 A. Yes.

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1 Q. Could you tell whether it was on or not?
 2 A. Yeah, it was running.
 3 Q. Could you see Sean?
 4 A. No.
 5 Q. And when you left the parking lot where were
 6 you sitting in Hank's car?
 7 A. In the back seat.
 8 Q. Where were Hoss and Hank?
 9 A. Hank was driving. Hoss was in the passenger
 10 seat. I was seated right behind Hoss.
 11 Q. And when you were leaving going to Hank's car,
 12 did you observe whether or not Sean had left the parking
 13 lot or not?
 14 A. No. His car was still there when we saw it
 15 when we were walking to Hank's car.
 16 Q. What about when you left the parking lot? Did
 17 you look back to see if Sean's car was still there?
 18 A. I couldn't see outside of the parking lot.
 19 Q. I'm sorry?
 20 A. I couldn't see the side he was parked at when
 21 we left.
 22 Q. Where did you go from there?
 23 A. To the gas station.
 24 Q. Do you remember which gas station?
 25 A. Yeah. The one on Appleway and Government.

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1 Q. Is that an Exxon station?
 2 A. I believe so.
 3 Q. And on the way there did Hoss or Hank question
 4 you about anything?
 5 A. Hoss asked me a couple of times what was wrong.
 6 Q. And what did you tell him?
 7 A. Nothing.
 8 Q. You told him nothing?
 9 A. Um-hum.
 10 Q. And can you tell us why you told him nothing?
 11 A. Because I don't -- I didn't want to talk about
 12 it.
 13 Q. When you arrived at the gas station, did you go
 14 in and get the cigarettes?
 15 A. No.
 16 Q. And who went in to get the cigarettes?
 17 A. Hank.
 18 Q. Did he get them for you?
 19 A. Yes.
 20 Q. Had he ever done anything like for you before?
 21 A. No.
 22 Q. Are you the type of person who doesn't like to
 23 be in public places?
 24 A. No.
 25 Q. Is there any reason why you didn't go into the

1 station?
 2 A. Yeah. I just didn't want to see anybody.
 3 Q. How were you feeling at that point?
 4 A. Still scared. Upset.
 5 Q. At some point in that drive either to or coming
 6 back from the convenience store did you have any problems
 7 with your breathing?
 8 A. Yeah, a little bit trying not to cry.
 9 Q. All right. And were you successful in that?
 10 A. Yeah.
 11 Q. So you hadn't cried any before coming back to
 12 the hotel room?
 13 A. Hum-um.
 14 Q. You have to answer.
 15 A. Oh, no. I'm sorry.
 16 Q. Were you making any kind of noises trying not
 17 to cry?
 18 A. No -- just, no.
 19 Q. When Hank went to the convenience store did
 20 Hoss try to approach you again with that question: "Is
 21 there anything wrong?"
 22 A. Yes.
 23 Q. And how many times while Hank was in the
 24 convenience store?
 25 A. Probably, like, once or twice.

1 Q. And did you give him the same response?
 2 A. Yeah.
 3 Q. Did he at any time turn around and look at you
 4 in the face?
 5 A. Yes.
 6 Q. And when did he do that?
 7 A. When we were at the gas station.
 8 Q. All right. And at that time were you crying
 9 or --
 10 A. No.
 11 Q. -- trying not to cry still?
 12 A. Yeah.
 13 Q. Did he say anything else, like, commenting on
 14 how you looked or sounded?
 15 A. Yeah. He could tell something was wrong.
 16 Q. And did you respond to that?
 17 A. I said: "Nothing is wrong."
 18 Q. On the way back to the hotel room -- um -- you
 19 didn't go anywhere else after the convenience store?
 20 A. No.
 21 Q. On the way back to the hotel room did Hoss
 22 continue to question you about this?
 23 A. Yes.
 24 Q. How many more times do you think he asked you?
 25 A. At least three more times.

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1 you tell him?
 2 A. Like, as soon as we got in.
 3 Q. Can you tell us as close as you can to your own
 4 words what you told Hoss?
 5 A. He just said: "Did he touch you?" And I was,
 6 like, yeah.
 7 Q. He asked you -- I'm having a problem hearing
 8 because of the vent.
 9 A. If he touched me.
 10 Q. And you said?
 11 A. "Yes."
 12 Q. Did you elaborate on that any?
 13 A. Not really.
 14 Q. So at that point you had told him -- "He,"
 15 referring to Sean, had touched you?
 16 A. Yes.
 17 Q. Did you tell Hoss anything else before the

18 police were called?
 19 A. I don't know. He asked some questions. And I
 20 said, "Yes." And he said that he was going to call the
 21 cops.
 22 Q. What else did he ask you that you responded yes
 23 to?
 24 A. A couple of questions.
 25 Q. Can you recall for us what those questions

1 Q. At some point did you decide to respond to the
 2 questions?
 3 A. Yeah.
 4 Q. At what point did you decide to tell him?
 5 A. When we got back to the hotel room.
 6 Q. And can you tell us why you decided to tell him
 7 then?
 8 A. Because I couldn't not cry. I guess I had to
 9 cry.
 10 Q. Why did you have to cry?
 11 A. Because -- because of what happened.
 12 Q. Was anybody besides you and Hoss there in that
 13 hotel room when you told him?
 14 A. No. Hank stayed in the car for a little bit,
 15 but he ended up coming back into the hotel room.
 16 Q. When he came back into the hotel room were you
 17 still crying?
 18 A. Yeah.
 19 Q. And were you telling what had happened? Were
 20 you still telling that when Hank came in?
 21 A. No.
 22 Q. And so somewhere between the time you arrived
 23 in the hotel room you told Hoss before Hank came in?
 24 A. Yeah.
 25 Q. How soon after you got into that hotel room did

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1 were?
 2 A. Not exactly.
 3 Q. Okay. Can you tell us what the nature of those
 4 questions were?
 5 A. Yeah. He just asked if he raped me.
 6 Q. All right. And did he use that word?
 7 A. Yeah.
 8 Q. Did he say anything else to you?
 9 A. That it wasn't my fault. And we should call
 10 the cops.
 11 Q. And did you agree at that point that you should
 12 call the police?
 13 A. Yeah.
 14 Q. Did you call the police or did somebody else?
 15 A. Hoss did.
 16 Q. What phone did he call the police from?
 17 A. His phone.

18 Q. How much later do you think it was that the
 19 police arrived?
 20 A. Like, five minutes, maybe.
 21 Q. Do you remember how many police officers you
 22 saw?
 23 A. Three or four.
 24 Q. Did you at some point that evening turn your
 25 jeans over to the police?

1 A. Yeah.
 2 Q. At what point did you do that?
 3 A. I can't remember exactly if it was before I
 4 left the room or at the hospital. I think it was before I
 5 left the room.
 6 Q. So you think you wore something different when
 7 you went to the hospital?
 8 A. Yes.
 9 Q. How long did you talk to the police before
 10 going to the hospital?
 11 A. Um -- I don't know exactly. Fifteen,
 12 20 minutes.
 13 Q. And did you tell the police officer everything
 14 that had happened to you?
 15 A. Yes.
 16 Q. Whose suggestion was it for you to go to the
 17 hospital?
 18 A. The police.
 19 Q. And how did you get to the hospital?
 20 A. Hank.
 21 Q. Hank drove you?
 22 A. (Witness nods head.)
 23 Q. Were Hoss and Hank there?
 24 A. Yeah.
 25 Q. Did the police ever show up at the hospital?

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1 the inside of my mouth.
 2 Q. From where did they take your hair?
 3 A. Um -- a couple from my back and a couple of
 4 them from either the side or the top.
 5 Q. You're pointing to your head?
 6 A. Like, a couple from the back of my head.
 7 Q. Okay.
 8 A. And then a couple from the top, I think.
 9 Q. Okay. Did they take any from your vagina?
 10 A. They had me comb that area.
 11 Q. Were you feeling comfortable during that
 12 examination?
 13 A. Not at all.
 14 Q. Can you describe for us how you felt.
 15 A. After everything else it was horrible.
 16 Q. How long did that take?
 17 A. A long time. I was there for several hours.

18 Q. So who was it that was doing the swabs and
 19 collecting the hairs and all?
 20 A. The nurse.
 21 Q. Did you at some point see a doctor?
 22 A. Um -- I don't know. One nurse. And then some
 23 other lady from something else came in, too.
 24 Q. Did anybody examine your genitalia area?
 25 A. Yes.

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1 A. Yes.
 2 Q. All right. Same policeman or --
 3 A. Yeah.
 4 Q. Did you go to the emergency room portion of the
 5 hospital or --
 6 A. Yes.
 7 Q. Was that Kootenai Medical Center?
 8 A. Yes.
 9 Q. And can you just sort of tell us what happened
 10 from the moment you got to the emergency room, who you
 11 saw, what you did.
 12 A. Um -- they took me into this little room where
 13 they take your blood pressure and stuff. And you talk to
 14 the cop for a while. And then they took me into a
 15 different room.
 16 Q. Did they take anything or do any swabs on you?
 17 A. Yes.
 18 Q. Can you describe what that was.
 19 A. Yeah. They did swabs -- um -- on me. They did
 20 several different things.
 21 Q. Did they pull any hairs or anything like that
 22 during that examination?
 23 A. Yes.
 24 Q. Can you describe that for us.
 25 A. They took a couple of my hairs; They swabbed

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1 Q. And how did that make you feel?
 2 A. Uncomfortable.
 3 Q. And that process you said was several hours?
 4 A. Yeah.
 5 Q. Do you know at what time you returned from that
 6 examination?
 7 A. It was, like, really early in the morning.
 8 Around 6:00 or 7:00.
 9 Q. Do you know about what time it was when you
 10 arrived at the hospital?
 11 A. It was, like, 2:00, I believe.
 12 Q. And where did you go after you left the
 13 hospital?
 14 A. I went back there, took a shower, and got all
 15 my stuff and left.
 16 Q. Who drove you there?
 17 A. Hank.

18 Q. And did he wait while you showered and got your
 19 stuff?
 20 A. No.
 21 Q. Did you discuss with them what you were going
 22 to do?
 23 A. Yeah.
 24 Q. What did you tell them you wanted to do?
 25 A. That I just wanted to take a shower. And I was

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1 going to leave.
 2 Q. And why did you decide to leave the hotel?
 3 A. Because I didn't want to be there.
 4 Q. Were you still afraid?
 5 A. Yeah.
 6 Q. Did you make arrangements for a ride or did you
 7 drive yourself?
 8 A. I drove.
 9 Q. How long do you think you were in that hotel
 10 room?
 11 A. Maybe, an hour tops.
 12 Q. And you were still scheduled to be there an
 13 additional day; is that right?
 14 A. Yeah. I think I had another day.
 15 Q. When you were in the hospital did you notice
 16 any injuries to your body?
 17 A. I had a little bit of a red mark on the side of
 18 my neck.
 19 Q. All right. And do you know how those happened?
 20 A. Yes.
 21 Q. How?
 22 A. When Sean had his hand on my neck.
 23 Q. Had you had any redness to your neck before
 24 this incident?
 25 A. No.

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1 A. My knee.
 2 Q. Do you remember observing your knee that
 3 evening?
 4 A. No. Not really.
 5 Q. Did you recall seeing that knee in that
 6 condition at any time?
 7 A. Yeah.
 8 Q. When?
 9 A. Later that day.
 10 Q. And at what point did you notice that bruise?
 11 A. When the nurse was pointing it out.
 12 Q. This?
 13 A. Yeah.
 14 Q. This top right?
 15 A. Yeah, I don't know.
 16 Q. Which knee is that?
 17 A. I don't know.

18 Q. Do you remember having that bruise before that
 19 evening?
 20 THE COURT: Ms. Gardner, if you could stand so
 21 you're not between the witness and the Jury. Thank you.
 22 MS. GARDNER: Okay.
 23 BY MS. GARDNER:
 24 Q. Do you remember?
 25 A. I didn't notice that bruise until she pointed

1 Q. Did you have any bruising?
 2 A. On my -- no, not that I --
 3 Q. I'm sorry?
 4 A. Maybe, a little bit on my neck.
 5 Q. Okay. Did you notice any bruises on your leg?
 6 A. No.
 7 Q. Do you think you had some bruising on your
 8 neck?
 9 A. Yeah.
 10 Q. Which part of your neck?
 11 A. On the sides of my neck.
 12 Q. Can you describe what the bruises looked like
 13 or bruising looked look?
 14 A. It was redness on either side of my neck.
 15 MS. GARDNER: May I approach the witness.
 16 THE COURT: You may. I'm going to turn this
 17 light back on.
 18 MS. GARDNER: Oh, yes.
 19 BY MS. GARDNER:
 20 Q. Showing you what's been marked as Exhibit 2, do
 21 you recognize that?
 22 A. (Inaudible).
 23 Q. You need to speak up just a little bit.
 24 A. That's me and the sides of my neck.
 25 Q. Do you know what this top right is?

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1 that out.
 2 Q. Okay. Do you know how that bruise was caused?
 3 A. No.
 4 Q. Are those photographs a true depiction of the
 5 -- of how the condition of your neck was and your knee and
 6 your face that evening at the hospital?
 7 A. You can't really see anything in the picture.
 8 Q. Can you see on there any indication of the
 9 redness you described on your neck?
 10 MR. HULL: Your Honor, I would object. She
 11 says she really can't see anything.
 12 THE COURT: I think that she can explore this.
 13 I'll overrule that.
 14 THE WITNESS: Maybe, a little bit.
 15 BY MS. GARDNER:
 16 Q. Okay. You say a little bit on those two lower
 17 pictures. Are those of your neck?

18 A. And this one right there.
 19 Q. And you're pointing to the bottom right
 20 picture?
 21 A. Yeah.
 22 Q. And is that other picture of the opposite side
 23 of the other side of your neck?
 24 A. Correct.
 25 MS. GARDNER: I would move for the admission of

1 Exhibit 2 at this time.
 2 MR. HULL: I don't have any objection.
 3 THE COURT: Two is admitted.
 4 (Plaintiff's Exhibit No. 2 was admitted.)
 5 MS. GARDNER: I would ask if we could publish
 6 this to the Jury.
 7 THE COURT: You may publish that to the Jury.
 8 MS. GARDNER: If I could approach the witness
 9 again.
 10 THE COURT: You may.
 11 BY MS. GARDNER:
 12 Q. This is showing you Exhibits 3 and 4. If you
 13 could tell us, do you recognize these items?
 14 A. Yeah. That's my pants and my underwear.
 15 Q. Okay.
 16 THE COURT: Which is which, please.
 17 THE WITNESS: My underwear and my pants.
 18 BY MS. GARDNER:
 19 Q. Exhibit 3, what I'm pointing to here is what?
 20 A. My jeans.
 21 Q. And are these the jeans that you were wearing
 22 during that evening?
 23 A. Yes.
 24 Q. Are these the same jeans that you picked up off
 25 the floor?

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1 A.
 2 Q. And put on?
 3 A. (Witness nods head.)
 4 Q. Are these the same jeans that you gave to the
 5 police?
 6 A. Yes.
 7 Q. Now, Exhibit 4 is what?
 8 A. My underwear.
 9 Q. Okay. Are these the same underwear you were
 10 wearing that evening before they were removed?
 11 A. Yes.
 12 Q. Are these the same underwear that you were
 13 looking for that evening?
 14 A. Yes.
 15 Q. And after your search for your underwear, did
 16 you ever see them after that point?
 17 A. Yes. After the cops arrived I told them that I
 18 couldn't find my underwear anywhere. And I had to
 19 describe them to them. And then one of the cops saw them
 20 in the bathroom room under a pile of towels.
 21 Q. Did he show them to you, then?
 22 A. Uh-huh.
 23 Q. In the same pile of towels that was under the
 24 sink that we saw earlier?
 25 A. Yes.

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1 Q. And did you confirm that these were the
 2 underwear that you previously had been wearing?
 3 A. Yes.
 4 Q. Did you put those underwear underneath the
 5 towels in the bathroom?
 6 A. No.
 7 MS. GARDNER: I move for the admission of
 8 Exhibits 3 and 4.
 9 THE COURT: Any objection?
 10 MR. HULL: I would object at this time,
 11 Your Honor, for evidentiary purposes. There's a chain of
 12 custody that hasn't been made.
 13 THE COURT: I'm going to overrule the
 14 objection. And three and four are admitted.
 15 (Plaintiff's Exhibits Nos. 3 and 4 were
 16 admitted.)
 17 MS. GARDNER: I'd ask at this time that these
 18 also be published to the Jury.

1 Q. When you put your jeans back on, did you notice
 2 anything on your jeans?
 3 A. No.
 4 Q. Did you notice any wetness about your jeans?
 5 MR. HULL: Object, Your Honor. Leading nature
 6 of the question. She's answered it. She said she didn't
 7 notice anything about the jeans.
 8 THE COURT: Sustained.
 9 BY MS. GARDNER:
 10 Q. In your trip from the hotel room to return to
 11 the hotel room, did anything to your knowledge get on your
 12 jeans?
 13 A. No.
 14 Q. Had you at any time during your stay at that
 15 hotel room walked on the mattress or applied your shoes to
 16 the top of that mattress or bed?
 17 A. No.
 18 Q. Did you hold hands with Sean Cook anytime that

19 THE COURT: They may be.
 20 MS. GARDNER: Return Exhibit 2 to the Court.
 21 With the Court's indulgence if I can have a
 22 minute or two here.
 23 THE COURT: You may.
 24 (Pause in proceedings.)
 25 BY MS. GARDNER:

19 evening?
 20 A. No.
 21 Q. Did you kiss him?
 22 A. No.
 23 Q. Did you ever sit in his lap?
 24 A. No.
 25 Q. Were you chewing gum at the Mouse Trap?

1 MR. HULL: I would object to the leading nature
 2 of the questions, Your Honor.
 3 THE COURT: That question is -- I'm going to
 4 overrule the objection to that question.
 5 THE WITNESS: Probably, yeah. I always chew
 6 gum.
 7 BY MS. GARDNER:
 8 Q. Okay. And do you recall Sean making a comment
 9 about gum?
 10 A. No.
 11 Q. Do you recall giving Sean gum?
 12 A. Not exactly, but I could have gave him gum.
 13 Q. Do you remember Sean making any comments such
 14 as wanting you?
 15 A. No.
 16 Q. Did you make any such comments to him?
 17 A. No.
 18 Q. Have you told the complete truth in your
 19 testimony as best as your recollection allows?
 20 A. Yes.
 21 MS. GARDNER: I don't have any further
 22 questions.
 23 THE COURT: We are going to take a ten-minute
 24 recess before cross-examination.
 25 So, Members of the Jury, don't talk about the

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1 Nurse Ren I believe her name is.
 2 THE COURT: Very well. Thank you both.
 3 Can you get Ms. Whitten back on the witness
 4 stand, please.
 5 MS. GARDNER: Yes. She is outside.
 6 (The Jury entered the Courtroom.)
 7 THE COURT: The record should reflect that the
 8 Jury has returned. And they're finding their seats just
 9 fine. And no one has tripped yet on those close seats, so
 10 be careful of that.
 11 Mr. Hull, you may cross-examine.
 12 MR. HULL: Thank you, Your Honor.
 13 CROSS-EXAMINATION.
 14 QUESTIONS BY MR. HULL:
 15 Q. How long had you had that dog prior to the date
 16 in April in question? April 8?
 17 A. I got him -- I got him in December the year
 18 before.

19 Q. December of the year before? I just was trying
 20 to hear you.
 21 A. Yeah, in December of the year before, I
 22 believe.
 23 Q. And typically the dog stayed with Mr. Mertins
 24 at Mr. Mertins' parents' house?
 25 A. Yes.

1 case among themselves or form or express any opinion.
 2 We'll be back here at 25 minutes to 11:00. You
 3 are excused.
 4 THE BAILIFF: All Rise.
 5 (The Jury left the Courtroom.)
 6 THE COURT: Does counsel need the Court for
 7 anything during this break?
 8 MR. HULL: No, Your Honor.
 9 MS. GARDNER: No Your Honor.
 10 THE COURT: All right. We'll be in recess for
 11 ten minutes.
 12 (Recess taken.)
 13 THE COURT: Can the Jury come back?
 14 MS. GARDNER: Yes, Judge.
 15 MR. HULL: Your Honor, there's one thing we
 16 probably should put on the record. Ms. Gardner asked me
 17 she said there was a nurse who did not see Danielle
 18 Whitten, but was a link in the chain of custody of the
 19 rape kit who picked it up sometime after that shift -- the
 20 next shift. She asked me if I would object to the
 21 admission of the rape kit results without that link in the
 22 chain of custody. And I told her I would not object.
 23 THE COURT: Very well. Thank you for putting
 24 that on the record.
 25 MS. GARDNER: Your Honor, I have excused

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1 Q. And on April 8th, Mr. Mertins was out of town
 2 working?
 3 A. Yes.
 4 Q. And Mr. Mertins rented you a motel room to keep
 5 the dog at?
 6 A. Yes.
 7 Q. And you had the motel room for four days. And
 8 April 8th was that part of the third day?
 9 A. Yes.
 10 Q. On April 8th it was in the afternoon that you
 11 went down to the liquor store?
 12 A. Yes.
 13 Q. And you drove directly from the motel to the
 14 liquor store?
 15 A. Yes.
 16 Q. And you bought a bottle of tequila?
 17 A. Yes.
 18 Q. And returned to the motel room?

19 A. Yes.
 20 Q. What size bottle of tequila was this?
 21 A. I don't know exactly. About this big.
 22 Q. And what did you pay for the tequila?
 23 A. About 10 or \$15.
 24 Q. You're not any more certain of what you paid
 25 than between ten and \$15?

1 A. No.
 2 Q. Now, you've testified that you used to live in
 3 the same residence with Mr. Cook with someone named Eli
 4 (phonetic)?
 5 A. Correct.
 6 Q. Her full name is Elizabeth Cann?
 7 A. Correct.
 8 Q. So that's a woman?
 9 A. Yes.
 10 Q. Now, in this motel room there's a table and two
 11 chairs.
 12 A. Yes.
 13 Q. And when you indicated when you were looking at
 14 the photos that were on the wall that you could see one
 15 chair, you weren't saying that there was only one chair.
 16 There were, in fact, two chairs at the table.
 17 A. Correct.
 18 Q. And one time when you were pointing at the
 19 video that was up there you pointed to where the door was?
 20 A. Um-hum.
 21 Q. And the door you pointed to was beyond where
 22 the table was out of sight in the corner by the tables?
 23 A. Yeah.
 24 Q. And that was past the chair that Mr. Cook was
 25 not sitting in, correct?

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1 Q. And what room you were in.
 2 A. Yes.
 3 Q. And then he arrived some hours later?
 4 A. Yes.
 5 Q. Do you have an estimate of how many hours after
 6 you saw him?
 7 A. Maybe, three or four.
 8 Q. So it was daylight when you were at the liquor
 9 store?
 10 A. Um-hum.
 11 Q. And it was three or four hours later. And it
 12 was dark when he arrived.
 13 A. Correct.
 14 Q. And this was in April?
 15 A. Yes.
 16 Q. And was it completely dark out when he arrived?
 17 A. Yeah, it was dark outside.
 18 Q. There was a suggestion to go to the Mouse Trap
 19 bar. Correct?
 20 A. Yes.
 21 Q. Did you notice the time when you were at the
 22 Mouse Trap bar?
 23 A. No.
 24 Q. And are there clocks to your recollection in
 25 the Mouse Trap bar?

1 A. Correct.
 2 Q. When Mr. Cook arrived at the motel room on the
 3 evening of the 8th, what's your best estimate of what time
 4 it was?
 5 A. I have no idea what time it was. It was dark
 6 outside.
 7 Q. So that's your best estimate. You have no idea
 8 what time it was?
 9 A. Yes. There was no clock in the hotel room.
 10 Q. And what steps did you take, if any, to avoid
 11 housekeeping coming and cleaning your room?
 12 A. I just told them that I didn't need it cleaned
 13 Q. And how did you inform them of that?
 14 A. They'd knock on the door every day asking if I
 15 want them to come in and clean the room.
 16 Q. So do you recall specifically on April 8th
 17 telling the chambermaid not to clean the motel room?
 18 A. Yes.
 19 Q. And when was that?
 20 A. One about 10:00, probably.
 21 Q. Now, when you met Mr. Cook at the liquor store
 22 you two embraced. Correct?
 23 A. Yeah.
 24 Q. And you told him where you were staying.
 25 A. Yes.

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1 A. I don't know. Probably.
 2 Q. Do you recall seeing one?
 3 A. No.
 4 Q. And you testified to having a beer before going
 5 to the Mouse Trap bar?
 6 A. Correct.
 7 Q. And your testimony is that you had nothing else
 8 to drink that day prior to that beer at the motel room?
 9 A. Correct.
 10 Q. And then you had a shot of tequila at the Mouse
 11 Trap bar?
 12 A. Yes.
 13 Q. And you testified to drinking the beer that
 14 occupies the neck of a Corona bottle.
 15 A. Correct.
 16 Q. You and Mr. Cook leave the Mouse Trap bar and
 17 return to your motel room.
 18 A. Yes.
 19 Q. And you have the key to your motel room?
 20 A. Yes.
 21 Q. And you unlock the door to get into your motel
 22 room?
 23 A. Yes.
 24 Q. And Mr. Cook accompanies you into your motel
 25 room.

1 A. Yes.
 2 Q. You don't ask him not to come into your motel
 3 room?
 4 A. No.
 5 Q. And didn't ask him to leave your motel room?
 6 A. No.
 7 Q. Now, you testified on direct examination that
 8 you were having problems with your boyfriend.
 9 A. No. Not, like, real problems, no.
 10 Q. You didn't testify two days ago -- did you
 11 testify two days ago that you were having problems with
 12 your boyfriend?
 13 A. We might have been arguing, but not, like,
 14 significant problems, no.
 15 Q. Did you testify two days ago that you had
 16 problems with your boyfriend?
 17 A. We probably had been arguing.
 18 Q. And how long had those problems with your
 19 boyfriend been going on?
 20 A. I don't know. We always bicker about him
 21 working. We've been together for four years.
 22 Q. Now, your testimony is that when you returned
 23 from the motel room, I mean, when you returned from the
 24 Mouse Trap bar you removed your shoes?
 25 A. Yes.

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1 Q. At a different hearing?
 2 A. Yes.
 3 Q. And that was what was called a preliminary
 4 hearing?
 5 A. Yeah.
 6 Q. Now, you didn't testify at that preliminary
 7 hearing about any choking, correct?
 8 A. Correct.
 9 Q. And you've indicated your testimony today, as I
 10 understand it, is that Mr. Cook did not ejaculate in you?
 11 A. Correct.
 12 Q. And that he stopped at some point saying he had
 13 to go to the bathroom and went to the bathroom.
 14 A. Yes.
 15 Q. Now, you've testified today that he was in
 16 there ten minutes?
 17 A. I don't know exactly how long.
 18 Q. And you had your phone?

19 A. Um-hum.
 20 Q. And you've been using your phone throughout the
 21 evening, correct?
 22 A. Correct.
 23 Q. So Mr. Cook would know you had a phone.
 24 A. Yes.
 25 Q. And you had your pants -- your testimony is

1 Q. when after returning from the Mouse Trap
 2 bar did you remove your shoes?
 3 A. Probably right when I sat down on the bed and
 4 put my feet up on the bed I removed my shoes.
 5 Q. And when you returned from the Mouse Trap bar
 6 you did sit on the bed?
 7 A. Yes.
 8 Q. And Mr. Cook sits at the chair at the table.
 9 A. Yes.
 10 Q. Now, you've testified that at some point
 11 Mr. Cook gets on the bed and thereafter holds you down
 12 with his forearm, correct?
 13 A. Yeah.
 14 Q. And you've testified that he completely remove
 15 your jeans?
 16 A. Yes.
 17 Q. And during that process he keeps his forearm
 18 across your chest.
 19 A. Yes.
 20 Q. And you've testified here today that at some
 21 point he took one hand and held your neck?
 22 A. Yes.
 23 Q. Now, you've testified previously in this
 24 matter?
 25 A. Yes.

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1 after Mr. Cook went to the bathroom you had your pants.
 2 A. Yes.
 3 Q. And you use your phone and put on your pants
 4 while Mr. Cook is in the bathroom.
 5 A. Yes.
 6 Q. At this point in time, it's your belief that
 7 the Mouse Trap bar is still open.
 8 A. Yes.
 9 Q. And the Mouse Trap bar is in -- you testified
 10 that it was virtually in the parking lot of the bar or of
 11 the motel.
 12 A. Correct.
 13 Q. And you've testified that you had a car there?
 14 A. Yes.
 15 Q. And you had the key to your car?
 16 A. Yes.
 17 Q. And your testimony is that you chose not to
 18 leave.

19 A. Correct.
 20 Q. Now, you don't recall that Mr. Cook was in this
 21 bathroom any longer than it took you to put on your
 22 clothes and call Mr. Dillon, correct?
 23 A. Not much longer, no.
 24 Q. But you believe he was in the bathroom sometime
 25 after you completed the call to Mr. Dillon?

A. Yes.

Q. And you've testified that you went to the door of the motel room during the making of that call?

A. Yes.

Q. And you opened that door?

A. No.

Q. But you were right at the door.

A. Yes.

Q. And you had your phone and your pants with you when you're right at the door making that phone call.

A. Yes.

Q. Now, subsequent to this sexual encounter with Mr. Cook and prior to going to the hospital, you did not shower.

A. No.

Q. You did not clean yourself in any way.

A. No.

Q. And you've testified when looking at the photos of your neck and your knee you don't recall which knee had the bruise?

A. No.

Q. And you don't know how you got that bruise on your knee?

A. No.

Q. And you may have had that bruise on your knee

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1 and hadn't noticed you had a bruise on your knee.

2 A. Correct.

3 Q. Now, when you were at the hospital were there
4 -- were you looking in mirrors?

5 A. No.

6 Q. Were you able to observe your neck somehow?

7 A. No. I just seen it before I left to the
8 hospital.

9 Q. Okay. And before you left to the hospital you
10 talked to a police officer?

11 A. Correct.

12 Q. And you didn't tell the police officer that you
13 had been choked at all?

14 A. I don't recall exactly.

15 Q. And you told the police officer that you didn't
16 believe that Mr. Cook ejaculated.

17 A. Correct.

18 Q. And when you're at the hospital you report to
19 personnel there that there had been a mild choking
20 incident.

21 A. Correct.

22 Q. And that Mr. Cook had ejaculated.

23 A. No.

24 Q. Now, two days ago when you were testifying

25 about Mr. Cook's pants being removed, you stated initially

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1 that "I unbuttoned his jeans." Correct?

2 A. No.

3 Q. That isn't what you said initially?

4 A. No. I don't believe so.

5 Q. And at the preliminary hearing you testified
6 about how Mr. Cook's pants became removed. Correct?

7 A. Correct.

8 Q. And do you recall being asked: "Okay. Did he
9 remove any of his clothing?"

10 A. Yes.

11 Q. And your answer was -- um -- "I unbuttoned his
12 or he unbuttoned his pants and stuff." Do you recall
13 making that response?

14 A. Yes.

15 Q. You were reluctant to report this encounter
16 with Mr. Cook as a rape to Hoss Dillon. Correct?

17 A. Yeah.

18 Q. And since making that allegation to Hoss Dillon
19 you feel that you're pretty much committed to maintaining
20 that description of the event. Correct?

21 A. Yes.

22 Q. Now, you became uncomfortable at some point
23 during this encounter with Mr. Cook. Correct?

24 A. Yes.

25 Q. And you called Hoss Dillon.

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1 A. Yes.

2 Q. Because you were uncomfortable?

3 A. Yes.

4 Q. And then you helped Mr. Cook make the bed.
5 Correct?

6 A. Yes.

7 Q. And waited in the motel room with Mr. Cook
8 until Hoss Dillon arrived sometime later.

9 A. Yes.

10 Q. You didn't expect Hoss to be questioning you
11 about what went on between you and Mr. Cook. Did you?

12 A. No.

13 Q. But Hoss Dillon is a very good friend of your
14 boyfriend, Mr. Mertins. Right?

15 A. Yes.

16 Q. And when he started pressing you about what had
17 gone on between you and Mr. Cook you were worried about

18 what your boyfriend might think. Correct?

19 A. No, not really.

20 Q. You've testified today that while the
21 Mr. Dillons -- the two brothers, Dillon -- were at the
22 motel room Sean took the dog for a walk?

23 A. He took the dog outside, yes.

24 Q. Now, at the preliminary hearing you didn't
25 mention that when the Dillons were there Sean took the dog

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1 for a walk.
 2 A. Well, he went outside. That's how we discussed
 3 what we were going to do.
 4 Q. Now, isn't it a fact that Mr. Cook took the dog
 5 out for a walk before the Dillons got there?
 6 A. No, I don't believe so. Maybe, earlier on in
 7 the day or the early evening.
 8 Q. So Mr. Cook may have taken the dog out for a
 9 walk prior to the Dillons arriving?
 10 A. Yes.
 11 Q. And after this incident in the bed?
 12 A. Yes.
 13 Q. Now, you understand that what we're trying to
 14 determine here is what really happened?
 15 A. Yes.
 16 Q. And that nobody is going to be mad at you if
 17 you tell what really happened?
 18 A. Yes.
 19 Q. And isn't the case that this encounter
 20 initially was consensual?
 21 A. Um -- for him to come over and for us to talk.
 22 Q. The sexual encounter?
 23 A. No.
 24 Q. And isn't the case that at some point you
 25 became uncomfortable with this encounter and asked

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1 out in the room any other time while you were --
 2 A. No, not really. He might have.
 3 Q. Does it stand out in your mind as anything
 4 significant?
 5 A. No.
 6 Q. You talked about -- um -- two days ago and
 7 today a little bit about your boyfriend and you have been
 8 together for four years you said?
 9 A. Yeah. We were together for a little over four
 10 years.
 11 Q. A little bit before the incident?
 12 A. Before the incident we had been together for
 13 over 3-1/2.
 14 Q. And did you continue to have a relationship
 15 with your boyfriend after this incident?
 16 A. Yes.
 17 Q. At some point did you tell your boyfriend about
 18 this rape?
 19 A. Yes.
 20 Q. What did you tell him?
 21 A. The next -- well, the day after I got out of
 22 the hospital and talked to him.
 23 Q. And was he returned to town by then?
 24 A. He was returning that night.
 25 Q. Did telling him cause the two of you to break

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1 Mr. Cook to stop?
 2 A. Yes.
 3 Q. And isn't it the case that he did stop and go
 4 into the bathroom?
 5 A. Yeah. Way after I said, "No," to begin with.
 6 MR. HULL: I don't have any further questions,
 7 Your Honor.
 8 THE COURT: Redirect examination?
 9 REDIRECT EXAMINATION
 10 QUESTIONS BY MS. GARDNER:
 11 Q. Had you at any time before April 8th received
 12 maid service in that room?
 13 A. I don't believe so.
 14 Q. Is there any particular reason why you didn't
 15 use the maid?
 16 A. Because I clean up after myself and make my own
 17 bed.
 18 Q. Is your dog house trained?
 19 A. Yes.
 20 Q. All right. Did you take him out frequently?
 21 A. Yes.
 22 Q. Now, Sean -- you've testified that he took the
 23 dog out at least during the time that you had the
 24 opportunity to talk to Hoss and his brother. But that
 25 night do you have any recollection of him taking the dog

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1 up?
 2 A. No.
 3 Q. Do you remember specifically complaining to
 4 Sean about your boyfriend and your habit of arguing?
 5 A. No, not specifically.
 6 Q. Were you asked about being choked at the
 7 preliminary hearing?
 8 A. No.
 9 Q. Were you asked about Sean walking the dog at
 10 the preliminary hearing?
 11 A. No.
 12 Q. And at the preliminary hearing in response to
 13 one of the questions you had said, "I unbuttoned," and
 14 then corrected yourself. Right?
 15 A. Correct.
 16 Q. Did you unbutton your pants or Sean's pants?
 17 A. Neither.
 18 Q. So what was that statement?
 19 A. I'm not sure. Probably just nervous.
 20 Q. And did you correct your misstatement at that
 21 hearing?
 22 A. Yes, I did.
 23 Q. Now, how do you know that -- upon what do you
 24 base your opinion that Mr. Cook did not ejaculate?
 25 A. I just don't recall him.

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1 Q. Do you recall feeling something that felt like
 2 ejaculate on you?
 3 A. No.
 4 Q. Do you recall seeing any ejaculate?
 5 A. No.
 6 Q. Is that why you came to the conclusion that he
 7 had not ejaculated?
 8 A. Yes.
 9 Q. Can you tell us why you chose not to go get
 10 help at the Mouse Trap?
 11 A. Because I don't know exactly. Because I don't
 12 feel comfortable just going up to random people. And I
 13 feel unsafe enough already.
 14 Q. Was it embarrassing?
 15 A. Yeah.
 16 MR. HULL: I object to the leading nature of
 17 the question, Your Honor.
 18 THE COURT: Sustained.
 19 BY MS. GARDNER:
 20 Q. Did you know anybody at the Mouse Trap?
 21 A. No.
 22 Q. Did you know any of your neighbors in any of
 23 the rooms?
 24 A. No.
 25 Q. Why were you at the door to the hotel room when

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1 be on your jeans or your panties?
 2 A. No.
 3 Q. Had you had any sexual activity in either one
 4 of those items -- your panties or your jeans -- on
 5 April 8th or on April 7th?
 6 A. No.
 7 MS. GARDNER: I don't have any other questions.
 8 THE COURT: Any recross?
 9 RE-CROSS-EXAMINATION
 10 QUESTIONS BY MR. HULL:
 11 Q. How long had you been wearing the jeans and
 12 panties since they had been washed?
 13 A. The panties had just been washed before I put
 14 them on. The pants I didn't wash them before I wore them
 15 the second time.
 16 Q. And when was it that you put the panties on
 17 before they were washed? I guess is what I'm asking.
 18 A. I put them on that morning.

19 Q. And the jeans, how long had you been wearing
 20 those?
 21 A. I put them on that morning. I don't know if
 22 they were washed before I had worn them last.
 23 Q. Now, the policeman who arrived at the motel
 24 room asked you what had happened?
 25 A. Yes.

1 you were making that call?
 2 A. I don't know. Just farthest away from the bed
 3 Q. Did you have any plans of leaving out that
 4 door?
 5 A. No. I didn't really have anywhere to go.
 6 Q. And why were you looking at your neck before
 7 going to the hospital?
 8 A. Because Hoss looked at it and said that he had
 9 seen stuff on it. Red marks.
 10 Q. And how were you able to observe your neck?
 11 A. In the mirror.
 12 Q. Was that after you told Hoss what happened?
 13 A. I didn't give him specific details, but, yeah.
 14 Q. Which was -- of the two between being raped and
 15 being choked was the more traumatic to you?
 16 A. It was all traumatic.
 17 Q. Did you intentionally not disclose the fact
 18 that you were choked while the rape was occurring?
 19 A. No.
 20 Q. Was there any reason why you didn't think to
 21 mention that?
 22 A. During the preliminary hearing?
 23 Q. During the preliminary hearing, yes.
 24 A. It just wasn't brought up exactly.
 25 Q. Do you know of any reason why ejaculate would

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1 Q. And you did not tell him that you had been
 2 choked. Correct?
 3 A. I don't recall exactly what I told the
 4 policeman, what details.
 5 Q. You may not have told him?
 6 A. I may not have told him.
 7 Q. And at the preliminary hearing you were asked
 8 all kinds of questions about what happened during this
 9 encounter with Mr. Cook. Correct?
 10 A. Yes.
 11 Q. And you did not mention that you had been
 12 choked. Correct?
 13 A. Correct.
 14 MR. HULL: I don't have any further questions,
 15 Your Honor.
 16 THE COURT: That means you may step down.
 17 Any reason why this witness cannot be excused?
 18 MS. GARDNER: I did have one other question for

19 her briefly if I could.
 20 THE COURT: Can counsel please approach.
 21 MS. GARDNER: Sure.
 22 THE COURT: Go ahead and be seated again.
 23 (Bench conference had off the record.)
 24 THE COURT: You may step down.
 25 And may this witness be excused?

1 MS. GARDNER: Yes, Ju
 2 MR. HULL: No objection.
 3 THE COURT: You're excused, also.
 4 The State may call its next witness.
 5 MS. GARDNER: Hoss Dillon.
 6 THE COURT: Sir, if you'll please come forward.
 7 And somewhere in the middle of the room here, face Madam
 8 Clerk and raise your right hand.
 9 ---oOo---
 10 HOSS DILLON,
 11 having been duly sworn by the Clerk of the Court, was
 12 examined and testified as follows:
 13 DIRECT EXAMINATION
 14 QUESTIONS BY MS. GARDNER:
 15 Q. Sir, can you start by tell us your name and
 16 spelling your last name for the record.
 17 A. My name is Hoss Dillon. Last name:
 18 D-i-l-l-o-n.
 19 Q. Sir, do you know Danielle Whitten?
 20 A. I do.
 21 Q. How long have you known her?
 22 A. Oh, about five years.
 23 Q. And how did you meet her?
 24 A. I met her through a friend of mine. He was
 25 actually Danielle's boyfriend, Brian.

1 Q. 's is his full name? Do you know?
 2 A. Um -- Brian Mertins.
 3 Q. And what has your relationship with Danielle
 4 been like over the five years?
 5 A. We've been friends.
 6 Q. Have you ever had any type of sexual
 7 relationship with her?
 8 A. No.
 9 Q. What about your friendship with Brian, her
 10 boyfriend? How would you describe your friendship with
 11 him?
 12 A. A good friendship.
 13 Q. Better or stronger than your one with Danielle?
 14 A. Um -- yes.
 15 Q. Do you have a brother?
 16 A. I do.
 17 Q. All right. What's his name?
 18 A. Hank Dillon.
 19 Q. And do you work with Hank sometimes?
 20 A. Um -- yeah, I used to.
 21 Q. And what kind of work did you used to do?
 22 A. We were doing maintenance for property
 23 management companies.
 24 Q. Did that involve any work in the City of Coeur
 25 d'Alene?

1 A. Yes.
 2 Q. And which parts of Coeur d'Alene had you worked
 3 in?
 4 A. All over Coeur d'Alene really.
 5 Q. Do you work on residential places?
 6 A. Yes.
 7 Q. Exclusively?
 8 A. Yeah.
 9 Q. About April 8th of this year, were you working
 10 in Coeur d'Alene?
 11 A. I was.
 12 Q. Where were you working?
 13 A. Down on 11th Street.
 14 Q. Which part of Coeur d'Alene?
 15 A. Down south by the lake. Down by Sanders Beach
 16 kind of.
 17 Q. Do you remember when you started working there
 18 that day?

1 inside of it.
 2 Q. And when did you -- what time of day do you
 3 recall starting your work there?
 4 A. Um -- it was about 3:00 in the afternoon that
 5 day.
 6 Q. And do you recall what time of day it was when
 7 you stopped your work there?
 8 A. Um -- it was about 11:00 at night.
 9 Q. And did you have anybody helping you work
 10 there?
 11 A. My brother and I.
 12 Q. Just the two of you?
 13 A. Yes.
 14 Q. Did you have a cell phone?
 15 A. I did.
 16 Q. And how did the two of you get to that work
 17 site?
 18 A. Um -- we drove.

19 A. Um -- actually, it was the last day of the
 20 job --
 21 Q. Okay.
 22 A. -- that everything happened so --
 23 Q. So what were you doing at that location?
 24 A. After we were finishing cleaning up, the house
 25 had caught on fire. And we were totally stripping the

19 Q. Who drove?
 20 A. I drove.
 21 Q. Was it his car or your car?
 22 A. Well, both of our cars were there.
 23 Q. So you got there in your own car? And he took
 24 his own car?
 25 A. Yes, ma'am.

1 Q. Do you know Sean Cook?
 2 A. I do.
 3 Q. How long have you known Sean Cook?
 4 A. Oh, probably, about two years, probably.
 5 Q. How did you meet Sean?
 6 A. I met him over at I was over seeing my friend,
 7 Brian and Danielle. Over where they were staying he was
 8 staying.
 9 Q. Were they all living in that apartment at the
 10 time?
 11 A. Yeah.
 12 Q. What was the relationship with Sean?
 13 A. Um -- we were friendly with each other. I
 14 mean, we never really hung out. But, I mean, I guess we
 15 were friends.
 16 Q. Did you have any animosity towards Sean?
 17 A. No.
 18 Q. On April 8th while you were working on that
 19 house on 11th, did you receive a phone call?
 20 A. I did.
 21 Q. And could you tell us who that phone call was
 22 from?
 23 A. It was from Danielle.
 24 Q. All right. About what time did you get that
 25 phone call?

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1 A. I was right around 11:00: I'm pretty sure.
 2 Q. And was there anything unusual about Danielle's
 3 voice in that phone call?
 4 A. Well, she seemed like she was talking really
 5 quiet. She seemed pretty urgent. You know, she asked me
 6 to come up to the motel.
 7 Q. Did she say anything else besides that?
 8 A. She said that Sean was there and that -- um --
 9 she couldn't get him out of there, I mean, she sounded
 10 pretty upset.
 11 Q. Was there anything specific about her voice
 12 that you remember that led you to conclude that she was
 13 sounding upset?
 14 A. Um -- I don't know. She just kind of had an
 15 upset tone in her voice.
 16 Q. Did she indicate how fast she wanted you to
 17 travel to that motel room?
 18 A. She did say as fast as I could get there.
 19 Q. Did you interpret that as needing to get there
 20 immediately?
 21 A. Yeah.
 22 Q. And did you do so?
 23 A. I did. As soon as I could get the job locked
 24 up.
 25 Q. Describe what you did from the moment you hung

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1 up from that phone call.
 2 A. Um --- I told my brother that we needed to go
 3 up to the motel -- um -- that something was wrong with
 4 Danielle or something was going on. I didn't know exactly
 5 what -- um -- and we locked up the house. And we jumped
 6 in his car. And we went up there.
 7 Q. Did you ask her what was wrong on that --
 8 during that phone conversation?
 9 A. You know, I did. But she was kind of reluctant
 10 to tell me, like, she didn't have a whole lot of time
 11 so --
 12 Q. Did she say she didn't have a whole lot of
 13 time?
 14 A. Um -- no. I could just tell in her voice.
 15 Q. Had you been to that hotel room before?
 16 A. No.
 17 Q. Did she tell you which hotel room she was in?
 18 A. She did.

19 Q. Prior to that call did you know what hotel room
 20 she was in? That she was staying there?
 21 A. I did not.
 22 Q. So how long did it take for you to get to that
 23 hotel?
 24 A. Maybe -- maybe, 10 minutes, 15 minutes.
 25 Q. Can you tell us what the distance was between

1 your work site and the hotel?
 2 A. Um -- two miles. Three miles, maybe, from 11th
 3 Street to Appleway.
 4 Q. Did you make any stops between the work site
 5 and the hotel?
 6 A. Red lights.
 7 Q. You didn't stop off at any places, though?
 8 A. No.
 9 Q. And which car did you go in?
 10 A. My brother's car.
 11 Q. And who drove?
 12 A. My brother.
 13 Q. And is there any particular reason why you
 14 decided to take that car?
 15 A. Um -- better on gas, I guess. I'm not sure
 16 why we took his car.
 17 Q. All right. Was there a bar in that area called
 18 the Mouse Trap?

19 A. Yes.
 20 Q. Can you tell us what -- are you good with
 21 distances?
 22 A. Um -- sufficient, I guess.
 23 Q. How far was the Mouse Trap from the door to her
 24 hotel room?
 25 A. Maybe, 150 feet or so.

1 Q. Is there a parking lot to the hotel room
 2 between those two buildings?
 3 A. The main entrance, yeah, there is a parking lot
 4 there.
 5 Q. How large is the parking lot?
 6 A. Um -- like, the whole thing all the way around
 7 the building? Or just that section?
 8 Q. Well, let's just talk about the parking lot
 9 between the buildings.
 10 A. Oh, probably, 30 feet, I guess, from the back
 11 of the Mouse Trap to the motel room.
 12 Q. When you arrived there where did you park in
 13 relation to where the motel room was?
 14 A. Um -- we parked on the other side because her
 15 room was up top. And it looked down at the swimming pool.
 16 We were on the other side of the swimming pool. So at the
 17 far end of the parking lot, I guess.
 18 Q. So her room was there a direct line from her
 19 room to the Mouse Trap? Or would you have to go on the
 20 other side of the building?
 21 A. We would have to go to the other side of the
 22 building.
 23 Q. On the complete opposite side of the building?
 24 A. Just basically around.
 25 Q. And as you told us 150 feet from her hotel

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1 A. Um -- yeah, a little bit. I mean, I was, I
 2 guess, trying to see what was going on so --
 3 Q. Who else was in that hotel room besides
 4 Danielle?
 5 A. Sean.
 6 Q. And where was Sean when you entered the room?
 7 A. Sitting in the chair at the table.
 8 Q. Was it the -- which chair would you say?
 9 A. Um -- the furthest chair from the door.
 10 Q. And how did he appear?
 11 A. Um -- laid back. Sitting in the chair.
 12 Q. Did he appear any different than -- when you
 13 say, "laid back," does he usually appear like that?
 14 A. Yes.
 15 Q. Have you ever seen Sean in an intoxicated
 16 state?
 17 A. Um -- maybe, once. Very briefly.

18 Q. Did he show any similarities between that state
 19 when you had seen him intoxicated?
 20 A. Um -- maybe, a little bit. I mean, I guess, my
 21 main focus when I went on really wasn't on Sean so --
 22 Q. Had you ever seen Danielle in an intoxicated
 23 state?
 24 A. I have.
 25 Q. Did she appear to show any of the similar

1 room. Is that how the crow flies? Or is that while
 2 walking this route?
 3 A. Um -- walking the route I would say. You have
 4 to walk around the building and down the stairs into the
 5 parking lot.
 6 Q. Is that the only business in the area?
 7 A. Um -- there's an Arby's right next to there. I
 8 think there's a tattoo shop and a laundromat next to the
 9 Mouse Trap.
 10 Q. So tell us how did you approach the hotel room.
 11 A. Just walked up and knocked on the door.
 12 Q. And who answered the door?
 13 A. Danielle did. I'm almost positive..
 14 Q. Anything unusual in appearance in Danielle at
 15 that point?
 16 A. I don't know. She looked upset.
 17 Q. Can you tell us specifically what it was about
 18 her that made you think she was upset?
 19 A. Her eyes were a little red, I guess, like, she
 20 had been crying or something.
 21 Q. Is Danielle a talkative person or not?
 22 A. Yeah. I would say.
 23 Q. Was she talkative that night?
 24 A. Not really.
 25 Q. Did you take any notice of that?

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1 signs?
 2 A. No.
 3 Q. So when you saw her that night or both of them
 4 did you take any notice that either one of them had been
 5 drinking?
 6 A. Well, there was beer bottles there so --
 7 Q. But just looking at them did they appear --
 8 A. I mean, not a whole lot, I guess.
 9 Q. How many beer bottles did you see?
 10 A. Maybe, four. Five, maybe.
 11 Q. Where were those beer bottles?
 12 A. I'm pretty sure there was, maybe, one or two on
 13 the nightstand next to the bed. And there was a couple on
 14 the table.
 15 Q. Were there any cans of beer?
 16 A. Not that I recall. I don't think.
 17 Q. So what did you talk about when you came to the

18 room?
 19 A. Just about work kind of. We talked about work.
 20 And I talked with Sean a little bit about what he was
 21 doing for work.
 22 Q. How long had it been since you had seen Sean
 23 last?
 24 A. Oh, four months. Five months, probably.
 25 Q. How long had it been since you had talked to

1 Danielle?
 2 A. Probably the day before that, I think.
 3 Q. Did you talk to Danielle on a daily basis?
 4 A. I talked to her and Brian pretty much on a
 5 daily basis, yes, if not every other day.
 6 Q. All right. Did you talk to Brian or her about
 7 the dog situation in the hotel?
 8 A. What do you mean?
 9 Q. The needing to get the hotel room because of
 10 the dog?
 11 A. Um -- did I talk to them about it?
 12 Q. Did you talk to them about it? Or did you know
 13 about it?
 14 A. About having the dog in the motel room?
 15 Q. Yes.
 16 A. Yeah. I mean, because they had stayed in the
 17 motel room before. And they had had the dog so --
 18 Q. So did you think there was anything unusual
 19 about the dog being there?
 20 A. No.
 21 Q. Where was the dog when you entered the room?
 22 A. Um -- I think in-between the bed, the T.V. or
 23 back kind of more toward the bathroom, I guess. It was
 24 kind of a spastic dog.
 25 Q. Moved around a lot?

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1 on this corner. My brother was sitting right there.
 2 Q. So across from your brother?
 3 A. Yeah.
 4 Q. At some point during your visit there did Sean
 5 leave the room?
 6 A. Um -- yeah, I'm pretty sure. I think he took
 7 the dog out.
 8 Q. And how far into your conversation did he do
 9 that?
 10 A. Um -- I had been there, maybe, ten minutes,
 11 maybe.
 12 Q. Did you and Danielle have a discussion while he
 13 was gone?
 14 A. Yeah. Well, I asked her what was going on.
 15 Q. What did she say?
 16 A. She just said that she wanted to get out of
 17 there.
 18 Q. Okay.
 19 A. Um -- pretty much.
 20 Q. Did you make any plans as far as how you were
 21 going to do that?
 22 A. We were just going to kind of take off and go
 23 to the store.
 24 Q. All right. Did you have any discussions about
 25 going to somebody's house?

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1 A. Yeah.
 2 Q. Where did you and your brother sit or stand
 3 when you were in that room?
 4 A. My brother sat down on the other chair on the
 5 other side of the table from Sean. And I sat down on the
 6 far corner of the bed.
 7 Q. Far corner meaning the closest or the --
 8 A. The furthest from the door facing the T.V., I
 9 guess.
 10 Q. And where was Danielle sitting?
 11 A. She was sitting on the other corner of the bed.
 12 Q. The corner being?
 13 A. In-between me and my brother the closest to the
 14 side of the door.
 15 Q. And Sean's chair, was that next to the wall?
 16 A. Yeah.
 17 Q. All right.
 18 A. The farthest from the door, I guess. The
 19 farthest side of the table.
 20 Q. And was Danielle sitting on that corner of the
 21 bed directly facing Sean? Or the corner closest to the
 22 door?
 23 A. She was sitting on the corner closest to the
 24 door, I believe. She moved around a little bit. I was
 25 sitting on the corner. The door is here. She was sitting

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1 A. To my brother's.
 2 Q. Was his girlfriend or fiancée pregnant at the
 3 time?
 4 A. At the time I believe she had just got
 5 pregnant, I think.
 6 Q. So was there discussion about going to the
 7 store?
 8 A. And then, maybe, going up to my brother's
 9 house.
 10 Q. All right. And where did your brother live?
 11 A. Um -- at the time he was living up in Hayden.
 12 Q. How long was Sean out of the room?
 13 A. Maybe, five minutes or so.
 14 Q. Whose idea was it for him to go out of the
 15 room?
 16 A. I think he just took the dog out for a walk.
 17 I'm not 100 percent on that.
 18 Q. All right. Now, when he returned to the room,
 19 how did the discussion go?
 20 A. Um -- well, he came in. And I sat down. And I
 21 think I'm pretty sure we were, just, "Are you ready to
 22 go?" Or whatever.
 23 Q. Did you say anything to prompt that?
 24 A. To prompt what?
 25 Q. To prompt leaving.

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1 A. Um -- I asked her if she was ready.
 2 Q. Okay. Had Sean been present during any of the
 3 discussions about you guys leaving?
 4 A. Um -- at the, like, right before we all left.
 5 We said we were going to take off.
 6 Q. Did you tell him where you were going to go?
 7 A. Um -- I don't recall.
 8 Q. So did he leave first? Or did you leave first?
 9 A. Yeah, he left first.
 10 Q. All right. About how long was it after he left
 11 that you guys left?
 12 A. Maybe, a minute or two.
 13 Q. Did you see any physical hugging or any kind of
 14 contact between Sean and Danielle during the entire time
 15 that you were in that room?
 16 A. No.
 17 Q. Did Danielle maintain the same demeanor that
 18 you saw when she first opened that door?
 19 A. Yeah.
 20 Q. Now, when you exited the hotel room did you see
 21 Sean?
 22 A. Um -- he was sitting in his car down on the
 23 west side. I think it was the west side of the building
 24 where he parked.
 25 Q. How was --

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1 observed that car before your vision was cut off from it?
 2 A. Just walking down. Walking down the stairs.
 3 Q. Did you see the car when you returned?
 4 A. No.
 5 Q. After you left the room did you ask Danielle
 6 anything?
 7 A. Yeah, I asked her what was going on. You know,
 8 what had happened?
 9 Q. What was her response?
 10 A. Um -- she really didn't want to say much at
 11 first, I guess. She just said that he was just trying to
 12 get on her whatever. And she kept trying to push him off
 13 or whatever.
 14 Q. She said that to you at first?
 15 A. Yeah, when we were in the car.
 16 Q. And was that the first time you asked her she
 17 said that?
 18 A. What was that?
 19 Q. The first time you asked her she said that?
 20 A. Well, I tried to ask her on the phone what was
 21 going on. So, I guess, it would be, like, the second
 22 time.
 23 Q. I see. And did you continue to ask her what
 24 had happened?
 25 A. Yeah, a few times. But, I mean, she didn't

1 A. Well, if you walk out the door and you go out,
 2 like, you're going towards the stairs looking, like, out
 3 the west side of the building, his car was parked, maybe,
 4 three or four cars lengths. He was sitting in it.
 5 Q. And was your brother's car on that same side?
 6 A. No. It was on the back side.
 7 Q. Could you tell whether the car was on?
 8 A. If the car was on? Like, started?
 9 Q. Yeah.
 10 A. Yeah, it was.
 11 Q. How do you know that?
 12 A. Um -- I mean, it was cold out. You could hear
 13 it run. You could see the exhaust.
 14 Q. Could you see him sitting in the driver's seat?
 15 A. You could see somebody sitting in the driver's
 16 seat. It was Sean's car. He had just left.
 17 Q. How did you recognize that as Sean's car?
 18 A. Danielle told me it was Sean's car.
 19 Q. Had you ever seen him in his car before?
 20 A. No.
 21 Q. And did that car remain there as you were
 22 leaving?
 23 A. Um -- we drove out the other side of the
 24 parking lot, I believe.
 25 Q. So how long was it that you say that you

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1 really say a whole lot at first.
 2 Q. Why did you continue to ask her?
 3 A. Well, I was asking her what was wrong because
 4 she was upset.
 5 Q. And the way she described it was he was trying
 6 to get on her?
 7 A. Like, trying to kiss her or something like
 8 that.
 9 Q. Did you not believe her?
 10 A. Um -- well, I didn't -- I don't think, I mean,
 11 really she's kind of an outgoing person. I really didn't
 12 think it would take something like that to upset her as
 13 bad as she was.
 14 Q. So did she act more upset as you asked her what
 15 had happened?
 16 A. Yeah.
 17 Q. Tell us how she changed the way she was acting.
 18 A. Well, after we got back we just went up to the
 19 store and got cigarettes. And when we got back I asked
 20 her again. You know, I could tell she was upset.
 21 Q. Where were you when you asked her?
 22 A. In the car.
 23 Q. Okay.
 24 A. And, I guess, we were just getting back from
 25 the store and I asked her again. I told her I know her

1 too well, you know. And she just start crying and told me
 2 so --
 3 Q. So she told you in the car?
 4 A. Um -- part way --
 5 Q. Well, explain to us.
 6 A. -- I guess. She said that he was on top of her
 7 and stuff like that. So we went back up to the room. And
 8 then she told me.
 9 Q. Can you tell us to the best of your
 10 recollection, you said: "He was on top of her and stuff
 11 like that."
 12 A. Well, I mean, she said he was trying to hit on
 13 her and kiss her and just, like, trying to lay on her and
 14 stuff.
 15 Q. And she said this at first when you said when
 16 you had left.
 17 A. Yeah, well, yeah. But then she was just saying
 18 he was trying to kiss her and make moves on her and stuff.
 19 Q. And at some point did what she reported to you
 20 change?
 21 A. Um -- from when we first got in the car?
 22 Q. From when he was trying to get on top of her.
 23 A. Um -- well, yeah. I mean, when we got back up
 24 to the room, I mean, she told me what all had happened to
 25 her.

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1 Q. When? At what point in the evening?
 2 A. It was just a little bit after I got there.
 3 Q. The first time?
 4 A. Yeah.
 5 Q. What did you do in the bathroom?
 6 A. Um -- I just used the rest room and washed my
 7 hands.
 8 Q. Urinated?
 9 A. Yeah.
 10 Q. Washed your hands?
 11 A. Yes.
 12 Q. All right. Did you move anything in that
 13 bathroom?
 14 A. No.
 15 Q. Did you use a towel?
 16 A. Um -- I think I used a little hand rag that was
 17 up in the towel rack.
 18 Q. Okay. Did you -- do you remember what you did
 19 with that hand towel after you used it?
 20 A. I don't.
 21 Q. Did you leave it there or did you --
 22 A. Yeah, I'm pretty sure. I'm pretty sure I left
 23 it there. I mean, I didn't take it out of the bathroom.
 24 Q. When she was describing her neck what did she
 25 say about what he did to her neck?

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1 Q. What did she tell you when you got back up to
 2 the room?
 3 A. She said that Sean had raped her, basically.
 4 Q. Can you tell us in more detail what you recall
 5 her saying?
 6 A. Um -- she looked pretty upset. She said that
 7 -- um -- that he forced sex on her.
 8 Q. Did she tell you --
 9 A. She said that he grabbed her neck.
 10 Q. Did she tell you about anything else as far as
 11 physical contact?
 12 A. Um -- not that I recall, no. I mean, at that
 13 point it was just kind of -- I really didn't -- I mean,
 14 she was pretty upset. I really didn't want to dig in any
 15 further.
 16 Q. When she was explaining this to you what was
 17 she doing emotionally?
 18 A. Crying with her face in her lap and her hands.
 19 Q. Did she tell you where this had happened?
 20 A. At the motel room.
 21 Q. Did she tell you when it had happened?
 22 A. Um -- right before she called me.
 23 Q. At some point in that evening did you go into
 24 the bathroom?
 25 A. I did.

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1 A. She just said he grabbed it.
 2 Q. Did she show you where he grabbed it?
 3 A. Yeah. She had a couple fingerprints, like,
 4 right here on her neck.
 5 Q. On the side of the -- the right side?
 6 A. Um -- I believe so.
 7 Q. Okay. And you also just grabbed the back of
 8 your neck. Why did you do that?
 9 A. Because that's how she said he grabbed her.
 10 Q. Did you look at her neck?
 11 A. Yes, I did.
 12 Q. What did you see?
 13 A. Um -- I seen a couple of fingerprints, like,
 14 right here.
 15 Q. On the right side of her neck?
 16 A. Yeah, I'm pretty sure.
 17 Q. Did you look at the back of her neck underneath
 18 her hair?
 19 A. Um -- a little bit. I really don't know. It's
 20 been a long time.
 21 Q. But you remember the two finger marks?
 22 A. Yeah, right.
 23 Q. Did you have her look at them? Or did she look
 24 at them herself?
 25 A. Um -- I don't -- I don't recall.

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1 Q. At what point was it in this conversation that
 2 you looked at her neck?
 3 A. Um -- after she started telling me, you know,
 4 after she said that he forced himself on her, and that he
 5 grabbed her on the neck.
 6 Q. Did you ask her anything in follow-up with any
 7 questions about how it had happened?
 8 A. Um -- I had asked her how he got there.
 9 Q. How?
 10 A. How Sean got there to the motel.
 11 Q. Okay. Why did you ask her that?
 12 A. Um -- just curiosity, I guess, of how the
 13 situation can get out of hand like that.
 14 Q. What did she say?
 15 A. She said that she had seen him earlier that
 16 day. I think it was at the store or at the liquor store.
 17 Q. And did you ask her any other questions?
 18 A. Not that I remember.
 19 Q. At some point did you make the decision to call
 20 the authorities?
 21 A. Yes, I did.
 22 Q. And whose idea was that?
 23 A. That was my idea.
 24 Q. And did you actually call the authorities or
 25 did she?

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1 A. Um -- I mean, when we're on our way back she
 2 started to cry.
 3 Q. What did you hear?
 4 A. The sound you make when you cry, I guess.
 5 Q. Okay. Anything unusual about her breathing?
 6 A. Um -- just that she was trying to -- she was
 7 trying not to cry, but she was crying so --
 8 Q. And that was the time that you say she started
 9 to talk about him trying to kiss her?
 10 A. Yeah.
 11 Q. Have you ever seen Danielle and Sean together?
 12 A. Um -- I mean, when they were staying together.
 13 Q. Had you ever seen them acting affectionate
 14 towards each other?
 15 A. No.
 16 Q. Had you ever seen them holding hands?
 17 A. No.
 18 Q. Is Danielle someone who you would describe as a
 19 touchy-feely person?
 20 A. Not really.
 21 Q. Does she chew gum?
 22 A. Um -- yeah, I guess.
 23 Q. How often? Have you ever seen her?
 24 A. Um -- yeah. I've asked her for gum before,
 25 yes.

1 A. I
 2 Q. Did she seem willing to talk to them?
 3 A. Um -- kind of. Not at first when I brought up
 4 the idea -- um -- but when they got there, you know, the
 5 cops pretty much kicked me out of the room and my brother
 6 so --
 7 Q. And they just were in there alone with her?
 8 A. Yeah.
 9 Q. How long did that take for them to arrive?
 10 A. Um -- maybe, five minutes.
 11 Q. Do you remember hearing when you were on your
 12 -- taking your car trip to the convenience store, do you
 13 recall where you, your brother, and Danielle were seated
 14 in that car?
 15 A. My brother was driving. I was sitting in the
 16 passenger seat. And Danielle was sitting behind me.
 17 Q. Directly behind you in the back seat?
 18 A. Um -- yeah.
 19 Q. Did you ever turn around and look at her?
 20 A. I did.
 21 Q. And why did you do that?
 22 A. Well, when I was asking her what was wrong and
 23 what was going on.
 24 Q. And did you ever hear her making any noises in
 25 the back seat?

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1 Q. Now, did you accompany her to Kootenai Medical
 2 Center?
 3 A. I did.
 4 Q. Who else went with you?
 5 A. My brother.
 6 Q. Did you stay there the whole time?
 7 A. I did.
 8 Q. About what time do you think you arrived at the
 9 hospital?
 10 A. About 1:30 or 2:00 in the morning, I guess.
 11 Q. Okay. And about how long do you think you
 12 stayed?
 13 A. I know that we got out of there a little before
 14 7:00 in the morning.
 15 Q. Did you take her back to the motel room?
 16 A. I did.
 17 Q. And did you leave her there?
 18 A. I did.
 19 Q. Did you talk to her about whether she was going
 20 to stay there or not?
 21 A. Yeah, she was leaving. I don't remember where
 22 she said she was going. I was really tired.
 23 Q. Did you know whether she has transportation or
 24 not?
 25 A. Um -- she did have a car.

1 Q. During the time that you've known Danielle
 2 have you come to an opinion about her reputation for
 3 truthfulness?
 4 A. What was that.
 5 Q. Her reputation for truthfulness?
 6 A. Um -- have I?
 7 Q. Do you have an opinion about Danielle's
 8 reputation?
 9 A. Oh, sorry. She's truthful, I mean.
 10 Q. All right.
 11 MS. GARDNER: Thank you. I don't have any
 12 other questions.
 13 THE COURT: Cross-examination.
 14 MR. HULL: Thank you.
 15 CROSS-EXAMINATION
 16 QUESTIONS BY MR. HULL:
 17 Q. Prior to this incident you've testified that
 18 you talked to Danielle and Mr. Mertins every day or every
 19 other day?
 20 A. Somewhere in there.
 21 Q. And do you still do that?
 22 A. Um -- well, I work with Danielle and her father
 23 now. I talk to Brian -- I don't know -- maybe, once a
 24 week, every other week or so since I've been working
 25 there.

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1 Q. So you work for Danielle's father?
 2 A. No. We all work together.
 3 Q. And where do you all work together?
 4 A. At Center Partners in Post Falls.
 5 Q. And you and Danielle have talked about this
 6 incident at the Motel 6 since the preliminary hearing?
 7 A. Um -- not really.
 8 Q. Do you remember testifying at the preliminary
 9 hearing?
 10 A. Yes. I remember being there.
 11 Q. And that was July 29th, 2008?
 12 A. Yeah.
 13 MR. HULL: Could he be provided with a copy of
 14 the transcript of the preliminary hearing?
 15 THE COURT: This is the transcript. Counsel
 16 will tell you what page.
 17 BY MR. HULL:
 18 Q. It indicates that your testimony began on
 19 Page 59. Okay?
 20 A. Okay.
 21 Q. You're asked what's your name on Page 59. And
 22 then you tell them who your name is. And you talk about
 23 having known Danielle for five years and having known
 24 Brian for some time and being a good friend of his.
 25 A. Um-hum.

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1 Q. Um -- and then you're asked: "Did she call you
 2 on April 8th in the evening time?" On Page 61 at line 15.
 3 Correct?
 4 A. July 15th, yeah.
 5 Q. And you indicated she did?
 6 A. Yes.
 7 Q. And you were asked: "Could you describe what
 8 her demeanor was during that conversation." Correct?
 9 A. Correct.
 10 Q. And you indicated: "It was fairly urgent. I
 11 mean she -- she just asked if I could come to where she
 12 was. She sounded really uncomfortable." Right?
 13 A. Correct.
 14 Q. And you indicate you hadn't heard her in that
 15 state before. Correct?
 16 A. Correct.
 17 Q. And you're asked how far away from her location
 18 you were. Correct?
 19 A. Correct.
 20 Q. And you indicated about a mile and a half. And
 21 then you talk about deconstructing this home, you and your
 22 brother, and getting there at about 10:00 or 10:30 to the
 23 motel. On Page 62?
 24 A. Um-hum.
 25 Q. And you indicate that it took you about 10 or

1 15 minutes to get there. Correct?
 2 A. Correct.
 3 Q. And you indicate you knocked on the door.
 4 Right?
 5 A. Correct.
 6 Q. And then there's a question at line 19 on
 7 Page 63. And it indicates: "And who came to the door?"
 8 And you answered, "Danielle." Correct?
 9 A. Correct.
 10 MS. GARDNER: I'm going object to this point.
 11 These questions have already been asked and answered.
 12 It's just a repetition of testimony that's already been
 13 provided.
 14 THE COURT: I'm going to overrule at that
 15 point. But I'm assuming counsel is going to get to a
 16 specific question rather than just reiterate the
 17 preliminary hearing testimony.
 18 MR. HULL: Your Honor, as much as possible it's
 19 just I need to point out the differences. And there's
 20 substantial in my opinion; so it could be fairly
 21 extensive.
 22 THE COURT: Well, I'm going to direct counsel
 23 to if you believe there are differences to get to those
 24 differences and not just rehash the whole testimony,
 25 please. But overruled on that specific objection.

1 BY MR. HULL:
 2 Q. Danielle answered the door. Correct?
 3 A. Correct.
 4 Q. You indicate that when you enter the room that
 5 you were talking about -- when asked what did you talk
 6 about when you entered the room, if anything? You
 7 indicate: "I hadn't seen Sean in a while. I was just
 8 kind of tryin' to break the ice and, you know, get some
 9 kind of conversation goin' and figure out what was goin'
 10 on there, you know, that was so urgent 'cause she hadn't
 11 told me exactly what was goin' on over the phone. I don't
 12 think she could. Um, uh, we just talked about, you know,
 13 what he may have been doin' lately. We talked about his
 14 work a little bit, where he was workin' or whatever."
 15 Correct?
 16 A. Correct.
 17 Q. And then you indicate on that same page --
 18 MS. GARDNER: Which page is that?
 19 MR. HULL: Sixty-eight.
 20 BY MR. HULL:
 21 Q. "And did you at one point," on line 17,
 22 "indicate to Sean that you and Danielle were gonna to be
 23 leaving?" And you answer: "Yes." Correct?
 24 A. Correct.
 25 Q. And then you're asked: "And tell us how that

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1 Q. "Did you make the decision to offer the -- the
 2 ride to the store as an excuse?"
 3 A. Correct.
 4 Q. "To -- to leave?" Is an answer. And you
 5 indicate: "Yes." Correct?
 6 A. Correct.
 7 Q. And then you answer again without a particular
 8 question: "And just to kind of break up the whole
 9 situation there." Right?
 10 A. That's what it says, yes.
 11 Q. And question: "And how far into the
 12 conversation did you make that excuse or decide to?"
 13 Right?
 14 A. Right.
 15 Q. And you answer: "Into the conversation of
 16 leaving or from me bein' there?" "From you being there.
 17 At what point after you arrived there did you make the
 18 decision that you were going to try to make up an excuse
 19 to get her out?" Correct?
 20 A. Correct.
 21 Q. And you answer: "Oh, it had -- it had been
 22 about ten minutes 'cause, you know, I mean, I just -- you
 23 know, I really wasn't aware of the situation fully uh,
 24 before we left. So -- I mean we -- we got there and I --
 25 I expected, you know, that maybe he would just get up and

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1 conversation went." Correct?
 2 A. Correct.
 3 Q. And you answer: "I just asked her, you know,
 4 if she was ready to go kinda, 'cause I was gonna take her
 5 to the store, my brother and I. And I guess that was --
 6 "Okay." "-- pretty much how it went." Correct?
 7 A. Correct.
 8 Q. And there isn't any indication that Sean had
 9 left the motel room with the dog. Correct?
 10 A. Correct.
 11 Q. And you're asked specifically how it was that
 12 this conversation about leaving came up. Correct?
 13 A. I was.
 14 Q. And then there's a question: "At what point
 15 did you -- did you have that conversation that you were
 16 gonna take her to the store?" Right? And that's at the
 17 top of Page 69.
 18 A. Correct.
 19 Q. And you answer: "Oh, it had been probably
 20 about ten minutes or so after sittin' there. I was just
 21 tryin' -- I was actually just kinda tryin' to evaluate the
 22 situation to see, you know, really what was going to
 23 happen -- or what had happened um, for her to be so
 24 upset." Okay. That's correct?
 25 A. Correct.

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1 leave or whatever and then we wouldn't have to go
 2 anywhere." But that's your answer. Right?
 3 A. Yes.
 4 THE COURT: Mr. Hull, if you continue to read
 5 from the transcript, please read more slowly than you
 6 think. It's tough for the court reporter to keep up with
 7 that.
 8 BY MR. HULL:
 9 Q. And then your question: "And did he?" After
 10 you're saying you thought he might leave, there's a
 11 question: "And did he?" Correct?
 12 A. Correct.
 13 Q. You answered: "No." Right?
 14 A. Right.
 15 Q. And then there's questions about Danielle
 16 participating in the conversation after you got there.
 17 Right?
 18 A. Right.
 19 Q. So there was no testimony at the time of the
 20 preliminary hearing that Sean Cook got up and walked the
 21 dog while you were there. Right?
 22 A. Um -- not that I see in here.
 23 Q. And, specifically, there was a question about:
 24 "Did he get up and go anywhere?" And you said: "No."
 25 Right?

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1 A. He didn't get up and leave to be gone for good.
 2 I mean, he didn't get up and say: "I have to leave."
 3 Q. So?
 4 A. I mean, just walking the dog and you come back.
 5 I mean, he's not gone.
 6 Q. So when you were answering: "I expected, you
 7 know, that maybe he would just get up and leave or
 8 whatever and then we wouldn't have to go anywhere." And
 9 then you're asked: "And did he?" You answer: "No."
 10 Correct?
 11 A. Correct.
 12 Q. All right. Now, in this phone call you heard
 13 noises that you believed to be from Danielle. You heard
 14 noises that you believed to be a door opening. Correct?
 15 A. In the phone call?
 16 Q. Yes.
 17 A. Um -- I think she got up to talk to me.
 18 Q. So did you hear noise from Danielle's end of
 19 the phone that you thought was her opening up the motel
 20 door?
 21 A. I don't remember.
 22 Q. I would draw your attention to Page 79 of the
 23 transcript. And I would draw your attention to your
 24 answer -- your portion of the answer starting at line 9 of
 25 that page when there's a discussion about this phone call

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1 and sat down in the middle of the bed."
 2 A. Correct.
 3 Q. "Well on the middle of the side." Correct?
 4 A. Correct.
 5 Q. "And that's the side towards the table," is the
 6 question. Correct?
 7 A. Yep.
 8 Q. And you answer: "Yes." Right?
 9 A. Yep.
 10 Q. And you indicate that Mr. Cook was sitting in
 11 the chair where you've indicated. The chair at the table
 12 on that side of the bed furthest from the door.
 13 A. Right.
 14 MR. HULL: If I could have a moment,
 15 Your Honor.
 16 (Pause in proceedings.)
 17 THE COURT: Mr. Hull, I think it would be
 18 appropriate to take our noon recess at this point.

19 MR. HULL: Very well.
 20 THE COURT: All right. Members of the Jury,
 21 we're going to take our noon recess. Again, don't talk
 22 about the case or form any opinion. I'm going to say that
 23 every time you leave, but it's very important.
 24 Please reconvene to hear testimony at 1:15
 25 this afternoon. Enjoy your lunch.

1 and you testified: "She really didn't specify a whole lot
 2 of what was goin' on. She did go outside." Correct?
 3 A. That's what it says there, yes.
 4 Q. So that's what you testified to at the
 5 preliminary hearing under oath that you heard sounds that
 6 made you believe that Danielle went outside of the motel
 7 room while she was talking to you on the phone. Correct?
 8 A. Correct.
 9 Q. And then after Danielle opened the door she
 10 went back and sat on the side of the bed next to the table
 11 where Sean Cook was sitting. Correct?
 12 A. Um -- she came back and sat on the bed. The
 13 same side of the bed, yes.
 14 Q. And she was sitting on the middle of the bed on
 15 that side. Correct?
 16 A. Yeah, at one point. She moved around a little
 17 bit.
 18 Q. And drawing your attention to Page 82 of the
 19 preliminary hearing transcript, on line 14 of Page 82, you
 20 were talking about Danielle having answered the door. And
 21 then there's a question: "And Danielle was sitting where
 22 when you came in?" Correct?
 23 A. Correct.
 24 Q. And you answer: "She was sitting um -- she
 25 was -- well, after she opened the door she walked back in

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1 THE BAILIFF: All rise.
 2 THE COURT: You can step down.
 3 (The Jury left the Courtroom.)
 4 THE COURT: Is there anything to take up by
 5 counsel before we break for lunch?
 6 MS. GARDNER: I don't believe so, Judge.
 7 MR. HULL: No, Your Honor.
 8 THE COURT: See you at 1:15, then.
 9 MR. HULL: 1:15.
 10 THE COURT: We are in recess.
 11 (Lunch recess taken.)
 12 THE COURT: All right. We are on the record in
 13 State versus Cook after the lunch break. And we had an
 14 informal quick meeting in chambers regarding the
 15 admissibility of testimony from Mr. Sawley. It is the
 16 subject matter of the prosecution's notice of intent to
 17 use 404(b) evidence. And it was specifically
 18 subsection 3.

19 And the offers of proof, essentially agreed to
 20 by the parties, was that Mr. Sawley was going to testify
 21 that he heard Mr. Cook make a statement to the effect of
 22 had he known that the alleged victim would have called the
 23 police he would have either killed her and placed her into
 24 a Dumpster or authorities would have found her head in a
 25 Dumpster. Something to that effect.

1 The Court in the exercise of its discretion on
 2 admitting evidence is going to deny the use of that
 3 evidence and not allow that particular evidence. The
 4 Court finds that there is limited probative value to that
 5 statement. It's relevant to the extent that it's relevant
 6 to the subject matter of this trial. Its probative value
 7 is less or is minimal because that statement could be made
 8 regarding either theory of this particular case. That
 9 this was a forcible rape. And had he known she was going
 10 to call the police regarding, that he would have killed
 11 her or it could be interpreted that the statement was made
 12 that this was consensual sex. And had he known she was
 13 going to falsely accuse him of rape, he would have killed
 14 her and put her in the Dumpster. So it has some limited
 15 probative value. The Court finds that that probative
 16 value is substantially outweighed by the prejudicial
 17 effect of such a statement to the point of unfair
 18 prejudice so that statement will not be allowed into
 19 evidence.
 20 Any questions from the State? Or any record
 21 that you want to make regarding that?
 22 MS. GARDNER: No, Your Honor. Not at this
 23 time. Well, I guess, I do want to say that depending on
 24 the circumstances under which Mr. Nelson heard this
 25 statement, which I understand are completely different

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1 circumstances, I would like to revisit that motion at a
 2 later time. And I would like to have the opportunity to
 3 speak with Mr. Nelson before he provides testimony. And
 4 we can make some kind of decision, I guess, on exactly
 5 where he can go in his testimony.
 6 THE COURT: All right. We can address it at
 7 that point.
 8 Any question or record that the defense would
 9 like to make?
 10 MR. HULL: No, Your Honor.
 11 THE COURT: Any reason to not bring the Jury
 12 back?
 13 MR. HULL: No, Your Honor.
 14 MS. GARDNER: No, Your Honor.
 15 THE COURT: Please do so.
 16 (The Jury entered the Courtroom.)
 17 THE COURT: All right. The record should
 18 reflect that the Jury is returned. They are in their
 19 appropriate places. Mr. Dillon is being summoned.
 20 You can resume the witness stand, please, sir.
 21 Mr. Dillon you're reminded that you're still under oath
 22 from the oath you took this morning.
 23 THE WITNESS: Okay.
 24 THE COURT: And, Mr. Hull, you may continue
 25 your cross-examination.

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1 MR. HULL: Thank you, Your Honor.
 2 ///
 3 CROSS-EXAMINATION (Continued)
 4 QUESTIONS BY MR. HULL:
 5 Q. Mr. Dillon, could you look at the top of Page
 6 85 of the transcript. And are you there?
 7 A. Yeah.
 8 Q. And at the top of Page 85 there's a question.
 9 "And when in this ten minutes of conversation did the
 10 topic of going to the gas station first come up?"
 11 Correct?
 12 A. Correct.
 13 Q. And your answer: "Right before we left."
 14 A. Correct.
 15 Q. And then there's a question: "So there wasn't
 16 any discussion about going anywhere prior to just before
 17 leaving." Right?
 18 A. Correct.
 19 Q. And your answer is: "No."
 20 A. Correct.
 21 Q. Now, I draw your attention to Page 86, line 7.
 22 And there's a discussion going on at that point in time
 23 about you asking Ms. Whitten about what had happened.
 24 Correct?
 25 A. Right.

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1 Q. And there's a question: "Okay. And you
 2 believe that the total is six times that you asked her
 3 what had happened?" Correct?
 4 A. Correct.
 5 Q. And your answer: "Yeah, about that." Right?
 6 A. Correct.
 7 Q. And then there's a question: "Now, it was the
 8 approximately sixth time that she said she had been
 9 sexually assaulted." That's the question.
 10 A. Right.
 11 Q. And your answer: "Yes." Correct?
 12 A. Correct.
 13 Q. Now, when were you describing these
 14 circumstances at the preliminary hearing in July you made
 15 no mention of having seen any redness on Danielle
 16 Whitten's neck. Right?
 17 A. Um -- I haven't read the transcript. I don't
 18 know. It's been a while.
 19 Q. Do you want to read the transcript to fi
 20 A. Um -- not really.
 21 Q. Okay. Could you review your testimony in there
 22 until you're satisfied as to whether or not you mentioned
 23 the redness on Danielle Whitten's neck at that time?
 24 A. Sure.
 25 THE COURT: Mr. Hull, we're not going to take a

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1 recess for him to read that preliminary hearing testimony.
 2 If you can direct him to a relevant portion, you can sure
 3 do that. But we're not going take that time.
 4 MR. HULL: Your Honor, I don't know how to
 5 direct his attention to something that's not there. So
 6 the only thing I can do is if he's not certain whether he
 7 mentioned redness of the neck at the preliminary
 8 transcript or not is to have him review that testimony
 9 until he's satisfied whether he did or didn't.

10 THE COURT: We're not going to take the time
 11 for him to do that.

12 BY MR. HULL:

13 Q. So you don't recall mentioning redness of the
 14 neck at the preliminary hearing?

15 A. No. I don't recall being asked if I examined
 16 her as well.

17 Q. Now, in your testimony here today you testified
 18 that prior to going to see Danielle Whitten, after she
 19 called you on the phone, you locked up the house you were
 20 working on; so it took some time. And then you left to go
 21 to see Danielle at the motel. Correct?

22 A. Correct. I mean, it doesn't take much time to
 23 close a door and lock a window and wait more than a couple
 24 of minutes to close it out.

25 Q. Okay. Now, I draw your attention to Page 88,

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1 line 15. About that interval of the testimony you're
 2 talking about having returned with Danielle Whitten to the
 3 motel room the following morning from the hospital.

4 Correct?

5 A. Correct.

6 Q. And the question is: "And what did you guys do
 7 when you got back to the room?" Correct?

8 A. Um -- what line are you talking about?

9 Q. Line 15. A question: "And what did you guys
 10 do when you got back to the room." Right?

11 A. Uh-huh.

12 Q. And you answer: "Um, we talked a little bit.
 13 Um, I had left the house that I was workin' on completely
 14 open um, and I had to go back and shut that up and just
 15 finish up a couple of things." Right?

16 A. That's what it says.

17 Q. And you were under oath when you were making
 18 this testimony back in April?

19 A. Correct.

20 Q. I mean in July?

21 MR. HULL: I don't have any further questions,
 22 Your Honor.

23 THE COURT: Any redirect examination?

24 MS. GARDNER: I do, Judge.

25 REDIRECT EXAMINATION

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1 QUESTIONS BY MS. GARDNER:

2 Q. As far as that last statement regarding the
 3 returning to the home, is that what you can recollect
 4 today as you sit here?

5 A. As what?

6 Q. Returning to that home to lock it up?

7 A. The windows may have been opened, but I know
 8 that the door was locked. And I had tools in there, but,
 9 I mean, as far as the windows, the back window might have
 10 been opened so --

11 Q. Was there an issue that you thought of
 12 particular importance about that day?

13 A. What was that?

14 Q. Whether you left the window open or not of the
 15 house?

16 A. My tools were in the house.

17 Q. And is your memory better today? Or was it

18 better on August -- July 29th of this year?

19 A. My memory better starting with the whole
 20 ordeal?

21 Q. Yes.

22 A. Um -- I mean, it was a little bit fresher then,
 23 I guess.

24 Q. Are you ill today?

25 A. I am.

1 Q. Can you just tell us briefly what you have.

2 A. I don't know. Just a bad cold, I guess, in my
 3 chest.

4 Q. Is there anything about that illness that is
 5 affecting your ability to recall events today?

6 A. I don't know.

7 Q. At the preliminary hearing did we ask you or do
 8 you remember us asking you about Sean leaving the room
 9 with the dog?

10 A. Um -- you know, I'm not totally sure.

11 Q. Do you remember at the preliminary hearing when
 12 you were there testifying, did you remember that there was
 13 this incident where Sean had left with the dog and the
 14 three of you had this discussion?

15 A. No.

16 Q. And is there a reason why you remember that now
 17 today?

18 A. Um -- you know, I'm not totally sure. Well, I
 19 just kind of thought about it a little bit this morning
 20 about everything that had happened.

21 Q. All right. And did you then remember about the
 22 discussion you had?

23 A. About him taking the dog out?

24 Q. Yes.

25 A. Yes.

1 Q. Okay. And if we had asked you at the
 2 preliminary hearing if Sean left the room with the dog
 3 would you have told us that: "Yes, he did"?
 4 A. Yeah.
 5 Q. And did you intend to tell the complete truth
 6 at that preliminary hearing?
 7 A. I did.
 8 Q. Are you telling us the complete truth to the
 9 best of your recollection today?
 10 A. I am.
 11 Q. Did you have any animosity towards Sean Cook
 12 prior to this day?
 13 A. No.
 14 Q. Why did you think Danielle went outside when
 15 you were on the phone with her?
 16 A. Right.
 17 Q. Why did you think that she was stepping
 18 outside?
 19 A. Um -- you know, I'm not totally sure. I don't
 20 really remember.
 21 Q. Okay. But that you recall her saying: "Hey,
 22 I'm stepping outside"?
 23 A. I don't think so. You know, I may have -- I
 24 may have asked her if, you know, so she could tell me more
 25 about what was going on over the phone if she could step

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1 A. Um -- that's what it says in here.
 2 Q. And while you had no animosity towards Mr. Cook
 3 prior to April 8th, you do now. Correct?
 4 A. Do I have animosity towards him?
 5 Q. Yes.
 6 A. Um -- I mean, if you could redefine it. Do I
 7 hate him? Is that what you're asking me?
 8 Q. Yeah.
 9 A. Or if I just dislike him.
 10 Q. Yes.
 11 A. I dislike his actions. You know, we were
 12 always fine friends. We never had cross words or
 13 anything. You know, I don't like what he did.
 14 Q. And you're much closer to Danielle Whitten than
 15 you ever were to Mr. Cook. Right?
 16 A. Well, yes.
 17 Q. And your testimony is substantially different

18 today than it was at the preliminary hearing. Right?
 19 A. Um -- I don't see where it's substantially
 20 different.
 21 Q. Now, when you left the motel room the following
 22 morning you left Danielle Whitten there alone?
 23 A. Yes.
 24 MR. HULL: I don't have any further questions.
 25 THE COURT: That means you may step down, sir.

1 away or if Sean was there or not. I don't really recall.
 2 Q. Did you hear any background noises when you
 3 were on the phone with her?
 4 A. Um -- it could have been the T.V. on. I'm not
 5 sure.
 6 Q. The questions that the defense counsel asked
 7 you about where everybody was sitting, do you recall or
 8 from your review of the transcript today, did we ever ask
 9 you where your brother was sitting?
 10 A. Before?
 11 Q. At the preliminary hearing.
 12 A. Um -- yeah, I'm pretty sure.
 13 Q. Sorry?
 14 A. I'm pretty sure. I think so.
 15 Q. Okay. And are you certain, as you sit here
 16 today, that the placement of everybody as you recall it
 17 was that evening?
 18 A. Yeah.
 19 MS. GARDNER: I don't have any other questions.
 20 THE COURT: Any recross?
 21 RECCROSS-EXAMINATION
 22 QUESTIONS BY MR. HULL:
 23 Q. Mr. Dillon, your testimony at the preliminary
 24 hearing was that the house was completely opened.
 25 Correct?

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1 Any reason why this witness cannot be excused?
 2 MS. GARDNER: No, Your Honor.
 3 MR. HULL: No, Your Honor.
 4 THE COURT: You're also excused.
 5 THE WITNESS: Can I stay? Or do I have to go?
 6 THE COURT: You may stay or you may go however
 7 you choose.
 8 THE WITNESS: Okay.
 9 THE COURT: The State may call its next
 10 witness.
 11 MS. GARDNER: Harold Dillon.
 12 THE COURT: Sir, if you would please come
 13 forward. And about halfway up here, face Madam Clerk, and
 14 raise your right hand, please.
 15 ---oOo---
 16 HAROLD RUSSELL DILLON,
 17 having been duly sworn by the Clerk of the Court, was

18 examined and testified as follows:
 19 DIRECT EXAMINATION
 20 QUESTIONS BY MS. GARDNER:
 21 Q. Sir, could you start by stating your name and
 22 spelling your last name.
 23 A. Harold Russell Dillon. And the last name is:
 24 D-i-l-l-o-n.
 25 Q. Do you also go by Hank?

A. Yes.
 Q. All right. There's some confusion here.
 Do you know Danielle Whitten?
 A. Yes, I do.
 Q. How long have you known her?
 A. Probably two years.
 Q. And how did you meet her?
 A. Through my brother. At the time she was --
 um -- her boyfriend was my brother's friend.
 Q. And what was her boyfriend's name?
 A. Brian.
 Q. And can you describe what your relationship has
 been like with Danielle?
 A. My relationship?
 Q. Right. How would you describe her?
 A. Just friends, you know. I see her every once
 in a while. We go fishing together, you know, with her
 ex-boyfriend and my brother.
 Q. Acquaintances, then?
 A. Yeah, not really. I know her.
 Q. How many times would you say that you have seen
 Danielle?
 A. I don't know. A lot.
 Q. More than ten times?
 A. Oh, yeah. More than 50 times, probably.

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A. Like I say, it was 10:30 at night. We were
 getting ready to quit anyway. And so we just finished,
 you know. Decided to finish up right then and go and see
 what was wrong.
 Q. So when you left do you remember whether you
 locked up everything and took all of your tools?
 A. Oh, yeah. I locked everything.
 Q. And how did you -- how did you go to the hotel?
 Did you drive?
 A. Yeah, I drove my car.
 Q. And about how long do you think it took you to
 get over there?
 A. From the time we left?
 Q. Yes.
 A. Seven minutes, five minutes. Something like
 that. It's only a couple of miles.
 Q. When you arrived did you get a chance to go

into the hotel room?
 A. Did I go in the hotel room when we got there?
 Q. Yes.
 A. Yes. Me and my brother both did.
 Q. Were Danielle and Sean in that room?
 A. Yes, they were.
 Q. And what was -- how would you describe
 Danielle's demeanor?

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Q. Okay. Do you know Sean Cook?
 A. Nope.
 Q. Did you ever meet somebody named Sean Cook?
 A. Yeah. I met him at the Motel 6 the night of,
 you know, what we're here for.
 Q. And is he in this courtroom?
 A. Yes, he is.
 Q. Could you please tell us where he's seated and
 what's he's wearing.
 A. The Defendant here in the white with the gray
 tie.
 Q. On April 8th of this year, did you go to a
 Motel 6 to see Danielle?
 A. Yes, we did or I did.
 Q. Where were you prior to going to that hotel?
 A. Me and my brother were working at a house that
 we were doing demolition work at 11th Street, 515 11th.
 Q. Did your brother stop your work at some point?
 A. Yeah. We were -- um -- at about 10:30 at
 night. And he got a phone call from Danielle, an urgent
 phone call, asking us to come over there right away.
 Q. Okay. And did you do that?
 A. Yeah, pretty much.
 Q. Do you remember whether you closed up the
 place, locked up the place or just --

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A. Um -- she was sitting on the bed. And she was
 quiet. Didn't really say too much. Normally she's not
 like that, you know. She's usually laughing and joking,
 whatever.
 Q. So she was acting --
 A. She was quiet, just, you know. Not really
 saying too much of anything.
 Q. How was Sean Cook acting?
 A. Well, like I said, I never -- I hadn't met Sean
 before, so I introduced myself to him. And we shook
 hands. And he seemed fine, just, you know, normal. I
 didn't think anything was wrong at that point.
 Q. At some point did Sean leave the room with the
 dog?
 MR. HULL: Your Honor, I would object to the
 leading nature of the question, Your Honor.
 THE COURT: I'm going to sustain that.

BY MS. GARDNER:
 Q. During this conversation did Sean ever leave
 the hotel room?
 A. Yes, he did.
 Q. Can you tell us how far into the conversation
 he did that?
 A. After about 15 minutes.
 Q. Can you tell us if anybody went with him?

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1 A. The dog went with him. went out to walk the
 2 dog.
 3 Q. And during that time he was out of the room,
 4 did the three of you talk about anything?
 5 A. Yes, we did. At that point when Sean was out
 6 of the room, Danielle finally, you know, started speaking
 7 and telling us, you know, that Sean wouldn't leave. And
 8 that she wanted to get out of the hotel room. And, you
 9 know, basically get everybody away from the hotel room.
 10 And she was -- so we decided to -- we decided to say that
 11 -- um -- my girlfriend is pregnant, and that we decided to
 12 tell Sean we were going to leave and go visit my
 13 girlfriend because her and Danielle know each other.
 14 Q. And how long was Sean absent from the room?
 15 A. About no more than ten minutes.
 16 Q. When he returned who, if anybody, broached the
 17 subject of leaving?
 18 A. Say that again?
 19 Q. Who, if anybody, mentioned leaving the place?
 20 A. Danielle wanted to leave the room, but she
 21 didn't know how to have a reason to leave the room
 22 without, you know, Sean going with us.
 23 Q. So when Sean returned which of the three of you
 24 mentioned leaving?
 25 A. I'm not sure.

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1 A. Crying. And, you know, just shaking. Just,
 2 you know, totally a wreck, basically.
 3 Q. Did anybody say anything just before she
 4 started doing that?
 5 A. Yeah, Hoss was. Hoss could tell that something
 6 was wrong with her. And he just, you know, basically just
 7 asked her what was wrong. Because it's obvious something
 8 was wrong, but she didn't say anything. And then he
 9 finally got her to talking. And that's what she said.
 10 Q. Were you still in the car at that point?
 11 A. No. We were in the hotel.
 12 Q. Did all three of you go in the hotel room
 13 together? Or did Hoss go first?
 14 A. All three of us were in the hotel room.
 15 Q. I'm sorry?
 16 A. All three of us were in the hotel room.
 17 Q. And it was at that point that you heard Hoss

18 ask her?
 19 A. Well, he, if I remember right, he asked her in
 20 the car, you know, what was wrong with her. She didn't
 21 actually say anything until she got back in the hotel
 22 room, you know, a little bit more, you know, talking with
 23 Hoss or whatever. Hoss asked her what was wrong. And she
 24 finally broke down and said.
 25 Q. Did you stay there from there on with her and

1 Q. Did somebody?
 2 A. Yeah, one of us did. I don't remember how it
 3 all came about but --
 4 Q. All right. And when you left the hotel room
 5 with Danielle and your brother, where did you go?
 6 A. To the gas station to get some cigarettes.
 7 Q. And who drove?
 8 A. I did.
 9 Q. And was there any discussion that you heard on
 10 the way to the store?
 11 A. On the way to the store she was, like, still
 12 kind of didn't want to say much, you know. You could tell
 13 something was bothering her, but she didn't really say too
 14 much. Then when we got to the gas station my brother
 15 asked me to go inside to get the cigarettes for them. And
 16 they stayed in the car and talked.
 17 Q. Okay.
 18 A. So I don't know what was said at that point.
 19 And then when I got back to the car -- um -- Danielle was
 20 still, you know, they were talking a little bit. She
 21 still hadn't mentioned anything about being raped or
 22 anything like that. So just, you know, she didn't break
 23 down until we got to the hotel room.
 24 Q. When you say "break down," could you describe
 25 for us what you mean by breaking down?

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1 your brother until the police arrived?
 2 A. Yeah. I at one point I excused myself because
 3 they're better friends than me. And, you know, she didn't
 4 really -- I don't think she felt comfortable saying all
 5 the details or whatever; so I just excused myself and went
 6 outside. And then they talked. And then, you know, about
 7 five or ten minutes later I came back in, you know.
 8 Q. During the time that you've known Danielle,
 9 have you an opinion about her character for truthfulness?
 10 MR. HULL: Your Honor, I would object. I don't
 11 think there's been an appropriate foundation of his
 12 knowledge for him to form that opinion.
 13 THE COURT: I'm going to sustain that objection
 14 not on those grounds but on the grounds of Rule 609 does
 15 govern how that evidence is admissible. And I sustain
 16 that objection at this point.
 17 BY MS. GARDNER:

18 Q. Did Danielle's demeanor change any after that
 19 point?
 20 A. What do you mean "change"?
 21 Q. Did she continue crying throughout the evening?
 22 A. She didn't cry the whole evening, no. I mean,
 23 it bothered her all evening, I mean, obviously.
 24 Q. Did you accompany her to the emergency room at
 25 Kootenai Medical Center?

18 Q. Did Danielle's demeanor change any after that
 19 point?
 20 A. What do you mean "change"?
 21 Q. Did she continue crying throughout the evening?
 22 A. She didn't cry the whole evening, no. I mean,
 23 it bothered her all evening, I mean, obviously.
 24 Q. Did you accompany her to the emergency room at
 25 Kootenai Medical Center?

1 A. Yeah. I drove her down here.
 2 MS. GARDNER: Thank you. I don't have any
 3 other questions.
 4 THE COURT: Cross-examination?
 5 CROSS-EXAMINATION
 6 QUESTIONS BY MR. HULL:
 7 Q. Now, Hoss is your brother?
 8 A. Yes, sir.
 9 Q. And you see him frequently I take it?
 10 A. Yes, sir.
 11 Q. And you and he have discussed this situation?
 12 A. What do you mean "discussed this"?
 13 Q. Discussed what -- since this evening in April,
 14 you've discussed this situation at the Motel 6?
 15 A. Sure.
 16 Q. And how many times do you think you and he have
 17 discussed this situation?
 18 A. Maybe once or twice I asked him if, you know,
 19 what was coming out of it, you know. If anything, you
 20 know, was coming up or whatever.
 21 Q. And when you first arrived at the motel room,
 22 you didn't think -- notice that anything was wrong.
 23 Correct?
 24 A. No. I mean, it was not obvious. I mean, the
 25 room wasn't tore up or anything like that. But Danielle

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1 wasn't saying, you know. She was sitting on the bed.
 2 You know, you could tell something was bothering her, but,
 3 you know --
 4 Q. And you heard no responses from Danielle in the
 5 car about being assaulted by Mr. Cook?
 6 A. Not in the car, no.
 7 Q. And your testimony is that all three of you
 8 when you returned from the gas station go into the motel
 9 room together?
 10 A. All three of us went in, yeah.
 11 Q. And that's when you heard Danielle make an
 12 allegation of being assaulted by Sean Cook?
 13 A. Correct.
 14 Q. Now, the phone call, you didn't take the phone
 15 call initially?
 16 A. No, I didn't.
 17 Q. And you didn't participate in that phone call?
 18 A. No.
 19 Q. So any characterization you've testified to of
 20 that phone call was something your brother told you?
 21 A. My brother told me that he needed to go to the
 22 Motel 6. That Danielle just called and said something was
 23 wrong.
 24 Q. So that's based on what your brother Hoss told
 25 you?

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1 A. Yeah.
 2 Q. Did you return to the work site the following
 3 morning with your brother?
 4 A. Um -- I'm not sure. I'm sure we did. We
 5 weren't done with the job.
 6 Q. Did you return with Hoss to the Motel 6 the
 7 following morning?
 8 A. No. The following morning of what?
 9 Q. The following morning after --
 10 A. The following morning we left the hospital at,
 11 like, 6:00 in the morning. So that would be the following
 12 morning. And we dropped Danielle off at the hotel room.
 13 Q. That's what I'm asking.
 14 A. Oh, yeah. I drove.
 15 Q. You drove back from the hospital to the
 16 Motel 6?
 17 A. Yes.
 18 Q. And then you drove down to the work site?
 19 A. I'm not sure. We didn't go directly from the
 20 work site, I don't think. I'm not really actually
 21 positive what we did that morning.
 22 Q. Do you recall returning to the work site that
 23 morning?
 24 A. That day. I don't know IF it was that morning,
 25 but that day, yeah.

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1 Q. Is your recollection that it was later in the
 2 day not immediately leaving the hotel?
 3 A. I don't really have a time, really. I don't
 4 know. That was a long time ago.
 5 MR. HULL: I don't have any further questions,
 6 Your Honor.
 7 THE COURT: Any redirect?
 8 MS. GARDNER: No, thank you, Judge.
 9 THE COURT: That means you may step down.
 10 THE WITNESS: Thank you.
 11 THE COURT: Any reason why this witness should
 12 not be excused?
 13 MS. GARDNER: No, Your Honor.
 14 MR. HULL: No, sir.
 15 THE COURT: And you're also excused.
 16 MS. GARDNER: Leslie Rogers.
 17 THE COURT: Come forward, please, Ma'am. And
 18 about halfway up here, face Madam Clerk and raise your
 19 right hand.
 20 ---o0o---
 21 LESLIE ROGERS,
 22 having been duly sworn by the Clerk of the Court, was
 23 examined and testified as follows:
 24 DIRECT EXAMINATION
 25 QUESTIONS BY MS. GARDNER:

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1 Q. Good afternoon, Ma'am. Could you state your
 2 name and spell your last name for the record.
 3 A. My name is Leslie Rogers. The last name is:
 4 R-o-g-e-r-s.
 5 Q. And, Ms. Rogers, how are you employed?
 6 A. I work at Kootenai Medical Center in the
 7 emergency department.
 8 Q. And what's your position there?
 9 A. I'm a nurse.
 10 Q. Can you tell us something about your training
 11 and experience as a nurse.
 12 A. Okay -- um -- so I got my bachelor's in
 13 nursing. I've been a nurse for about 7-1/2 years. Prior
 14 to working at Kootenai, I worked six years in a small
 15 hospital. Then I've worked up here for the last
 16 2-1/2 years.
 17 Q. Have you received any training in the
 18 collection of what's referred to as rape kits?
 19 A. We have in-services every year. And then we
 20 also have to go get preceptors to learn how to do it.
 21 Q. Can you tell us what a rape kit is?
 22 A. A rape kit is -- it's a box that we collect
 23 evidence -- um -- it has step by step how to do it. And
 24 you have to keep it in your possession the whole time.
 25 Q. And can you tell us something about the

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1 A. The head and pubic areas where you collect the
 2 hair. If they think they scraped the person, you collect
 3 evidence underneath the fingernails -- um --
 4 Q. All right. About how long does a typical rape
 5 kit take?
 6 A. Oh, it varies per patient and how many swabs
 7 you have to obtain. Usually about an hour, hour and
 8 20 minutes.
 9 Q. Do you conduct this rape kit collection before
 10 or after the doctor does the sexual assault examination?
 11 A. First, you get the information from the
 12 patient. Find out exactly what happened. You get the
 13 hair samples. You need to do oral swabs, fingernail
 14 scrapings, the clothes -- um -- get them ready to have the
 15 doctor come in and see them. We pretty much try to save
 16 the swabs vaginally and the rectum swab for last because
 17 those are usually more invasive.
 18 Q. All right. So those are the last things --
 19 A. Those are the last things we try to do.
 20 Q. Have you been present during the doctor's
 21 sexual assault examination before?
 22 A. Yes. We always have to have a nurse in there
 23 with a doctor when they perform the exam.
 24 Q. And what does that include? That exam.
 25 A. The doctor usually comes in, he examines the

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1 procedure for collection of a rape kit?
 2 A. Um -- you have to have the box. It's always
 3 sealed. You have to unseal the box. It has a piece of
 4 paper in it that says step by step how to do it. There's
 5 another piece of paper that asks questions. You fill that
 6 out with the patient's name, what happened at the alleged
 7 assault, or whatever. And then you collect the evidence.
 8 There's swabs that you have to obtain. With the swabs
 9 they have to be in the dryer for an hour -- um -- let's
 10 see. You have to get blood samples, and, like, hair
 11 samples. And then once you get that, you seal the box
 12 back up. And then you end up giving it to the officer.
 13 Q. What part of the body do you get the swabs
 14 from?
 15 A. Well, it varies per instance. If there's any
 16 oral secretions, if there was anything orally, you have to
 17 have swabs from the mouth. And you have to have vaginal
 18 swabs if there's penetration or ejaculation. Rectal swabs
 19 if there's any of that -- um -- those are the main swabs
 20 that we give. We also get evidence, like, hair samples.
 21 We have them comb the pubic hairs to see if there's any
 22 stray pubic hairs that way, but I think those are the main
 23 swabs.
 24 Q. Okay. What other areas do you collect hair
 25 from?

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1 patient, finds out what's going on, looks for any bruises,
 2 any scrapes, any complaints of pain anywhere, like, if
 3 they have abdominal pain, he kind of checks that out.
 4 Then we set them up for a pelvic exam up into one of the
 5 exam chairs. And they usually perform a visual inspection
 6 of the outside of the vaginal area. And then they do a
 7 speculum exam. And usually at that time they obtain a wet
 8 mount. Where you put a little saline solution in there,
 9 bring it out, and see if there's any sperm on it or
 10 something like that. And then he gets the vaginal swab
 11 and the rectal swab at that time.
 12 Q. So he does that?
 13 A. Yes, yes. I don't do that.
 14 Q. And then hands it to you?
 15 A. I put it in the dryer for an hour. And then we
 16 seal it away.
 17 Q. How many of those exams would you say you've
 18 witnessed?
 19 A. Oh, my goodness. Probably 20 to 30. It's
 20 quite a bit.
 21 Q. All right. Is it common to have tearing?
 22 A. It can be can -- um -- usually on that part
 23 where the doctor does the examination.
 24 Q. So you don't have an opinion about that?
 25 A. I do not know. Because I don't look when the

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1 doctor is doing it. I just -- I'm kind of there.
 2 Q. Did you do a -- well, I'll ask you this way.
 3 Were you working on April 8th of this year at the
 4 hospital?
 5 A. Yes. Because the documentation says that I
 6 was.
 7 Q. Okay. And did you see a patient by the name of
 8 Danielle Whitten?
 9 A. According to my records, yes.
 10 Q. And do you rely on those records to recall what
 11 you observed about patients?
 12 A. Yes.
 13 Q. And why do you do that?
 14 A. We see a lot of patients. We see around 40,000
 15 patients a year. And I don't try to memorize patients,
 16 who they are, and what they're here for.
 17 Q. In reviewing your records did you observe any
 18 injuries on Danielle?
 19 A. According to my documentation, there was
 20 redness on the right side of the neck, a pinkened skin
 21 area to the left, and a bruise on the right knee.
 22 Q. And do you recall just from your independent
 23 recollection anything specifically about those injuries?
 24 A. I don't. Sorry.
 25 Q. All right. Do you recall specifically talking

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1 to her about those injuries?
 2 A. I don't. It's back in April. I don't
 3 remember.
 4 Q. All right. Would you have documented something
 5 if there was something that stood out in your conversation
 6 with her?
 7 A. Yes. Everything is documented.
 8 Q. Did you document any of your discussions with
 9 Danielle?
 10 A. Um -- basically, what I documented is her
 11 account of what happened with the assault.
 12 Q. Okay. And what was her account of what
 13 happened?
 14 A. Can I read it? What I try to do is when
 15 they're telling me, I type it all in, just so I have an
 16 accurate record of what she's told me. Is that okay?
 17 MS. GARDNER: Can the witness be allowed to
 18 review that portion of her records and then turn it back
 19 over?
 20 THE COURT: Yes. You can refresh your
 21 recollection from your notes, but you can't necessarily
 22 read them during.
 23 THE WITNESS: Okay. I'll try to remember --
 24 um --
 25 THE COURT: And if you need to look more than

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1 once, go ahead.
 2 THE WITNESS: Okay. Let's see. So what she
 3 told me is about 11:00 that night, which would have been
 4 the 7th, is that she went to the Motel 6 with a gentleman.
 5 They were sitting on the bed talking. He put his hand on
 6 her knee. She told him to move it. Kind of pushed it
 7 away. And he grabbed her leg, pulled her down on the bed.
 8 She kind of pushed him away. He pulled down her pants --
 9 um -- restrained her across her chest and upper chest area
 10 with his arm and pulled her pants down. She pushed him
 11 away -- um -- he started having sex with her. She said
 12 that she pushed him away again. He restrained her. Then
 13 she said he turned her over, so she was laying face down
 14 on the bed. And that he entered her vaginally with his
 15 penis. She told me that he was not wearing a condom. And
 16 that he ejaculated.
 17 Q. And those were all the notes that you printed
 18 up after taking her direct information and putting it into
 19 the --
 20 A. Correct. I was typing that as she was in the
 21 room telling me what was going on.
 22 Q. Do you remember -- now, that you've gone over
 23 what she's told you, do you remember how she was behaving
 24 or how her demeanor was?
 25 A. According to my notes, she was very quiet when

1 she first came in. And that she was very tearful while
 2 she was explaining the information.
 3 Q. Is there anything unusual about that type of
 4 behavior?
 5 A. No. That's typically what I see.
 6 Q. Now, you've talked about the rape kit --
 7 A. Um-hum.
 8 Q. -- process. Did you conduct a rape kit
 9 collection and follow that procedure with regards to
 10 Danielle on the 8th of April?
 11 A. Yes.
 12 Q. And after you completed your collection, what
 13 did you do with that kit?
 14 A. After -- when I get everything collected, while
 15 everything is drying, we close the kit up and put it in a
 16 locked cupboard. It takes an hour for the swab to dry.
 17 Once those are dry, we seal all of the evidence into the
 18 box -- um -- I put my seal on the outside. And then we
 19 lock it up waiting for the officer to come get it.
 20 Q. And did you follow that procedure as far as
 21 locking up the kit?
 22 A. Yes. I do that every time. I try and do it
 23 the same way.
 24 Q. Okay. And there's nothing different about the
 25 procedure with this witness kit?

1 A. No.
 2 Q. Did she say anything with regard to the
 3 bruising of the knee?
 4 A. Um -- I don't remember her saying anything.
 5 I'm sorry.
 6 Q. Okay. Have you had an opportunity to review
 7 your notes to see if there were any comments about that?
 8 A. I looked there. All I saw is where I
 9 documented that there was a small bruise on her right
 10 knee.
 11 Q. Was there anybody there in the hospital taking
 12 photographs of her injuries?
 13 A. I know that there was a lady that came down
 14 from the Rape Crisis Center, and she took pictures.
 15 MS. GARDNER: Could I have Exhibit 1.
 16 THE CLERK: This one?
 17 MS. GARDNER: May I approach the witness.
 18 THE COURT: You may.
 19 BY MS. GARDNER:
 20 Q. I'm showing you what's been admitted as
 21 Exhibit 2. Do you recognize those?
 22 A. The pictures?
 23 Q. Yes.
 24 A. Yes.
 25 Q. Do those, in your opinion, accurately show us

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1 ejaculation in her vaginally?
 2 A. That's what she told me, yes.
 3 Q. And there was no bruising noted to the neck?
 4 A. No. Just the red mark.
 5 Q. And no abrasions noted to the neck?
 6 A. Just the red mark that I saw.
 7 Q. And you did not collect the swabs. The doctor
 8 collected the swabs?
 9 A. If there was -- I can't remember if it was
 10 oral. If it was just vaginal swabs, the doctor collected
 11 them.
 12 Q. So any vaginal swabs he would have?
 13 A. That's correct.
 14 Q. You said you don't watch when they're doing the
 15 vaginal swabs?
 16 A. I kind of stand there just to make sure, you
 17 know, collect the swabs from him and put them in the
 18 dryer. But I'm not physically touching her at that point,
 19 no.
 20 Q. And you don't inspect the -- is that
 21 genitourinary the doctors use? Is that the word? Am I
 22 saying that?
 23 A. Genital? Or --
 24 Q. It is -- uh -- G-e-n-i-t-o-u-r-i-n-a-r-y.
 25 Genitourinary?

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1 the injuries that you observed?
 2 A. As far as I remember, yes.
 3 Q. And from these pictures, can you see the
 4 redness that you've testified about on the neck?
 5 A. It looks like it's about right there in the
 6 center of the neck and runs down.
 7 Q. And is that where you remember those injuries
 8 on the neck being?
 9 A. As far as I can remember, yes.
 10 Q. Which side of the neck was darker? You said
 11 one side was darker.
 12 A. The right side was the darker red. And then it
 13 was more pink on the left.
 14 MS. GARDNER: No further questions.
 15 THE COURT: Cross-examination?
 16 MR. HULL: Thank you.
 17 CROSS-EXAMINATION
 18 QUESTIONS BY MS. HULL:
 19 Q. Ma'am, in your notes you indicate that the
 20 patient had a faint red mark to the right side of the neck
 21 and pinkened area to the left side of the neck. Correct?
 22 A. Um-hum.
 23 Q. And a dime-sized bruise to the right knee?
 24 A. Yes.
 25 Q. And the patient told you that there had been

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1 A. Yes. The genitourinary area.
 2 Q. So you didn't observe the genitourinary area?
 3 A. Um -- no.
 4 MR. HULL: Thank you. I don't have any further
 5 questions.
 6 THE COURT: Any redirect?
 7 REDIRECT EXAMINATION
 8 QUESTIONS BY MS. GARDNER:
 9 Q. Mr. Hull just asked you a question about
 10 whether Danielle told you that he had ejaculated in her
 11 vagina. Is that your recollection of what your note
 12 specifically said?
 13 A. My notes stated that she told me he did
 14 ejaculate in her vagina and was not wearing a condom.
 15 Q. It says -- what specifically does it say? I'm
 16 sorry.
 17 A. It says: "Assailant was not wearing a condom
 18 and ejaculated in her vaginally."
 19 Q. "In her vaginally"?
 20 A. Um-hum.
 21 MS. GARDNER: Okay. Thank you.
 22 THE COURT: Any recross based on that?
 23 MR. HULL: No, Your Honor.
 24 THE COURT: You may step down, then.
 25 And may this witness be excused?

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1 MS. GARDNER: Yes.
 2 MR. HULL: I have no objection.
 3 THE COURT: You may also be excused.
 4 And the State may call its next witness.
 5 MS. GARDNER: If I could just have a second.
 6 THE COURT: Go right ahead.
 7 MS. GARDNER: If I could just have a second,
 8 Judge. I'm just trying to see if we have an officer out
 9 in the hall.
 10 THE COURT: That's fine. While we're waiting,
 11 if anyone wants to stand in place, we'll go off the record
 12 here. I feel like standing up. So if anyone else would
 13 like to, please feel free to do so.
 14 (Pause in proceedings.)
 15 THE COURT: Let's go back on the record here.
 16 Before you leave, Ms. Gardner, is it
 17 appropriate to take a recess at this point?
 18 MS. GARDNER: Actually, I think we're going to
 19 be able to aline everything together. And I have a
 20 witness outside of the courtroom.
 21 THE COURT: Go right ahead, then.
 22 MS. GARDNER: Could we have a break, Judge.
 23 THE COURT: Yes.
 24 We will be in recess about five minutes, maybe,
 25 a touch longer.

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1 seemed like we needed to take up something out of the
 2 presence of the Jury. If we can advise the Jury that we
 3 will be a few minutes longer. We're taking some legal
 4 matters up.
 5 THE BAILIFF: Sure.
 6 THE COURT: So we're on the record.
 7 So go ahead, Ms. Gardner.
 8 MS. GARDNER: First, Judge, I think that the
 9 witness that's here is going to be testifying differently
 10 than what we've talked about previously as far as the
 11 comment about what he should have done with the victim.
 12 And -- um -- if I can just restate what Mr. Nelson has
 13 just told me.
 14 THE COURT: Go ahead.
 15 MS. GARDNER: Eventually in their discussions,
 16 the Defendant and the cellmate, Mr. Nelson, Mr. Cook
 17 started to tell Mr. Nelson what had actually happened.

18 That he forcibly raped this girl. In that discussion
 19 Mr. Cook told Mr. Nelson thinking back on it the only
 20 thing I would have done differently after I raped her was
 21 I would have killed her and put her body in the Dumpster.
 22 That's very different from how our other witness recalled
 23 the statement being made. So it was part of his
 24 confession in the jail facility when he made that
 25 statement. There also is some statements that the defense

1 Don't talk about the case or form any opinions.
 2 (The Jury left the Courtroom.)
 3 THE COURT: Do the attorneys need anything on
 4 the record?
 5 MS. GARDNER: No, Your Honor. The coordination
 6 not being so coordinated right now.
 7 MR. HULL: Um -- when you were suggesting --
 8 someone was suggesting the jail to see if it was okay to.
 9 THE BAILIFF: The family can take clothes, too,
 10 Mr. Hull. And you're welcome to take it to the jail for
 11 him.
 12 THE COURT: Before we go off the record, also,
 13 the Court wanted to make one comment. I sustained an
 14 objection on evidence I referred to as Rule 609. I was
 15 mistaken. I meant to say Rule 608(a) governed that. So
 16 the same ruling for that ruling is 608(a), not 609.
 17 We are in recess.
 18 THE BAILIFF: Judge, what time are we starting
 19 tomorrow?
 20 THE COURT: 8:30.
 21 THE BAILIFF: 8:30.
 22 (Recess taken.)
 23 THE COURT: We're back on the record in State
 24 v. Cook. The Jury is not present. And it appears that
 25 Mr. Nelson is present in court now for testimony. And it

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1 offered in the opening that I asked Mr. Nelson about as
 2 far as a flier going around in the jail. If you recall
 3 previously, we had talked about Mr. Cooks' statements to
 4 Mr. Nelson that he had done this before with an older
 5 woman and a younger gal. And Mr. Nelson remembers the
 6 flier talk around the jail being that there was a woman
 7 that was visiting and putting fliers out outside of the
 8 jail. An older woman who was claiming that she was a
 9 victim of his. And that he doesn't need to get out of
 10 jail. He never saw the actual flier, but there was
 11 discussion going all around the jail community about this
 12 flier.

13 I don't know where the Defendant is planning on
 14 going with that. But, obviously, if they intend to raise
 15 that flier issue up in the testimony further, they didn't
 16 ask Danielle if she was the person putting the flier out.
 17 So I just want to let the Court know that that issue of
 18 his other victims might come in, also, if there's further,
 19 I guess, evidence about a flier.

20 THE COURT: So if I'm hearing you right, then,
 21 Mr. Nelson is likely to say that he heard that there was
 22 an older woman who claimed to have been a rape victim of
 23 Mr. Cook's that was putting up the fliers?

24 MS. GARDNER: Yes.
 25 THE COURT: All right. Mr. Hull, any response

1 to these two issues before the Court.

2 MR. HULL: Well, Your Honor, from what she's

3 saying about the flier it sounds like hearsay. It's just

4 in the previous testimony he said something about a flier

5 that's why I mentioned it. And I thought it sounded

6 peculiar to me, so I pointed it out. So, perhaps, we can

7 ask Mr. Nelson what he knows about a flier.

8 THE COURT: You can inquire. Go ahead.

9 MR. HULL: In your previous testimony in the

10 preliminary hearing you talk about a flier. How did you

11 hear about a flier?

12 MR. NELSON: Just through the jail. People

13 talking in the jail and through the visit. Apparently,

14 she was coming to visit trying to get everybody that

15 visits to look at her paperwork that she had on Sean.

16 MR. HULL: And this flier you learned of it

17 from your wife. Is that --

18 MR. NELSON: No. Through the kid that was in

19 jail. Supposedly Danielle's cousin or just a cousin or

20 something. She was the one that was telling everybody

21 about this.

22 MR. HULL: And you don't know anything more

23 about the flier?

24 MR. NELSON: No. I never seen the flier.

25 MR. HULL: That's what you were referring to?

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1 MR. NELSON: Right.

2 MR. HULL: Your Honor, I wouldn't be inquiring

3 in front of the Jury, then, because it's hearsay.

4 THE COURT: All right. The Court is going to

5 continue to exclude any evidence regarding any alleged

6 statements by Mr. Cook that he in hindsight would have

7 chosen to have killed the alleged victim in this case.

8 And the Court is continuing to exclude that testimony

9 because I think the distinguishment that I wanted to make

10 about the potential testimony was if the admission had

11 been that at the time of the act he contemporaneously

12 contemplated killing the victim that would have been part

13 and parcel of the admission. And I think part and parcel

14 of the statements against interest. An after the fact

15 comment that after the fact he now thinks he should have

16 done one thing or another, again, has limited probative

17 value but is substantially outweighed by the prejudicial

18 effect and unfair prejudice even to the point that I am

19 going to exclude it under Rule 403.

20 Also, it sounds like there should be no

21 testimony about these fliers because it sounds like that

22 this information is based on hearsay to this witness.

23 Anything else from the State?

24 MS. GARDNER: Just that I haven't had an

25 opportunity to talk to Mr. Nelson since the Court's recent

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1 ruling regarding what was allowed in testimony and what

2 wasn't as far as the prior record. And I did want to have

3 an opportunity to just briefly tell him that.

4 THE COURT: Do you need another five minutes or

5 so?

6 MS. GARDNER: Maybe, not even that.

7 THE COURT: All right. Let's stay in recess

8 about another five minutes or go back into recess. Let me

9 know when you're ready.

10 (Recess taken.)

11 THE COURT: We're back on the record in State

12 v. Cook. And are we ready for the Jury to return?

13 MS. GARDNER: Yes, Judge.

14 MR. HULL: Your Honor, I have one issue.

15 Ms. Gardner is indicating she intends to introduce a

16 redacted letter from Mr. Cook into evidence regarding --

17 MS. GARDNER: Mr. Nelson.

18 MR. HULL: Mr. Nelson. I get names wrong all

19 the time, obviously. Regarding threats to his family and

20 why he didn't testify following the preliminary hearing.

21 I'm going to object to that letter as hearsay. Certainly

22 it's an unsworn, out-of-court statement. I'd also be

23 objecting to it as unduly emphasizing one particular

24 aspect of the evidence. Certainly if she wants to have

25 him review it to refresh his recollection or something

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1 like that, I think that would be appropriate. It would

2 also be appropriate to be used to refresh his recollection

3 on cross-examination but just to save a step, I am

4 objecting to the admission of the letter as hearsay.

5 THE COURT: I think the Court would need to see

6 the letter marked as an exhibit or offered. We can sure

7 make the objection at that point. And I'll be better

8 prepared to rule on that.

9 MR. HULL: Thank you, Your Honor. I thought it

10 would be a good time, maybe, saving a trip.

11 THE COURT: Thank you.

12 MS. GARDNER: Do you want to go ahead and

13 review that?

14 THE COURT: We're otherwise ready to bring the

15 Jury in?

16 MS. GARDNER: Yes, Judge.

17 THE COURT: Please do so.

18 (The Jury entered the Courtroom.)

19 THE COURT: The record will reflect that the

20 Jury has returned. The State has called its next witness.

21 Sir, if you'd please stand and face Madam Clerk

22 and raise your right hand as best you can.

23 ---o0o---

24 PAUL NELSON,

25 having been duly sworn by the Clerk of the Court, was

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1 examined and testified as follows:
 2 THE COURT: Be seated, sir.
 3 Go ahead, Ms. Gardner.
 4 DIRECT EXAMINATION
 5 QUESTIONS BY MS. GARDNER:
 6 Q. Sir, could you start by stating your name and
 7 spelling your last name for the record.
 8 A. Paul Nelson, N-e-l-s-o-n.
 9 Q. Sir, you're currently in custody?
 10 A. Yes.
 11 Q. And how long have you been in custody?
 12 A. Six months.
 13 Q. And what are you in custody for?
 14 A. Possession of methamphetamine, a dirty pipe.
 15 Q. And when were you arrested?
 16 A. April 28th of 2008.
 17 Q. And have you been released from custody any of
 18 that time until today?
 19 A. No, I haven't.
 20 Q. Have you been sentenced?
 21 A. Yes, I have.
 22 Q. When do you believe you were sentenced?
 23 A. August 29th I believe was when it was.
 24 Q. Were you sentenced to the state penitentiary?
 25 A. Yes, I was.

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1 Q. So just you and him in one cell.
 2 A. Right.
 3 Q. And when did he begin being your cell partner?
 4 A. Oh, I don't remember the exact date of that.
 5 Q. Was it -- did it happen immediately when you
 6 were taken into custody?
 7 A. No, no, no. It was later. I had, actually, a
 8 couple of cell partners before him. You lose track of
 9 time in there --
 10 THE COURT REPORTER: I can't understand you.
 11 THE COURT: Yeah, we're not understanding you.
 12 THE WITNESS: I had had a couple of other cell
 13 partners prior to him. In there you could lose track of
 14 who you lived with and stuff like that pretty much.
 15 BY MS. GARDNER:
 16 Q. Had you known Sean Cook prior to him being your
 17 cell mate?

18 A. No, I hadn't.
 19 Q. Did you know Danielle Whitten?
 20 A. No, I didn't. Still don't.
 21 Q. At some point when the two of you were cell
 22 partners did Mr. Cook share with you the reasons why he
 23 was in custody?
 24 A. Yes, he did.
 25 Q. How many conversations would you say you've had

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1 Q. Have you had a prior grand theft conviction?
 2 A. Yes, I have.
 3 Q. And was that about 2003?
 4 A. Um -- I believe it was a little bit later than
 5 that.
 6 Q. And where was that?
 7 A. In Oklahoma.
 8 Q. Can you tell us the circumstances under which
 9 you received that conviction.
 10 A. I had boughten (sic) a remote-control
 11 airplane --
 12 MR. HULL: Your Honor, the rule specifically
 13 states that the extraneous circumstances of the conviction
 14 are inadmissible.
 15 THE COURT: Sustained.
 16 BY MS. GARDNER:
 17 Q. Were you in custody at the Kootenai County Jail
 18 on around April of this year?
 19 A. Yes, I was.
 20 Q. Did you meet somebody by the name of Sean Cook?
 21 A. He was my cell partner.
 22 Q. When you say "cell partner," what does that
 23 mean?
 24 A. There's two men in a cell. It was me and him
 25 in a cell.

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1 with Mr. Cook about that?
 2 A. Uh -- two or three probably.
 3 Q. The first time he talked to you about it what
 4 did he say to you?
 5 A. The first time he said that he was in there for
 6 rape. That it was consensual sex. That she had agreed to
 7 it.
 8 Q. Okay. Did he tell you at that point that first
 9 time where it had occurred?
 10 A. No, he didn't.
 11 Q. Did he tell you anything else besides --
 12 A. At that time, no.
 13 Q. All right. At some point in your relationship
 14 being cell mates did you and Mr. Cook become closer?
 15 A. Sure, yeah. We got to be.
 16 Q. Did you begin participating in jail activities
 17 together?

18 A. Yeah, yeah. ~~We played cards and stuff, yeah.~~
 19 Q. Was there any type of a religion?
 20 A. Yes.
 21 Q. Can you describe that for us.
 22 A. We just prayed together and had, you know,
 23 Bible type deals together and go to church together and
 24 stuff like that.
 25 Q. And was there a point when Mr. Cook started to

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1 tell you more about this offense?
 2 A. Yes, there was. And I had told him I didn't
 3 want to hear about it.
 4 Q. You're going to have to slow down and speak up.
 5 A. I told him I didn't want to hear about it
 6 because I didn't want to be involved in it.
 7 Q. Okay. And how much later was that from the
 8 first time he told you?
 9 A. Um -- just a few days.
 10 Q. And did you hear anything about it?
 11 A. Yeah, there was people talking about what he
 12 was in there for and stuff.
 13 Q. But you and Mr. Cook he said he wanted to talk
 14 about it. And you said you didn't want to hear about it?
 15 A. Right, yeah.
 16 Q. So did you continue to listen to him talk about
 17 it?
 18 A. Well, sure. I was in the cell, so I had no
 19 choice.
 20 Q. And there were other people in the cell at the
 21 time?
 22 A. Yeah, there was Gene Reeves, Gene Allen Reeves
 23 (phonetic). He heard this as well.
 24 Q. All right. And what did Mr. Cook say at that
 25 point in that conversation?

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1 Q. And then after meeting her, meeting up with
 2 her, did he talk any about knowing her?
 3 A. Yeah. He said that they had known each other
 4 in the past. That was pretty much it. I don't know to
 5 what extent or nothing.
 6 Q. Now, what did he say about the day of the
 7 incident?
 8 A. Just that he had done her bad. That he pushed
 9 the door in on her and forced her on the bed and had his
 10 elbow on the back of her neck when he raped her.
 11 Q. You're going to have to slow down again for me
 12 here.
 13 He said that he pushed her on the bed?
 14 A. On the bed, or, yeah, he had pushed her down on
 15 whatever it was. He had pushed her down. Had his elbow
 16 on the back of her neck is how he said it. I assumed it
 17 was a bed, but he didn't say that.

18 Q. Did he talk about the two of them being in that
 19 hotel room together?
 20 A. No. Just during the incident.
 21 Q. And was there something else you said? Did you
 22 say something about a door?
 23 A. Just that he had pushed the door in. When she
 24 opened the door he had pushed the door in and forced his
 25 way on her.

1 A. He just told me what had happened. You know,
 2 it was over a period of a few hours talking that he
 3 basically got down to the whole deal of what had happened.
 4 That he had stalked this girl and seen her car sitting in
 5 the --
 6 Q. All right. So let's start from the beginning
 7 of what he told you first about you say stalking.
 8 A. Stalking, yeah.
 9 Q. Tell us what he said about that.
 10 A. Apparently, they had met at a bar or something.
 11 And they had gotten high together. And he remembered her
 12 car and had seen her car parked at a Motel 6 or seven. He
 13 waited several days before he finally figured out where
 14 she was living at in the apartment.
 15 Q. In the apartment or hotel?
 16 A. Hotel. Hotel, yeah.
 17 Q. And did he say anything else about how he was
 18 able to find her?
 19 A. He just waited until he had seen the room that
 20 she had went in to.
 21 Q. Did he say anything about meeting her at a
 22 store or anywhere outside of the hotel?
 23 A. Just that the club or wherever it was, that
 24 they had met at a bar or wherever it was. I believe that
 25 it was a bar that they had met at.

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1 Q. All right. Did he say anything else about the
 2 actual rape?
 3 A. Just that he hurt her, you know, the way he had
 4 her pinned down on the bed with his elbow in her neck.
 5 Q. And that conversation you say it took a while?
 6 Or did you say hours before --
 7 A. Yeah, it was over a couple of hours of talking,
 8 you know, that it was all brought out.
 9 Q. What were you talking about before he
 10 discussed --
 11 A. Just Christian stuff. Being saved. You know,
 12 being saved, and forgiveness of sins, and stuff like that.
 13 Q. And was it part of that conversation?
 14 A. Yes, it was.
 15 Q. And did you, yourself, talk about things that
 16 you had done?
 17 A. Not nothing, no.

18 ~~Q. All right. Prior to that during that two hours~~
 19 ~~did he talk any more about this rape?~~
 20 A. Just about that and just other things that he
 21 had done.
 22 Q. Now, did he talk to you at that point about not
 23 talking about this with anybody else?
 24 A. Yeah, he told me that his lawyer had called.
 25 Well, she did. She called him and told him not to be

1 telling nobody about the case. And [redacted] was also pretty
 2 worried because he had been making statements over the
 3 phone and through visits about what had happened.
 4 Q. And so in that conversation was this after he
 5 told you what had happened?
 6 A. Pretty much during the whole conversation,
 7 yeah.
 8 Q. And so when you left that conversation, was
 9 there a later time when he talked to you again about it?
 10 A. Yeah, we talked about it a couple of different
 11 times.
 12 Q. How much later would you say that the next time
 13 was that he brought it up?
 14 A. It was within a few days because he was moving
 15 out of my cell within probably a week or so after that.
 16 Q. Okay. So a few days later were you in the cell
 17 together?
 18 A. Yes, it was, yes.
 19 Q. And was there anybody else there?
 20 A. Yeah, Gene Reeves.
 21 Q. Okay. And who is that?
 22 A. He was one of the dudes that we had Bible
 23 studies and prayers with.
 24 Q. Okay. Just another inmate?
 25 A. Yeah.

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1 Q. Did he ever go back on that and say no I was
 2 just kidding? It was consensual?
 3 A. No.
 4 Q. Did he talk about getting out of jail?
 5 A. Yeah, that's all any of us talk about.
 6 Q. Did he talk about himself wanting to escape?
 7 A. No. I never heard him talk about it. We went
 8 out to the yard one day, and he was looking at the fence
 9 and everybody was talking about him. And everybody was
 10 talking about him, you know, he's fixing to hit the fence,
 11 you know.
 12 Q. Did you ever write a letter about Mr. Cook?
 13 A. Yeah, I did.
 14 Q. Do you remember testifying at a preliminary
 15 hearing?
 16 A. Yes, I do.
 17 Q. Prior to that time how were you reacting or
 18 feeling about Mr. Cook telling you all this?
 19 A. Uh -- I didn't like it. I mean, I don't
 20 believe a person should be doing that to anybody, you
 21 know. It's against everything I've ever been taught. And
 22 it's against anything I believe in, you know.
 23 Q. Did it affect you to the point that you talked
 24 to somebody about it?
 25 A. Yeah. It did, yeah.

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1 Q. All right. And did he talk again about this
 2 incident?
 3 A. Um -- yeah.
 4 Q. And what did he say that time?
 5 A. Pretty much the same stuff.
 6 Q. That he had last told you?
 7 A. Yeah.
 8 Q. And was this other inmate there during all that
 9 time?
 10 A. Yes, he was.
 11 Q. Was there any further discussion about not
 12 talking to anybody else outside of that cell?
 13 A. Not after that, no.
 14 Q. And then was there another time when he talked
 15 about this?
 16 A. Um -- there was, like, two or three different
 17 times that we talked -- spoke about it, yeah.
 18 Q. At any of those other times did he change any
 19 version of the story?
 20 A. Just from the first time to the next time. The
 21 next time after the first where he was saying that she was
 22 consensual, that was the only time that he changed that.
 23 Q. So the second, third, fourth or any other times
 24 were all like the second time?
 25 A. Right.

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1 Q. Who did you talk to?
 2 A. To my lawyer.
 3 Q. What is your wife's name?
 4 A. I talked to her about it several times, too.
 5 My wife is Karen.
 6 Q. What's her last name?
 7 A. Freeland.
 8 Q. And did she encourage you in one way or the
 9 other about --
 10 A. Yeah. She told me I had to do what was right.
 11 She said -- you know, she's been through it. Her daughter
 12 was raped. And she told me, she said: "Paul, you have to
 13 stand up. You're saying you're a Christian. You've got
 14 to do the Christian thing. You've got to stand up."
 15 Q. And did you contact the authorities about this?
 16 A. She did. She did.
 17 Q. So when was the next time after that
 18 conversation with your wife that you heard from anybody --
 19 authorities -- about this?
 20 A. Detective Miller contacted me probably three or
 21 four days after that.
 22 Q. And who's Detective Miller?
 23 A. He's one of the detectives here in Kootenai
 24 County. So I've never met her. I just talked to her on
 25 the phone.

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1 Q. All right. And was this before the
 2 preliminary hearing?
 3 A. Yes, it was. Yes.
 4 Q. The preliminary hearing -- um -- on the day
 5 that you were -- were you transported to this courthouse
 6 for that hearing?
 7 A. Yes, I was, from Shoshone County.
 8 Q. Did you know anything about you were being
 9 required to testify?
 10 A. Not up to that point. I didn't know.
 11 Q. At what point did you find that out?
 12 A. Whenever we got here. Sitting out in the
 13 parking lot, the transport officer told me why I was here.
 14 Q. Prior to your transport while you were at the
 15 jail, did you have any contact with Mr. Cook?
 16 A. Yes. We were sitting in the visiting booths
 17 together. And he was telling me that I was supposed to be
 18 coming to testify which at that time I didn't know I was.
 19 I even informed Mr. Cook I didn't know I was at the time.
 20 Q. And what did he say to you, then?
 21 A. That's when he started making threats and
 22 stuff. If I did, that something would happen to my
 23 daughter.
 24 Q. Did he say anything about your wife?
 25 A. And my wife, yeah.

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1 Just from the drive from there to here.
 2 Q. Okay. Were you -- what were you feeling at the
 3 time?
 4 A. Pretty worried about my family.
 5 Q. Had you had an opportunity to talk to your
 6 wife?
 7 A. No, I hadn't.
 8 Q. Following that preliminary hearing -- um -- you
 9 did -- you were sworn in as a witness, right?
 10 A. Yes, I was. Yes.
 11 Q. And you did provide a little bit of testimony.
 12 A. Right. Yes, I did.
 13 Q. Can you tell us what your testimony was that
 14 day.
 15 A. Pretty much pertaining to the first
 16 conversation we had where he said, you know, about the
 17 consensual sex and stuff like that. That's pretty much,
 18 basically, what I said.

19 Q. Did you say anything eventually about him
 20 admitting that he had forced her?
 21 A. I don't believe I did that day. I might have,
 22 but I don't believe I did. I was pretty worried about my
 23 family at that time.
 24 Q. Following that hearing did you write that
 25 letter?

1 Q. Did say anything specific about what would
 2 happen to your wife?
 3 A. That somebody would follow her. And she would
 4 be done just the same that Danielle was done.
 5 Q. Did he say anything about her visitation with
 6 you?
 7 A. Yes. He would have somebody follow her. That
 8 he had somebody that would follow her wherever she went.
 9 Q. Did he tell you who that was?
 10 A. Uh -- his girlfriend at the time. I don't
 11 remember her name, though.
 12 Q. And did he say anything else specifically as
 13 far as what he would do to your wife or daughter?
 14 A. Just, you know, that they would be taken care
 15 of.
 16 Q. Okay. Did you then testify at the preliminary
 17 hearing?
 18 A. No, I didn't.
 19 Q. Why didn't you testify?
 20 A. Because I was worried about my family's welfare
 21 -- being hurt.
 22 Q. How much time would you say elapsed between the
 23 time that he said that to you when you were sitting here
 24 in the courtroom?
 25 A. Fifteen, 20 minutes, maybe. Thirty minutes.

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1 A. Yes, I did.
 2 Q. And who did you address that letter to?
 3 A. I wrote one, I believe, to you. And I also
 4 wrote one to Dennis Reuter.
 5 Q. And who is Dennis Reuter?
 6 A. My lawyer, my attorney.
 7 Q. All right. And how soon after that hearing did
 8 you write that letter?
 9 A. As soon as I got back to the jail.
 10 Q. And -- um --
 11 A. I don't believe I sent it out until the next
 12 day or the next day because I was wanting to make sure I
 13 had everything in it, you know. You can only mail letters
 14 out in the morning time there on the service cart.
 15 Q. And why did you write that letter?
 16 A. Because I was concerned about my wife's and my
 17 daughter's well-being.

18 Q. Did you express anything about your desire to
 19 tell actually what Mr. Cook told you?
 20 A. Sure I did, yeah.
 21 Q. Did you have any intentions as far as or wishes
 22 expressed as far as wanting to get out of or transferred
 23 from that jail?
 24 A. Just so my wife would be safe to when she could
 25 come and visit me she wouldn't have to worry about

1 somebody following her and doing something to her.
2 Q. Was it your understanding that you would remain
3 in custody but just wanted another jail?
4 A. Right. Yeah, nothing was said about getting
5 out of jail.
6 MS. GARDNER: May I approach the witness.
7 THE COURT: You may.
8 BY MS. GARDNER:
9 Q. Showing you what's been marked as Plaintiff's
10 Exhibit 5, do you recognize that?
11 A. Yes, I do.
12 Q. And is that the letter that we've been
13 referring to?
14 A. Yes, it is.
15 MS. GARDNER: I would move for the admission of
16 Exhibit 5.
17 THE COURT: Defendant's position?
18 MR. HULL: Your Honor, I would object as
19 hearsay and cumulative and unduly emphasizing a particular
20 portion of the testimony, Your Honor.
21 THE COURT: The objection is sustained as to
22 hearsay.
23 BY MS. GARDNER:
24 Q. In that letter did you talk about specifically
25 where you were when Mr. Cook made these statements to you?

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1 A. Breakfast, I believe, is what we was eating.
2 Either breakfast or lunch we was eating.
3 Q. Did he tell you anything about finding out that
4 you were a state's witness?
5 A. Yes, he did. He said that he had talked to his
6 attorney that morning, actually -- so it was lunch we was
7 eating -- he had talked to his attorney that morning. And
8 that he informed him that I was testifying on him against
9 the rape case and also, apparently, attempted escape.
10 Q. Had he made any statements to you or had you
11 overheard him make any statements about him trying to
12 escape?
13 A. No. He hadn't made any statements. But
14 everybody in the yard felt that is what he was trying to
15 do because he had been talking about he wanted out. He
16 shouldn't be in there. He's this, that, you know. He was
17 really depressed acting that day.
18 Q. Did he make any statements regarding getting
19 out and hurting his victim?
20 A. Yeah, he did, actually. He said that he wanted
21 out so he could make sure that nobody was left to testify
22 against him.
23 Q. When did he made that statement?
24 A. He made that statement to me and to
25 Gene Reeves.

1 A. Yeah, yes, I did.
2 Q. Where were you?
3 A. We was in the window visiting booths for the
4 trustees or attorney visits.
5 Q. Can you describe for us what type of room you
6 were being held in.
7 A. Sure. It's like a room probably four foot by
8 five foot. And there's a window on the front of it and a
9 window here and a window here. And your visitors sit on
10 the other side of that window. The other inmates are
11 sitting -- there's windows down where you can see all the
12 way through, all the way down.
13 Q. Can you communicate with other inmates?
14 A. Sure. You can hear each other talking, yeah.
15 Q. And is that window opened?
16 A. No. It's shut. But you can still hear through
17 it.
18 Q. Okay. And was Mr. Cook in an adjoining room?
19 A. Yes, he was.
20 Q. All right. Did you have any difficulty
21 understanding him?
22 A. No, no.
23 Q. What are the walls of that room like?
24 A. They're just concrete walls or brick walls.
25 Q. Were you eating lunch there?

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1 Q. When?
2 A. To me and Gene Reeves, like, a couple of days
3 prior to that.
4 Q. Okay. A couple of days prior to?
5 A. Him reporting that to myself.
6 Q. Now, can you recall as best as possible what he
7 said?
8 A. Just that he was -- he wanted out. He needed
9 out so he could get things straightened out so she
10 couldn't testify against him. She was -- uh -- that his
11 testimony -- her testimony would really hurt him. That he
12 wanted to try to stop her from testifying.
13 Q. So in that conversation did he say anything
14 about specifically killing her?
15 A. Yeah, he did. He was going to stop her by
16 taking her life.
17 Q. At that point did you know who his victim was?
18 A. No. I still -- I still couldn't pick her out.
19 I believe -- I believe I know who she is from the one time
20 sitting in here because I couldn't say for sure that's who
21 she is, you know, I've never met that girl.
22 Q. From the preliminary hearing you have seen her?
23 A. Right.
24 Q. And so then was it before that conversation or
25 afterwards that you saw him looking outside of the fence?

1 A. It was after that.
 2 Q. And is that where you made the conclusion?
 3 A. Right, yeah, um-hum.
 4 Q. Did he make any statements to you when you were
 5 in that holding getting ready to go to court about having
 6 your daughter raped?
 7 A. Yes, he did. Yes.
 8 MR. HULL: Your Honor, I would object to the
 9 leading nature of the question.
 10 THE COURT: It is leading. And it has been
 11 asked and answered. That is sustained.
 12 BY MS. GARDNER:
 13 Q. Had your wife and daughter visited you before
 14 in the jail?
 15 A. Yes. They come almost every visit.
 16 Q. Had Mr. Cook ever been around when they've
 17 come?
 18 A. Yes.
 19 Q. Had you talked to Mr. Cook about your visits
 20 with them?
 21 A. No, I haven't. You know, when he was my cell
 22 partner, so, yeah, we talked about visits in general. You
 23 know what I'm talking about?
 24 Q. Did you talk to him about your wife? Anything
 25 about your wife?

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1 Q. Had you made any -- well, let me ask you this
 2 way. Has the State given you any promises of leniency if
 3 you testify against Mr. Cook?
 4 A. No, no.
 5 Q. And you've already been sentenced?
 6 A. Yes, I have.
 7 Q. Is what you've told us today the full truth?
 8 A. Yes, it is.
 9 MS. GARDNER: I don't have any other questions.
 10 THE COURT: Can I have that exhibit, please.
 11 Thank you.
 12 Cross-examination?
 13 CROSS-EXAMINATION
 14 QUESTIONS BY MR. HULL:
 15 Q. Mr. Nelson, you're not claiming that your
 16 testimony is any way today influenced by any sort of
 17 threats?
 18 ~~A. No. But from Mr. Cook, sure. Yeah.~~
 19 Q. What?
 20 A. From Mr. Cook. On my family sure it is, yeah.
 21 Q. That's influencing you today?
 22 A. Well, sure it is. I mean, I'm worried about my
 23 family, you know.
 24 Q. But you're testifying -- your claim is that
 25 what you're testifying to today is the whole truth?

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1 A. Oh, yeah. We talked about them all the time.
 2 When you're cell partners that's all you do in there is
 3 talk about stuff like that.
 4 Q. Were you having any medical problems when you
 5 wrote this letter?
 6 A. Yes. I'm in pretty bad medical shape.
 7 Q. How long have you had medical problems?
 8 A. Since January of this year.
 9 Q. And could you describe for us what those
 10 medical problems are.
 11 A. I need a hip replacement because of the blood
 12 vein that goes into my hips being it was severed. And I
 13 don't have no blood flowing into my hip or leg. I've also
 14 got real bad brain damage from being hit in the head with
 15 a pistol.
 16 Q. Have you had to receive medication because of
 17 that?
 18 A. Yes, I do. I do still, yeah.
 19 Q. Had the fact that you've had medical problems
 20 did that affect your decision to tell what Mr. Cook had
 21 told you?
 22 A. Uh -- to some degree sure, but, no. I was
 23 doing it because of my belief, my Christian belief. I had
 24 to. It was right. And my wife she wanted me to do what
 25 was right. And that's why I was doing it.

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1 A. Yes, it is.
 2 Q. Okay. That's what I'm trying to get at.
 3 A. Oh, okay.
 4 Q. The prosecutor asked you if you were convicted
 5 of concealing property, a felony. You were also convicted
 6 of grand larceny, a felony?
 7 A. Yes, I was.
 8 Q. And those were in 2003?
 9 A. 2003.
 10 Q. Now, you have requested your attorney to file a
 11 motion to reduce your sentence?
 12 A. A Rule 35, yeah.
 13 Q. And it is your belief that has been filed?
 14 A. Yes. It has been filed.
 15 Q. And in your request to your attorney for that
 16 reduction of sentence, you again talk about your medical
 17 problems?
 18 ~~A. Right, yeah.~~
 19 Q. And you talk about you don't believe you're
 20 going to get the appropriate kind of medical attention you
 21 need in prison?
 22 A. Right.
 23 Q. And you indicate about a concern that you will
 24 lose your leg if you don't get the appropriate medical
 25 attention?

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1 A. Yes, sir.
 2 Q. And in that letter again you indicate to your
 3 attorney that you've been told you're very important to
 4 the Cook case as a witness?
 5 A. Uh -- yeah.
 6 Q. And that, perhaps, that importance in the Cook
 7 case could help get your sentence reduced?
 8 A. No. That wasn't told to me. I have not been
 9 given no promise.
 10 Q. I'm not saying a promise. I'm just saying in
 11 that letter do you indicate that an investigator contacted
 12 you pertaining to your testimony on the Sean Cook case?
 13 A. Yeah, Detective Miller.
 14 Q. And I was wondering if you could talk to the
 15 prosecutor of that case and see if they could help me to
 16 receive an early release in some way?
 17 A. To get medical help.
 18 Q. Yeah. That's in your letter?
 19 A. Yeah.
 20 Q. Maybe, an early parole or something?
 21 A. For medical, yeah.
 22 MR. HULL: I don't have any further questions,
 23 Your Honor.
 24 THE COURT: Any redirect?
 25 REDIRECT EXAMINATION
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1 one thing.
 2 Q. And only one incident?
 3 A. Right, yeah.
 4 Q. Okay. And that was in Oklahoma?
 5 A. Yes.
 6 MS. GARDNER: Thank you.
 7 THE COURT: Any recross?
 8 MR. HULL: No, Your Honor.
 9 THE COURT: That means you may step down and go
 10 with our good bailiff there.
 11 The State may call its next witness.
 12 MS. GARDNER: The State calls Karen Freeland.
 13 THE COURT: If you'll come forward please,
 14 Ma'am. And right about there in the middle, face Madam
 15 Clerk and raise your right hand, please.
 16 ---oOo---
 17 KAREN FREELAND,
 18 ~~having been duly sworn by the Clerk of the Court, was~~
 19 examined and testified as follows:
 20 DIRECT EXAMINATION
 21 QUESTIONS BY MS. GARDNER:
 22 Q. Ma'am, could you start by stating your name
 23 and spelling your last name.
 24 A. Karen Freeland, F-r-e-e-l-a-n-d.
 25 Q. Ma'am, are you married?
 STATE OF IDAHO VS COOK SUPREME COURT

1 QUESTIONS BY MS. GARDNER:
 2 Q. Did somebody tell you, you were an important
 3 witness in this case?
 4 A. No. Nobody has told me that.
 5 Q. In talking to Detective Miller, when did that
 6 conversation take place? Was that before or after the
 7 preliminary hearing?
 8 A. After. This was just recently. Not too long
 9 ago --
 10 THE COURT REPORTER: That last part? Not too
 11 long ago --
 12 THE WITNESS: Not too long ago when I spoke to
 13 her. It was after the preliminary hearing.
 14 BY MS. GARDNER:
 15 Q. What was the purpose of Detective Miller's
 16 visit to you?
 17 A. She called me on the phone. She wanted to make
 18 sure or asked me if I was still willing to testify in this
 19 case.
 20 Q. And what did you tell her?
 21 A. I told her: "Yes, I was."
 22 Q. You talked about your conviction or convictions
 23 in 2003. Was there one or two?
 24 A. There was -- it was one deal, but they had
 25 charged me for two; concealing and possession. Both on
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1 A. I'm sorry?
 2 Q. Are you married?
 3 A. Yes.
 4 Q. And who are you married to?
 5 A. Paul Nelson.
 6 Q. How long have you been married to Paul?
 7 A. About 3-1/2 years.
 8 Q. Do you have a daughter?
 9 A. Yes, I have two.
 10 Q. Do you have a daughter named Ashten?
 11 A. Yes, I do.
 12 Q. And how old is Ashten?
 13 A. Twenty.
 14 Q. Is that your daughter or yours and Mr. Nelson's
 15 daughter?
 16 A. She's my daughter.
 17 Q. And back this last spring was Paul arrested?
 18 A. Yes, he was.
 19 Q. And has he been in custody since then?
 20 A. Yes, he has.
 21 Q. Have you visited him?
 22 A. Yes, I have.
 23 Q. How regularly would you say?
 24 A. A couple of times a week. Twice a week.
 25 Q. Do you take your daughter with you? Ashten?
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1 A. Yes.
 2 Q. And how is it when you've visited him, can you
 3 explain for us how you're able to communicate with him
 4 during those visits?
 5 A. Through the T.V. monitor.
 6 Q. All right. Tell us about that. Is it, like,
 7 through a telephone?
 8 A. Yes. It's through a telephone and a T.V.
 9 monitor. We can visit for 30 minutes.
 10 Q. All right. And are you seated at that monitor?
 11 A. Yes.
 12 Q. And so if somebody is coming around there, are
 13 they able to hear what you're talking about?
 14 A. Um -- I'm not sure.
 15 Q. Because you're communicating through, like, a
 16 telephone?
 17 A. Right.
 18 Q. Was there a time last summer or spring when
 19 your husband complained about something that was going on
 20 at the jail?
 21 A. Yes.
 22 Q. And who did that involve?
 23 MR. HULL: Your Honor, I'd object as hearsay.
 24 THE COURT: Your response?
 25 MS. GARDNER: I don't have a response, Judge.

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1 A. Um -- he was disgusted. And I'll use my terms.
 2 He was freaked out by it and asked me -- asked me what my
 3 opinion of it was. And I told him he had to tell
 4 somebody.
 5 Q. Have you, yourself, ever been a victim of a
 6 rape?
 7 A. Yes, ma'am.
 8 Q. Have you ever expressed that to your husband?
 9 A. Yes.
 10 Q. Do you have strong opinions about reporting
 11 those types of things?
 12 A. Yes, I do.
 13 Q. What are those opinions?
 14 MR. HULL: Your Honor, I would object. This is
 15 irrelevant at this point.
 16 THE COURT: The relevance?
 17 MS. GARDNER: I think it goes to the state of
 18 mind during that discussion that followed the reporting.
 19 THE COURT: Sustained.
 20 BY MS. GARDNER:
 21 Q. During the time that you've been with your
 22 husband, have you developed an opinion about his
 23 representation for truthfulness?
 24 A. Yes.
 25 MR. HULL: Your Honor, I would object to her

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1 I guess I'm just going to go with another question.
 2 THE COURT: All right. I'm going to sustain
 3 that.
 4 BY MS. GARDNER:
 5 Q. After talking to your husband, did you take any
 6 actions?
 7 A. Yes, I did. I was very concerned. I told my
 8 husband that he needed to talk to the commander that was
 9 on duty and -- um -- tell him about it.
 10 Q. Did you, yourself, take actions as far as the
 11 commander?
 12 A. Yes, I did.
 13 Q. Can you describe for us what you did.
 14 A. I went to the class where you sign up to do
 15 your visits. And I asked for the commander to be sent to
 16 my husband's cell.
 17 Q. Okay. And did you have any later conversations
 18 with your husband about that?
 19 A. I'm sorry?
 20 Q. Did you have any later conversations with your
 21 husband about the watch commander?
 22 A. Yes. He said that he saw him.
 23 Q. And what was his -- what was your husband's
 24 demeanor when he was telling you about this problem at the
 25 jail?

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1 answering that question. It's that rule you cite.
 2 THE COURT: That is sustained. And it's
 3 actually rule 608(a), not 609. But it's sustained
 4 pursuant to Rule 608 (a).
 5 MS. GARDNER: Judge, could I take up argument
 6 on that point outside of the presence of the Jury.
 7 THE COURT: You could. This would be a good
 8 time for our afternoon recess and we can take up this
 9 legal matter.
 10 So I'm going to ask you to return to continue
 11 at 8:30 in the morning. That's when we expect and hope to
 12 start testimony tomorrow. Don't talk about the case with
 13 anyone or form or express any opinion. Enjoy your
 14 afternoon.
 15 (The Jury left the Courtroom.)
 16 THE COURT: And you can step down, Ma'am.
 17 THE WITNESS: Thank you.
 18 MS. GARDNER: Ms. Ezeeland, if you could be
 19 here at -- what time in the morning?
 20 THE COURT: 8:30 in the morning we will begin.
 21 MS. GARDNER: At 8:30 in the morning.
 22 THE WITNESS: Thank you.
 23 THE COURT: All right. Go ahead, Ms. Gardner.
 24 MS. GARDNER: Yes. I was reviewing that rule
 25 the last time the Court made the ruling, and -- um -- I

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1 think in this case with Mr. Nelson here is the need to
 2 establish the truthful character of Ms. Freeland's
 3 husband. Looking at Rule 608, sub A, sub 2, it states:
 4 "That evidence of a truthful character is
 5 admissible only after the character of the witness for
 6 truthfulness has been attacked by opinion, or reputation,
 7 evidence or otherwise."
 8 And that is sometimes difficult to determine
 9 exactly when this should come out. But we have the
 10 witness here who could testify about his reputation for
 11 truthfulness. We have the witness that's already
 12 testified. And he's been cross-examined and questioned
 13 about his truthfulness and his motives in not testifying
 14 truthfully, his being a witness and possibly that
 15 affecting his getting out of jail or getting out of
 16 prison, his medical conditions and possibly that being a
 17 reason. So there's been a lot of question already about
 18 his truthfulness. So I think that this is the time to
 19 have a witness testify about his truthfulness.
 20 THE COURT: Mr. Hull?
 21 MR. HULL: Your Honor, I would continue to
 22 object. And as well the Rule goes on to state that if
 23 they go into this then we're allowed to go into specific
 24 instances of dishonesty. And the prosecution has refused
 25 to give us an NCIC and says we can only have felony

1 the licensing -- um -- agreement and rules, we are not
 2 able to access NCIC ourselves in law enforcement if we
 3 violate these rules that they have. And one of those
 4 rules is that we don't just hand out NCICs on every
 5 witness in a case. So what our policy is -- and it's been
 6 this way for longer than I've been at the prosecutor's
 7 office -- to provide for witnesses a listing and an
 8 account as much as we can information about any prior
 9 felony convictions. And that's what I did. Mr. Nelson is
 10 not the Defendant in this case. If he had been, we'd
 11 provide the NCIC of the Defendant to the defense attorney.
 12 But we just simply cannot go beyond that and provide
 13 privacy information like that on the record of all of our
 14 witnesses. So I complied with that as much as I could.
 15 And I would like to say that Mr. Nelson's
 16 credibility and truthfulness is coming into question with
 17 his prior conviction for grand theft, but I'm not allowed
 18 to rebut that and have a witness testify about his
 19 truthfulness. He's in a jumpsuit here and, obviously, in
 20 custody. So he's already in the negative as far as the
 21 Jury's perception of him as having the character for
 22 truthfulness. So -- um -- I think that this witnesses is
 23 very different from our other witnesses in that regard
 24 so --
 25 THE COURT: Let me take a moment and review the

1 convictions some little clip they have. And when
 2 Ms. Gardner was talking about putting Ms. Freeland on,
 3 among other things, for Mr. Nelson's -- um -- reputation
 4 for truth and veracity, I told her, well, if you're going
 5 there, I'm going to need a complete NCIC because if you're
 6 going to put on evidence of his reputation for
 7 truthfulness I can go into specific instances of his
 8 dishonesty. But as well, Your Honor, I don't think the
 9 appropriate foundation has been laid to have this witness
 10 testify to his reputation and truthfulness and veracity.
 11 THE COURT: All right. Just to make the record
 12 clear, then, did the defense specifically request an NCIC,
 13 National Criminal Information Center, printout on
 14 Mr. Nelson?
 15 MR. HULL: Yes, Your Honor.
 16 THE COURT: And, if I understand right, the
 17 State's response was to not give you that printout but to
 18 advise you of the prior felony convictions of Mr. Nelson.
 19 MR. HULL: Yes, Your Honor. There's a
 20 supplemental response to discovery which should be lodged
 21 in the Court's file that is the same as what I've
 22 received.
 23 THE COURT: All right. Ms. Gardner?
 24 MS. GARDNER: Well, Judge, I know you're aware
 25 of this issue yourself, but we cannot provide understand

1 rule again.
 2 (Pause in proceedings.)
 3 THE COURT: All right. I'm not going to rule
 4 on the objection at this point. I will rule at 8:30 in
 5 the morning tomorrow. I want to read a few of the
 6 accompanying cases that are cited to this particular rule.
 7 Anything else to bring up at this point by
 8 either counsel?
 9 MS. GARDNER: No, Your Honor.
 10 MR. HULL: Your Honor, since there is no ruling
 11 at this point in time, I would be requesting an order from
 12 the Court that I be given access to the entire record of
 13 Mr. Nelson. I don't care if they've got NCIC rules. I
 14 have to be able to cross-examine their witnesses. And
 15 they have access to his record. I don't.
 16 THE COURT: All right. I'm not going to enter
 17 that order at this time. I sure under the Defendant's
 18 position and the rationale for that position, but I'm not
 19 going to enter that order at this time.
 20 Anything else from either party?
 21 MS. GARDNER: No, Your Honor.
 22 MR. HULL: No, Your Honor.
 23 THE COURT: Just before we break for the day,
 24 then, how are we doing in time frames in terms of when the
 25 State expects that it may be resting its case?

1 MS. GARDNER: I'm thinking for
 2 cross-examination three hours.
 3 THE COURT: You may rest late morning tomorrow?
 4 Possibly early afternoon?
 5 MS. GARDNER: Yes.
 6 THE COURT: All right. And then how long is
 7 the defense's case in chief? And it's hard to gauge, I
 8 know.
 9 MR. HULL: Oh, you know, 2-1/2 hours, I guess.
 10 THE COURT: We're still on track to get this to
 11 the Jury by Friday you believe?
 12 MS. GARDNER: I believe so.
 13 MR. HULL: No problem.
 14 THE COURT: All right. Very well. We will be
 15 in recess on this matter until 8:30 tomorrow morning.
 16 (The proceedings recessed at 2:43 p.m. to
 17 reconvene on November 6, 2008.)
 18 ---oOo---
 19 (DAY NO.: 3 - November 6, 2008 - 8:21 a.m.)
 20 P R O C E E D I N G S
 21 THE COURT: All right. We are on the record in
 22 State v. Cook, Thursday morning.
 23 The Jury is not present. And counsel for both
 24 parties are here. The Court has had an opportunity to
 25 review a particular case regarding the issue of whether

1 Mr. Nelson was not an initial witness anyway. We didn't
 2 find out about him until the day before the preliminary
 3 hearing and discovery had already started for the most
 4 part. We then supplemented our witness list on a as soon
 5 as possible basis coming up to the weeks before trial.
 6 THE COURT: All right. Well, Thursday is, in
 7 other words, that's October 30, the Thursday before the
 8 trial began on November the 3rd.
 9 Well, the issue of whether opinion evidence
 10 regarding a person's reputation or excuse me whether
 11 opinion or reputation for a person's truthfulness is
 12 admissible as guided by Rules of Evidence 608(a) and
 13 608(b). And certainly 608 stands for the proposition that
 14 evidence of a truthful character is admissible only after
 15 the character of the witness for truthfulness has been
 16 attacked by opinion or reputation evidence or otherwise.
 17 And the Court read the case of *Pierson v. Brooks*,
 18 *P-i-e-r-s-o-n*, 115 Idaho, 529, a Court of Appeals case in
 19 1989. And that the holding in this case is for an
 20 expanded definition really of what attacking of a
 21 witness's character for truthfulness can mean slashing
 22 cross-examination innuendo type of evidence regarding a
 23 person's character for truthfulness can be an attack on
 24 that truthfulness. And so the Court does find that the
 25 evidence of a felony conviction, although brought out by

1 favorable opinion on testimony with regard to witness
 2 Paul Nelson will be admitted. And the Court has a further
 3 question, I think, to ask about the record. That would
 4 be: When did defense make its request for an NCIC
 5 printout of Mr. Nelson's record?
 6 MR. HULL: Your Honor, in the original request
 7 for discovery we asked for criminal records, check of all
 8 witnesses -- um -- specifically, I raised it Thursday on a
 9 telephone call when Ms. Gardner indicated she contemplated
 10 eliciting opinion for truthfulness testimony from
 11 Ms. FreeLand.
 12 THE COURT: And does the State agree with that
 13 record? Is that Thursday the issue was raised in that
 14 regard?
 15 MS. GARDNER: Thursday the issue was
 16 specifically raised, yes, Judge. Also, if I can comment
 17 further on that. Mr. Nelson was not originally in this
 18 case a witness, so when we responded to the initial
 19 request for discovery, the State didn't provide
 20 information on that. And, basically, Judge we -- I'm
 21 looking right now to see if that was part of the NCIC
 22 along with all of the other witnesses was a request for
 23 some additional discovery. Like I said, it's not our
 24 office policy. And we never provide NCICs of witnesses.
 25 We provided NCICs of the Defendant. But, nevertheless,

1 the State, it was brought out by the State because the
 2 State knows that if it doesn't beat the defense to the
 3 punch that defense will bring out the character or at
 4 least evidence of a felony conviction of Mr. Nelson. So
 5 essentially it's the defense that is impeaching that
 6 credibility. Also, the various reasons for theories by
 7 which the defense has put forward reasons for the Jury to
 8 not believe Mr. Nelson in terms of cross-examination
 9 itself. Defense did an attack on the character for
 10 truthfulness of Mr. Nelson. On the other hand, 608(b)
 11 allows specific instances of conduct of the witness for
 12 the purpose of attacking or supporting the credibility of
 13 the witness other than conviction of a crime as provided
 14 by 609. It may not be proven by intrinsic evidence. They
 15 may, however, in the discretion of the Court. And the
 16 Court recognizes this is a discretionary call and is
 17 probative of truthfulness or of untruthfulness be inquired
 18 into on cross-examination of the witness concerning the
 19 character of the witness for truthfulness or
 20 untruthfulness or the character for truthfulness or
 21 untruthfulness of another witness as to which character
 22 the witness being cross-examined has testified.
 23 So as the Court read that particular rule,
 24 Ms. FreeLand is allowed to give her opinion testimony
 25 regarding the character of truthfulness of Paul Nelson.

1 The defense is allowed to go into specific instances
2 of conduct to challenge that opinion. The defense has
3 specific -- have specifically requested the NCIC printout
4 from the prosecution of Paul Nelson. And the Court is
5 fully and intimately aware of the prosecuting attorney's
6 policy regarding not disclosing the NCIC printout. That's
7 a good policy. There is licensing reasons for it.
8 On the other hand, I can't believe that the
9 policy is flexible to the extent that the Court order does
10 not violate the licensing policy that a law enforcement
11 agency has regarding NCIC printouts. And largely the
12 evidence regarding Paul Nelson is evidence that is in the
13 hands of the prosecution. It's not the type of evidence
14 that can reasonably be discovered by the Defendant because
15 essentially the specific instances of conduct with which
16 the Defendant could challenge an opinion of truthfulness
17 that Ms. Freeland is likely to give those specific
18 instances of conduct are in the hands of the prosecution.
19 The defense specifically requested an NCIC printout. It
20 was denied per policy and for reasonable reasons, but
21 under these particular circumstances it was requested for
22 the purposes of being able to rebut and meet the
23 anticipated prosecution evidence of an opinion that
24 Paul Nelson has a character for truthfulness. Right now
25 that's a valid reason for the defense to have had that

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1 what went on between him and Mr. Cook that I thought it
2 would be appropriate to address out of the presence of the
3 Jury.
4 THE COURT: All right.
5 MR. HULL: There was a statement by Mr. Cook
6 that he had been in prison before. I believe that would
7 be inappropriate to be brought up.
8 MS. GARDNER: The State has no intention of
9 bringing that out.
10 THE COURT: I would expect that. Okay.
11 MR. HULL: There was a statement in the report
12 that it talked for 90 minutes. And Mr. Cook seems evasive
13 on -- the Detective's characterization -- evasive without
14 just the conclusionary nature. I don't have any objection
15 to the specifics about what was said and what wasn't said,
16 but I would object to the characterization as evasive.
17 There is a statement that we heard of Detective Martin
18 heard Sean Cook talking on a cell phone just like Martin's
19 girlfriend when I was going to have sex with her. I
20 would be objecting to that on two grounds. One, that it's
21 inadmissible propensity evidence and also irrelevant.
22 And, also, it hasn't been disclosed as prior misconduct
23 that they intend to introduce in their notice.
24 THE COURT: Let me slow you down, Mr. Hull,
25 about the evidence of evasiveness that the Detective may

1 expanded criminal history of Mr. Nelson.
2 A court order probably would have relieved the
3 State of its licensing problems and disclosing of that
4 type of evidence to the defense. And, therefore, the
5 State's decision to not disclose that evidence really
6 precluded Mr. Cook of being able to challenge
7 Ms. Freeland's opinion that her husband has the character
8 for truthfulness. So because this is a discretionary call
9 by the Court and under the analysis that the Court has
10 just announced and the factors that were involved, I am
11 not going to allow Ms. Freeland to give her opinion
12 because the State would then benefit by that opinion and
13 would again benefit by the denial. The reasonable
14 discovery request by the defense for the defense to be
15 able to investigate and may be an additional basis for
16 that opinion.
17 Any questions by the State?
18 MS. GARDNER: No, Your Honor.
19 THE COURT: Any questions by the defense?
20 MR. HULL: No, Your Honor.
21 THE COURT: All right.
22 MR. HULL: There was one thing I thought we
23 might be able to take up prior to the Jury coming to save
24 time later. And that involves prior to Detective Martin
25 testifying there's some probably areas of his report of

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1 have observed.
2 MS. GARDNER: The observations of the officer.
3 I do have full intention of setting that foundation and
4 asking him if there were conflicting statements given by
5 Mr. Cook and what those were, if there were -- um -- what
6 his demeanor was. He certainly can't testify that he
7 believed Mr. Cook was lying in that interview. But he can
8 provide information as far as if his eyes were darting
9 around, if he wasn't maintaining eye contact. Things like
10 that without make the conclusion that he was being evasive
11 or dishonest.
12 MR. HULL: Your Honor, I'm not objecting to the
13 particulars that he observed or heard. It's just the
14 conclusion.
15 THE COURT: It sounds like we are in agreement
16 on that. What about the telephone call or overheard
17 comment about: Just like when he wanted to have sex with
18 another person's girlfriend?
19 MS. GARDNER: I listened to this entire video.
20 For one thing, I want to say I have no intention of
21 playing that entire video because it's just replete with
22 all types of statements that would not be appropriate to
23 try and introduce. I have no intention of having
24 Detective Martin relay the conversations that Mr. Cook was
25 having with his friends on the other line and the

1 statements that he was making. I t think that it's
 2 objectionable to have the Detective talk about Mr. Cook
 3 making phone calls in his absence. And there was some
 4 brief discussion between Tracy Martin and Mr. Cook about
 5 one of those phone calls that Tracy Martin walked in on
 6 where there were -- um -- Tracy Martin basically directed
 7 Mr. Cook to tell Johnny, the last friend that he called,
 8 to not go out and try to talk to witnesses because
 9 Mr. Cook had mentioned Danielle and Hoss and Hank Dillon
 10 as ganging up on him.

11 MR. HULL: I don't know that I followed that.
 12 And there isn't any, you know, it's not in his report that
 13 conversation. So I think what I'm saying is that the
 14 conversation on the phones are not relevant. So I'm
 15 objecting to the one that I clearly understand. I don't
 16 understand the one about Johnny -- telling Johnny not to
 17 contact people.

18 MS. GARDNER: It's all in the video. You have
 19 to watch the entire video.

20 THE COURT: The telephone conversation is then
 21 that the Defendant had made that Detective Martin
 22 overheard may or may not be relevant based on the context
 23 of the testimony. We will address those as they come up.

24 MR. HULL: And then there was a request to take
 25 a polygraph that Mr. Cook agreed to take. And then he

1 later called said upon the advice of his attorney he
 2 wasn't going to take it. My position would be while if
 3 the State is going to put that he agreed to take one, we
 4 are allowed to elicit from Mr. Cook the reasons why he
 5 didn't take one. It seems it would be more appropriate
 6 not to talk about polygraphs one way or the other. It
 7 just seems cleaner to me and more appropriate. It doesn't
 8 prove anything one way or the other.

9 THE COURT: We always want to be clean.
 10 What's the State's position?

11 MS. GARDNER: I'm not going to mention the
 12 polygraph, Judge.

13 THE COURT: Very good. We are in agreement,
 14 then.

15 MR. HULL: That's all I wanted to do. I was
 16 just hoping to save time doing it now.

17 THE COURT: Thank you.
 18 Anything else from the parties?

19 MS. GARDNER: I don't believe so, Judge.

20 THE COURT: All right. Let's return the Jury,
 21 please.
 22 (The Jury entered the Courtroom.)
 23 THE COURT: All right. The Jury has returned.
 24 They are in their appropriate seats.
 25 Ms. Freeland, you may take the stand again.

1 And you are reminded that you're still under oath from the
 2 oath you took yesterday.

3 We are on direct examination by the State.
 4 Ms. Gardner, you may continue.

5 MS. GARDNER: Thank you, Judge. I've concluded
 6 my direct examination of this witness.

7 THE COURT: Cross-examination.
 8 MR. HULL: No cross, Your Honor.
 9 THE COURT: Well, thank you for coming back.
 10 That means you may step down.
 11 And may this witness be excused?
 12 MS. GARDNER: Yes, Judge.
 13 Could I have a word with this witness, also,
 14 just briefly?
 15 THE COURT: You may.
 16 (Discussion had off the record between
 17 Ms. Gardner and Ms. Freeland.)
 18 ~~MS. GARDNER: I need to exit the courtroom~~
 19 briefly just to find my next witness.
 20 THE COURT: Go right ahead.
 21 (Pause in proceedings.)
 22 MS. GARDNER: My next witness wasn't due until
 23 9:00. He's not here yet. So I'll go ahead and call
 24 Tracy Martin.
 25 THE COURT: If you'll come forward please, sir.

1 A. Yes, I have.
 2 Q. Could you just tell us what that training has
 3 been.
 4 A. Various schools. I've attended week-long,
 5 two-week trainings in Dallas, Spokane. Just various
 6 training-type schools.
 7 Q. Can you tell us what you -- um -- just the
 8 general fields that you study in those trainings.
 9 A. Again, just all sex related type offenses --
 10 um -- child abuse, child sex abuse type cases.
 11 Q. Do you learn anything about evidence
 12 collection?
 13 A. I do.
 14 Q. What do you learn about evidence collection
 15 generally?
 16 A. Proper collection, processing, evidence
 17 procedures.
 18 Q. All right. Do you learn anything about suspect
 19 interrogations? Interviews?
 20 A. Yes.
 21 Q. And do you learn about witness interviews?
 22 A. Yes.
 23 Q. Are there any differences in interviews of
 24 victims in these types of crimes versus general crimes?
 25 A. At times. There are various feelings,

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1 accounted for, how it was collected, where it was
 2 collected and then begin setting up what interviews you
 3 need to do.
 4 Q. And did you review reports from other officers
 5 in this case before trying to contact Mr. Cook?
 6 A. I did.
 7 Q. Did you assure that the evidence that had been
 8 reported as collected in those reports was actually in the
 9 custody of the police department?
 10 A. Yes, I did.
 11 Q. And was it?
 12 A. It was.
 13 Q. All right. In this case did you have any items
 14 that were being forwarded to the forensic or laboratory
 15 for testing?
 16 A. There were numerous items. There were bedding
 17 materials. I believe there was some clothing items.
~~18 There was a sexual assault kit that was sent to the state~~
 19 lab.
 20 Q. And is there any communication that you had
 21 with the state the lab on testing of certain items?
 22 A. Generally we'll submit a request. This is the
 23 item we're sending you, this is our report, this is what
 24 we're looking for.
 25 Q. When the suspect admits to having sexual

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1 sensitive areas that need to be addressed that aren't
 2 typically, like, with a grand theft or a theft type of
 3 crime.
 4 Q. Did you interview a Sean Cook?
 5 A. I did.
 6 Q. And in relation to what?
 7 A. A reported rape.
 8 Q. And who was the alleged victim in that?
 9 A. A Danielle Whitten.
 10 Q. When did you interview Mr. Cook?
 11 A. I believe it was on May 28th, I think, is when
 12 I first spoke to him.
 13 Q. And how long had you had this report?
 14 A. I originally began working on it April 16th, I
 15 believe, is when it first came to my desk.
 16 Q. So what happened between April 16th and
 17 May 28th when you met with Mr. Cook?
 18 A. The majority of the time was trying to locate
 19 Mr. Cook. Get in touch with him.
 20 Q. When you began your investigation can you just
 21 tell us the first day, beginning the investigation, what
 22 did you do?
 23 A. You collect all the reports that officers,
 24 report takers, witnesses, read all of the reports. Make
 25 sure that the evidence collected to that point is

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1 intercourse with the victim, is there a difference in how
 2 the laboratory treats the testing?
 3 A. There is. Typically if the person that we're
 4 investigating has admitted to sexual contact or sexual
 5 intercourse as in this case they're not going to process
 6 the items for a, quote, "DNA match."
 7 Q. And is there anything that affects -- in that
 8 confession that affects the laboratory's testing of all
 9 the items submitted for semen?
 10 A. Just to the extent they'll process the item to
 11 verify that there's a presence of sperm on those items.
 12 Q. All right. And in this case do you know if the
 13 laboratory tested all of the items or just some of the
 14 items or none of the items for semen?
 15 A. I believe they processed the sexual assault
 16 kit. There were a pair of jeans that were processed. And
 17 I believe a pair of women's panties that were processed.
~~18 Q. All right. Do you know in this case what~~
 19 happened with the bedding and the sheets and all of that
 20 that was submitted?
 21 A. I believe once they received the report they
 22 determined they were going to return those back to the
 23 police department. So they should still be in the custody
 24 of the police department.
 25 Q. Do you submit your report to the laboratory?

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1 A. Yes. Up to what I have that point.
 2 Q. Okay. And do you submit information to the
 3 laboratory about whether the suspect has admitted to the
 4 sexual contact?
 5 A. Yes.
 6 Q. And at what point in your investigation do you
 7 do that?
 8 A. As soon as I have it or if I have that
 9 information before I submit those items then. And I'll
 10 send it at that time.
 11 Q. Can you tell us why you do that.
 12 A. It's important for the state lab to have as
 13 much information so they can either narrow their scope of
 14 where they need to look for whatever evidence they're
 15 trying to process or that they need to take further steps,
 16 I guess, would be the best way to say it.
 17 Q. And in this case did you report to the state
 18 laboratory that Mr. Cook had admitted to sexual contact or
 19 sexual intercourse?
 20 A. Yes. That would have been in my report.
 21 Q. Did you receive reports back from the Idaho
 22 Forensic Laboratory?
 23 A. Yes. We get a supplemental report from them
 24 telling us which items they tested, which items they
 25 returned. And then oftentimes we will get a separate

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1 report saying that their findings were, what they were
 2 able to locate, or what they didn't find.
 3 Q. Is there a separate section of the Idaho State
 4 Laboratory that analyzes fingerprints?
 5 A. There is.
 6 Q. And where are they in relation to the one
 7 that --
 8 A. I believe that can be processed -- um --
 9 either locally or I believe there's another lab in
 10 Meridian, Idaho that can process those.
 11 Q. In this case did the laboratory review any
 12 items for fingerprint testing?
 13 A. They did.
 14 Q. And what items or item?
 15 A. There were numerous -- I believe they were
 16 alcohol bottles of some sort. It was I believe a beer
 17 bottle in particular that they processed.
 18 Q. Any cups that they processed?
 19 A. There were some plastic cups. I don't know
 20 what color or what size. But I believe there were some
 21 plastic cups that were also recovered at the motel.
 22 Q. Okay. And did you or your department submit
 23 fingerprint samples or a sample of Mr. Cook to that lab?
 24 A. I don't know that they were submitted from our
 25 agency or if they had them in an automated system.

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1 Q. But your understanding is that at some point
 2 that they reviewed his fingerprints compared to what was
 3 located on the cup?
 4 A. They do. They run a comparison.
 5 Q. And did you receive reports of that analysis?
 6 A. Yes. There was a matching fingerprint coming
 7 back to the Defendant Mr. Cook.
 8 MS. GARDNER: If I could approach the Clerk.
 9 THE COURT: Yes.
 10 MS. GARDNER: May I approach the witness.
 11 THE COURT: Yes.
 12 BY MS. GARDNER:
 13 Q. So I'm showing you what's been marked as
 14 Plaintiff's Exhibit 6, 7, and 8. Could you take a look at
 15 these and tell us if you recognize these.
 16 A. They appear to be copies of the forensic
 17 reports from the state lab.
 18 Q. And in this particular matter that we're
 19 A. Yes.
 20 Q. Who was the investigating officer from your
 21 department?
 22 A. I am.
 23 MS. GARDNER: I move for the admission of
 24 Exhibits 6, 7, and 8 at this time.
 25 MR. HULL: May I just have a look to see what

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1 the numbers are and stuff? Thanks.
 2 THE COURT: Ms. Gardner, for the record, could
 3 you identify which exhibit is a report of what.
 4 MS. GARDNER: Six is the forensic biology
 5 report of the semen analysis from the clothing of
 6 Danielle Whitten.
 7 THE COURT: Okay.
 8 MS. GARDNER: Exhibit 7 is the criminalist
 9 analysis report of the fingerprints located or not located
 10 on various items of bottles, cups submitted. And
 11 Exhibit 8 is the fingerprint analysis showing the latent
 12 print marked No. 5 positively identifying the right thumb
 13 of Sean Cook.
 14 THE COURT: Any objection to 6, 7, and 8 being
 15 admitted?
 16 MR. HULL: Your Honor, we previously stipulated
 17 to the admission of those forensic results without the
 18 need to bring up the forensics. So, no objection.
 19 THE COURT: Six, 7, and 8 are admitted.
 20 MS. GARDNER: Submit these to the Clerk or
 21 yourself, Judge?
 22 THE COURT: The Clerk will be fine. Thank you.
 23 (Plaintiff's Exhibits Nos. 6, 7, and 8 were
 24 admitted.)
 25 BY MS. GARDNER:

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1 Q. So after reviewing the reports and checking to
 2 make sure the evidence was submitted, what was your next
 3 step in this investigation?
 4 A. I began trying to locate Mr. Cook.
 5 Q. And what effort were you taking to try and
 6 locate Mr. Cook?
 7 A. Checking the last known area that he was
 8 supposed to be at and contacting his employer. I left
 9 numerous messages with, I believe, two separate managers
 10 or the job site foreman or the company he worked for.
 11 Q. Where was he working?
 12 A. For a landscaping company. I believe they're
 13 based out of Spokane.
 14 Q. And how many contacts did you have with that
 15 company?
 16 A. Three or four, maybe.
 17 Q. Over the time span of how long?
 18 A. Probably a couple of weeks.
 19 Q. Where was he living according to your
 20 understanding at the time?
 21 A. From what I understood, he was living here in
 22 Coeur d'Alene someplace. I didn't have an exact physical
 23 address.
 24 Q. All right. Did you have a phone number for
 25 him?

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1 actually returned my call. I wasn't able to contact him
 2 directly. He called me back.
 3 Q. Do you know from where he called you?
 4 A. I don't.
 5 Q. When you spoke with him on the phone did you --
 6 what did you tell him?
 7 A. That I was investigating a case and needed to
 8 speak with him.
 9 Q. Is that all the information you gave him?
 10 A. Yes.
 11 Q. And did he agree to come in and talk with you?
 12 A. He did.
 13 Q. And when did he come in?
 14 A. I don't believe it was that day. It was
 15 shortly after the conversation within a day or so.
 16 Q. All right. And was he in custody when he came
 17 in to talk to you?
 18 A. No.

19 Q. Where did he talk to you?
 20 A. At the police department.
 21 Q. Can you describe for us what type of
 22 facilities you have for interviewing suspects.
 23 A. Um -- real small rooms. Our space is fairly
 24 limited. It's a room probably no bigger than the judge's
 25 table area. It's a fairly small room.

1 A. Eventually I did.
 2 Q. And how did you obtain the phone number for
 3 him?
 4 A. Through one of the supervisors.
 5 Q. And did you have a phone number -- a personal
 6 phone number for him or a work phone number?
 7 A. I believe it was a work phone number.
 8 Q. Did you ever have his personal cell phone
 9 number?
 10 A. Not that I recall.
 11 Q. When you eventually met with Mr. Cook did he
 12 tell you where he was living?
 13 A. Yes.
 14 Q. And where did he tell you he was living?
 15 A. Here in Coeur d'Alene.
 16 Q. Did he tell you which street he was living on?
 17 A. I believe he gave me an exact address. I don't
 18 recall off the top of my head.
 19 Q. And did he make any comments to you about
 20 having a cell phone or not having a cell phone?
 21 A. I don't recall specifically.
 22 Q. How long was it that you tried to contact
 23 Mr. Cook before you were finally successful in reaching
 24 him on the phone?
 25 A. I believe it was close to three weeks. And he

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1 Q. When you went into that room with Mr. Cook was
 2 it being recorded?
 3 A. It was.
 4 Q. Can you describe for us what kind of a
 5 recording you have in those rooms.
 6 A. We have audio and video that's recorded onto a
 7 DVD.
 8 Q. Did you let Mr. Cook know that he was being
 9 recorded?
 10 A. I believe I had my digital recorder that was
 11 placed on the table. And he could clearly see my recorder
 12 being placed on the table and removed each time I would
 13 leave the room.
 14 Q. What is a digital recorder?
 15 A. Instead of just like the little microcassette
 16 tape recorders it just records it digitally.
 17 Q. So an additional audio recording?
 18 A. Correct.

19 Q. And did you also have video recording, though,
 20 of Mr. Cook's interview?
 21 A. Correct.
 22 Q. And when you first entered that room to
 23 Mr. Cook did you read him his rights?
 24 A. I did.
 25 Q. And just tell us what those rights are that you

1 Q. All right. Did he say your last name?
 2 A. No.
 3 Q. How much later in the conversation from the
 4 point that he mentioned these friends of hers to the point
 5 where he told you what their names were?
 6 A. I believe it was later in the interview. I
 7 don't think it was right up-front. It was later in the
 8 interview.
 9 Q. Did he indicate to you a reason why he did not
 10 tell you who were the people that interrupted their sex?
 11 A. The reason he said was he thought I was
 12 investigating them for something. And he didn't want to
 13 give up their name, I guess.
 14 Q. Did he ever specify what it was that you would
 15 have been investigating Hoss and Hank for?
 16 A. Something about a prior -- I don't recall if it
 17 was a drug bust or a theft. But something about a
 18 previous raid, I think, was the word that he used and
 19 thought they were suspects.
 20 Q. Did he expand any more on that claim?
 21 A. No.
 22 Q. Did he make any claims as far as what he said
 23 to Danielle during the consensual sex?
 24 A. Basically, just that they were hurrying to make
 25 up the bed. Apparently, the bed had been messed up.

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1 A. That he had to stop. They stopped or didn't
 2 finish.
 3 Q. And what did he say that they did after
 4 receiving that phone call?
 5 A. I believe they started making the bed. He went
 6 into the bathroom. He told me that Danielle was looking
 7 for her panties, was asking Mr. Cook: "Where's my
 8 panties?" He was responding: "I don't know." Just
 9 things of that sort.
 10 Q. Did he tell you anything about what his
 11 demeanor was when the Dillons arrived?
 12 A. I believe just concerned that they were friends
 13 of Brian's. And he didn't want them finding out what had
 14 taken place.
 15 Q. What was the demeanor of Mr. Cook during this
 16 interview?
 17 A. Arrogant is the only word I can think of.
 18 Q. Can you tell us why you concluded that his
 19 demeanor was arrogant?
 20 A. Once he was made aware of why I was talking to
 21 him, he just came across as very arrogant, very
 22 condescending, that he was better than that. He's, I
 23 mean, just very arrogant.
 24 Q. At some point in this interview did you leave
 25 the room?

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1 Q. I'm sorry. During the sex.
 2 A. I believe he did. But I'd have to look at my
 3 report again.
 4 Q. If you want to look at your report to refresh
 5 your recollection again.
 6 A. He made the statement that they both had wanted
 7 each other for quite some time.
 8 Q. Did he say anything about that being said
 9 during the sex?
 10 A. I don't recall if that was something specific
 11 during that time.
 12 Q. Now, what did he say with regard to how they
 13 were interrupted in their sex?
 14 A. What I remember was there was a phone call that
 15 was either made or received. And they were made aware
 16 that Hoss and Hank were coming to the motel room. And he
 17 didn't want to see them in that state because they were
 18 supposedly friends of Brian, who was Danielle's boyfriend
 19 -- current boyfriend.
 20 Q. And did you question him at what point that
 21 phone call was received?
 22 A. I believe he said it was during the actual
 23 sexual contact.
 24 Q. And what did he say as far as their actions
 25 upon receiving that phone call?

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1 A. I did.
 2 Q. And were you able to observe what Mr. Cook was
 3 doing while you were outside of the room?
 4 A. I was. Through the video.
 5 Q. How were you able to do that?
 6 A. We have a video monitor that monitors our
 7 interview room.
 8 Q. What, if anything, did you observe Mr. Cook
 9 doing?
 10 A. It was like he was talking to himself. He was
 11 making statements: "I can't believe this." Some of the
 12 statements were hard to hear because my recorder wasn't in
 13 there. It was just the video mike.
 14 Q. Did he have a cell phone?
 15 A. He did.
 16 Q. Did he do anything with the cell phone?
 17 A. I believe he made a total of two phone calls.
 18 It may have been three, but two that I saw.
 19 Q. And could you hear those phone calls?
 20 A. Just his side of the conversation.
 21 Q. Could you hear who those phone calls were made
 22 to?
 23 A. I think there was a male and a female. I don't
 24 recall the female's name. I think the male was John or
 25 Johnny.

Q. When you began this conversation... was there a point towards the beginning where he talked about whether or not he was in a relationship with anybody?

A. I believe I did in regard to one female in particular. And he said: "No. She's just my roommate."

Q. And what was her name?

A. I believe it started with a "C." I don't recall. I'd have to look up the report and see if I had it just to see a first name.

Q. Would it refresh your recollection to look at your report?

A. If I listed her, that would.

Q. Okay.

A. I don't have it listed in my report. I just recall a first name beginning with "C."

Q. Would you recall it if you heard it?

A. Yes.

Q. Was it Charity?

A. That sounds right.

Q. Do you remember the last name? What it began with?

A. I want to say it was, like, Pierre or Pirone. Something to that effect.

Q. Did you make a decision as far as custody of Mr. Cook at the end of this interview?

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1 A. He was released. He was not in custody. As a
2 matter of fact, I even told him that a few times during
3 the interview. That I didn't have any intention of
4 arresting him.

5 Q. And so did he walk out of the interview room a
6 free person?

7 A. He did.

8 Q. In his conversations with the people on the
9 phone, did you hear him make any comments about being
10 taken off to jail?

11 A. He made several comments to being taken to
12 jail.

13 Q. What did he say?

14 A. Um -- I believe to the male that he was
15 speaking with: "Come and get my car. They're taking me
16 to jail." He used a lot of profanity. "Come and get my
17 keys. You've got to get me out of jail" -- um -- just
18 statements to that effect.

19 MS. GARDNER: I don't have any other questions.

20 THE COURT: Cross-examination.

21 CROSS-EXAMINATION

22 QUESTIONS BY MR. HULL:

23 Q. Detective Martin, the first time you had actual
24 contact with Sean was on May 28th. Right?

25 A. Correct.

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1 Q. And he agreed to come in and see you?

2 A. Yes.

3 Q. And he came in and saw you on May 28th. Right?

4 A. It was either the 28th or the next day. It was
5 shortly after our conversation.

6 Q. In your report you indicate today, 5/28/08, I
7 received a phone call from Sean Cook. I asked him if he
8 would be willing to come to the police department. And he
9 told me he would. Sean told me he could be at the police
10 department at, approximately, 1600 hours?

11 A. That sounds correct.

12 MS. GARDNER: Objection.

13 BY MR. HULL:

14 Q. Sean arrived at the police department?

15 THE COURT: Hold on. There's an objection on
16 that.

17 MR. HULL: Oh, excuse me.

18 MS. GARDNER: Asking questions that have
19 already been answered.

20 THE COURT: Overruled. Go ahead.

21 BY MR. HULL:

22 Q. And then your report goes on. Sean arrived at
23 the police department. And there isn't any change of date
24 on your report?

25 A. Correct.

1 Q. So that means he showed up the same date you
2 talked to him on the phone.

3 A. Yes.

4 Q. Okay. I just wanted to clarify that.

5 At one point in your testimony you indicated
6 that, perhaps, Mr. Cook didn't talk to you about having
7 sexual contact with Danielle Whitten prior to being told
8 that there was an accusation of rape. Having reviewed
9 your report, he talked to you about having had sexual
10 contact with Danielle Whitten prior to being told there
11 was an allegation of rape. True?

12 A. That doesn't sound correct.

13 Q. Do you have your report there?

14 A. I do.

15 Q. You know, the pages aren't paged. But if you
16 would, there is a page that -- could I approach?

17 THE COURT: You may.

18 MR. HULL: Because I don't know how to

19 identify the page without a page number on it, but it
20 doesn't seem to have one. There's a page that looks like
21 this. That's what I have. Is this your report?

22 A. That looks like a copy of my report.

23 Q. These things print out on computers. Right?

24 A. Yes.

25 Q. And the pages come out differently sometimes --

1 A. They do.
 2 Q. -- on this system, which is really annoying,
 3 isn't it?
 4 A. It is.
 5 Q. Well, I don't want to read a whole bunch of it,
 6 but could you look at that page and review it and tell me
 7 first off whether that's an accurate copy of your report
 8 because our pages seem to be different. But just look at
 9 that page and look through it a little bit.
 10 THE COURT: Mr. Hull, if you could let
 11 Ms. Gardner know where you're at. If you know where
 12 you're at.
 13 MR. HULL: If she wants to approach.
 14 MS. GARDNER: Can I just approach, Judge?
 15 THE COURT: That would be great.
 16 MR. HULL: If she wants to come and look at it,
 17 Your Honor. That's why I'm here. I don't know how to
 18 describe it.
 19 MS. GARDNER: I'm sorry.
 20 THE WITNESS: Okay.
 21 BY MR. HULL:
 22 Q. Is what I have here a portion of your report?
 23 A. It looks to be.
 24 Q. Did you have a chance to look it over?
 25 A. I did.

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1 Q. -- that this was a rape investigation.
 2 A. Correct.
 3 Q. And in that report the specific statements
 4 you've recorded regarding the sex stopping is: "We didn't
 5 finish because her friends were coming over." Right?
 6 A. Correct.
 7 MR. HULL: Okay. No further questions.
 8 THE COURT: Any redirect?
 9 REDIRECT EXAMINATION
 10 QUESTIONS BY MS. GARDNER:
 11 Q. This report, do you prepare your reports
 12 alongside the review of the video of your interview? Or
 13 do you just do it separately?
 14 A. They're done separately. It's usually within a
 15 day or so.
 16 Q. Okay. So have you reviewed the video of the
 17 interview of Mr. Cook?
 18 A. I have.
 19 Q. How long is that interview?
 20 A. Just under two hours.
 21 Q. And your report here is a chronological account
 22 of what you recall being discussed?
 23 A. Yes. It's just to supplement my video, the DVD
 24 interview with Sean.
 25 Q. Okay. Your defense attorney talked about how

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1 Q. And prior to you telling Sean that this was a
 2 rape investigation he told you about having sexual contact
 3 with Danielle Whitten. Correct?
 4 A. Again, I don't see it in here. In your report
 5 he made a comment that, well, I really don't -- that I
 6 don't want to talk about this stuff or something to that
 7 effect.
 8 Q. Okay. Up here in this report, which you've
 9 identified as being a page of your report. Right? This
 10 is a page of your report?
 11 A. It appears to be. I can't match it up with
 12 what I have.
 13 Q. Okay. There's a description of Sean having
 14 sexual contact with Danielle Whitten. Correct?
 15 A. Correct.
 16 Q. And then down here it indicates Sean told me:
 17 "He didn't understand why I was talking to him about what
 18 happened between he and Danielle." Correct?
 19 A. Correct.
 20 Q. And then it's after that: "I told him Danielle
 21 was saying he forced himself on her."
 22 A. Correct.
 23 Q. So in your report he admits to having sexual
 24 contact with Danielle prior to you telling him --
 25 A. Correct.

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1 in your report you first mentioned Mr. Cook talking about
 2 them having sex, and then you mentioned the rape. Now
 3 having looked at your report is that -- um -- do you
 4 recall that being mentioned first before you mentioning
 5 the rape or not?
 6 A. I found it in my report. And that is correct.
 7 Q. Okay. That he talked about the sex. And then
 8 at some point afterwards you talked about --
 9 A. Very superficial as far as the actual sex.
 10 Once I told him she was alleging he forced himself on her,
 11 then he started telling me more details.
 12 Q. What do you mean "very superficial" as far as
 13 the sex?
 14 A. He kept making an inference: Well, I'm a
 15 gentleman. I wouldn't do that. And we had sex. It was
 16 consensual-type statements.
 17 Q. In reaction to what was he saying that "I'm a
 18 gentleman. I wouldn't do that"?
 19 A. In regards to the allegation that he forced
 20 himself on her, that he raped her.
 21 Q. All right. So if you didn't mention that until
 22 after the rape allegation, until after he talked about the
 23 sex, then what did he talk about as far as the sex goes
 24 before you told him that the allegation was rape?
 25 A. Again, he just referred back to when they were

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1 at the bar she kissed him. They walked back to the motel
2 room hand-in-hand. When they got back to the motel room
3 they mutually removed their clothing. And I believe he
4 was specific when he said: "I removed my clothes. She
5 removed her clothes." Then it was turning off -- either
6 turning on the fan or turning off the lights. I'm not
7 sure which was first. And then they had sexual
8 intercourse.

9 MS. GARDNER: Thank you.

10 The COURT: Any recross?

11 RECCROSS-EXAMINATION

12 QUESTIONS BY MR. HULL:

13 Q. And what you've just testified to is what he
14 told you before you notified him that there had been an
15 allegation of rape?

16 A. That's correct.

17 Q. Okay.

18 MR. HULL: That's all I have.

19 THE COURT: That means you may step down.

20 THE WITNESS: Thank you.

21 THE COURT: The State may call its next
22 witness.

23 MS. GARDNER: Thank you. May I exit the
24 courtroom?

25 THE COURT: You sure may.

1 (Pause in proceedings.)

2 THE COURT: If you'll come forward, sir. Face
3 Madam Clerk and raise your right hand, please.

4 ---oOo---

5 BRIAN BRUMBAUGH,

6 having been duly sworn by the Clerk of the Court, was
7 examined and testified as follows:

8 DIRECT EXAMINATION

9 QUESTIONS BY MS. GARDNER:

10 Q. Sir, could you start by telling us your name
11 and spelling your last name for the record.

12 A. It's Brian Brumbaugh, B-r-u-m-b-a-u-g-h.

13 Q. How are you employed?

14 A. A police officer with the City of Coeur
15 d'Alene.

16 Q. How long have you been so employed?

17 A. About 6-1/2 years.

18 Q. Are you POST certified?

19 A. Yes, I am.

20 Q. Can you tell us what it means to be POST
21 certified?

22 A. I'm certified through the POST counsel through
23 the state.

24 Q. And do you receive any training to become POST
25 certified?

1 A. Yes. I have attended the Academy and through
2 my field training.

3 Q. Okay. In your training have you been taught
4 how to interview witnesses? Suspects of crimes?

5 A. Yes.

6 Q. And have you been taught how to record those
7 interviews?

8 A. Yes.

9 Q. And prepare a police reports?

10 A. Yes, I have.

11 Q. And have you been taught how to collect
12 evidence?

13 A. Yes.

14 Q. Take photographs of the scenes of crimes?

15 A. Yes.

16 Q. Were you on duty on April 7th to April 8th, the
17 early morning hours of this year?

18 A. Yes, I was.

19 Q. Did you have contact with a female by the name
20 of Danielle Whitten?

21 A. Yes, I did.

22 Q. Can you tell us how that contact was made.

23 A. I responded to the Motel 6 for a reported rape
24 call.

25 Q. And where did you make contact with

1 Danielle Whitten?

2 A. She was in the room that I responded to,
3 room 240.

4 Q. Was that 240 on the first floor or the second
5 floor?

6 A. The second floor.

7 Q. And is there a bar near that hotel called the
8 Mouse Trap?

9 A. Yes, there is.

10 Q. Do you know in relation to where her room was
11 where the Mouse Trap is?

12 A. Basically, the Mouse Trap almost sits right to
13 the north of the motel. It's fairly close.

14 Q. Okay. Was her room facing the Mouse Trap or
15 the pool or something else?

16 A. It was upstairs. You walk up a flight of
17 stairs. That building has, like, an open center with the

18 pool. So her room would have faced to the south which
19 would have faced towards the pool.

20 Q. Now, when you made contact with Danielle, was
21 there anybody else there in the room?

22 A. Yes. There were two other males.

23 Q. Do you know what their names were?

24 A. They were brothers. I think their names were
25 Hoss and Hank Dillon, I think.

1 Q. And how did the room app. when you first
 2 entered it?
 3 A. Typical motel room. It wasn't, like, totally
 4 messy, but there were clothes laying around. And it
 5 wasn't nothing out of the ordinary.
 6 Q. Okay. Did you speak with Danielle there in
 7 that hotel room?
 8 A. Yes, I did.
 9 Q. Did you speak with her alone? Did you make any
 10 arrangements to -- well, strike that.
 11 Did you make any arrangements as far as Mr. --
 12 the Dillon brothers staying there.
 13 A. Yes. I asked them to step out onto the walkway
 14 so I could speak with her alone.
 15 Q. Okay. Were there any other officers with you?
 16 A. Not at that point. There was initially another
 17 officer, but he left.
 18 Q. Okay. Were there later officers that showed up
 19 at the scene?
 20 A. Yes.
 21 Q. And how many other officers?
 22 A. Sergeant Trueell (phonetic). One officer came
 23 up later on.
 24 Q. But when you talked to Danielle were you there
 25 alone with her in that room?

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1 had happened?
 2 MR. HULL: Your Honor, I would object to this
 3 as been offered to the truth of the matter asserted. It's
 4 hearsay. And I can't think of any other reason for
 5 introducing it.
 6 MS. GARDNER: Just the timing of it. It's not
 7 offered for the truth of the matter. Just that it was a
 8 fresh report versus a stale report.
 9 THE COURT: Well, I think the contents of what
 10 Ms. Whitten said to the officer is hearsay, unless there's
 11 an exception or if it's not hearsay for some reason.
 12 MS. GARDNER: All right.
 13 THE COURT: All right. Sustained.
 14 BY MS. GARDNER:
 15 Q. After you spoke with Ms. Whitten, first, could
 16 you tell us if you recall what she was wearing during
 17 that interview.
 18 A. I believe she had, like, a dark-colored

19 sweatshirt on, a pair of jeans, and socks.
 20 Q. Do you recall whether she had shoes on?
 21 A. No. She did not have shoes on.
 22 Q. Did you take photographs of the interior of
 23 that hotel room?
 24 A. Yes, I did.
 25 Q. And what did you take pictures of specifically?

1 A. Yes.
 2 Q. Can you describe what her demeanor was.
 3 A. To me she appeared like she was kind of shaken.
 4 Scared a little bit.
 5 Q. Can you tell us, was she crying?
 6 A. No.
 7 Q. Was she -- what was she doing to make you think
 8 she was shaken or scared?
 9 A. She was sitting in one of the chairs kind of
 10 over by the corner of the bed. She was sitting in the
 11 chair. She's almost, like, in, like, a fetal position
 12 with her knees drawn up to her chest. And she had, like,
 13 her arms wrapped around her knees. She's kind of turned
 14 sideways in the chair, like, you know, in a closed-body
 15 position.
 16 Q. And did she maintain that position throughout
 17 your interview?
 18 A. Pretty much the whole time.
 19 Q. Did she give you an account of what had
 20 happened?
 21 A. Yes, she did.
 22 Q. Did she give you information as far as when
 23 that had happened?
 24 A. Yes.
 25 Q. And what did she tell you as far as when that

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1 A. The overall condition of the room. Separate
 2 items within the room, like, the table and chairs and the
 3 condition of the bed, items that were in the bathroom.
 4 Like, I took pictures of items that were in the garbage
 5 can.
 6 Q. Why did you take the pictures of the specific
 7 items?
 8 A. Just to show the condition of the room and
 9 where they were placed at when I was there.
 10 Q. Did you collect any evidence?
 11 A. Yes, I did.
 12 Q. What did you collect?
 13 A. I basically took everything off the bed. The
 14 bedspread, blankets, sheets, mattress protector -- um -- I
 15 think I took some beer bottles. And I think I took a
 16 plastic cup. And there was towels and a pair of underwear
 17 in the bathroom. Other than I'm not sure exactly if
 18 that's a complete list but --

19 Q. Did you submit those items for testing? For
 20 any specific type of testing?
 21 A. I logged them into evidence at the police
 22 department to be forwarded for testing. Where they're
 23 actually forwarded to I don't know.
 24 Q. So you don't make the request to specifically
 25 test an item for something?

1 A. No.
 2 Q. Did you collect any of her clothing?
 3 A. Yes, I did.
 4 Q. What did you collect as far as clothing?
 5 A. In the room I took a pair of underwear that
 6 were in the bathroom. Later I collected the pants that
 7 she was wearing at the hospital.
 8 Q. So you went to the hospital afterwards?
 9 A. Yes.
 10 Q. Where did you locate the underwear?
 11 A. In the rest room. You walk in the door --
 12 um -- the sink, the counter was on the left side. There
 13 was a pile of several towels and her underwear or a pair
 14 of underwear that were on the floor underneath the sink in
 15 the corner.
 16 Q. Did you take photographs of that?
 17 A. Yes, I did.
 18 Q. Before removing the underwear?
 19 A. Yes.
 20 Q. Did you take pictures of the bed?
 21 A. Yes.
 22 Q. Did you do anything to the bed as you were
 23 taking pictures?
 24 A. Basically, I took a picture of the bed of that
 25 condition. And then I took that -- the top layer -- like,

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1 I took a picture. Then I took the bedspread and folded
 2 that up, put it in a bag, and then I took another picture
 3 of each layer of bedding on the bed before I took it off
 4 of the bed.
 5 Q. At any point did you take a photograph of a
 6 close-up of the bed?
 7 A. Yes, I did.
 8 Q. And at that point had you removed any of the
 9 coverings from the bed?
 10 A. Yes.
 11 Q. Which covering?
 12 A. Um -- like I said, I had taken the bedspread,
 13 the wool blanket, and I believe the first flat sheet had
 14 already been taken off the bed.
 15 Q. Okay. So what were you left with when you took
 16 that close-up?
 17 A. There was the fitted sheet and the mattress
 18 that had the pad that goes on top of the mattress then the
 19 mattress itself.
 20 Q. Why did you take that close-up picture?
 21 A. It was something that was odd and out of the
 22 ordinary.
 23 Q. What did you see?
 24 A. It appeared to be, like, a smudged print, a
 25 footprint on the sheet.

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1 MS. GARDNER: May I approach the witness.
 2 THE COURT: You may.
 3 BY MS. GARDNER:
 4 Q. Showing you what's been marked as Exhibit 9,
 5 can you tell us what those appear to be.
 6 A. Pictures that I've taken of the bed.
 7 Q. Are those some of the pictures or all of the
 8 pictures?
 9 A. It's not every picture.
 10 Q. Are those a fair and accurate depiction of the
 11 photographs that you took of that hotel room that night?
 12 A. Yes.
 13 MS. GARDNER: I move for the admission of
 14 Exhibit 9 at this time.
 15 THE COURT: Just to make the record clear, is
 16 Exhibit 9, was it previously Page 1 and the top two
 17 pictures of Page 2 of the previous Exhibit 1?
 18 MS. GARDNER: Yes, it was.

19 THE COURT: Any objection?
 20 MR. HULL: Could I voir dire and approach the
 21 witness in aid of objection?
 22 THE COURT: You may approach and voir dire.
 23 VOIR DIRE EXAMINATION
 24 QUESTIONS BY MR. HULL:
 25 Q. Officer, this smudge you're talking about,

1 could you point that out to me.
 2 A. That's this picture here.
 3 Q. And what is that a picture of? I mean, what is
 4 the smudge on?
 5 A. The sheet here, if you go in order of the
 6 pictures, so this was, like, the wool blanket, then the
 7 flat sheet, the fitted sheet, and then the picture of
 8 what I thought was a smudge on the sheets I saw.
 9 Q. You don't have any personal knowledge of when
 10 that smudge might have gotten on the mattress pad?
 11 A. No.
 12 Q. Do you have any personal knowledge of how long
 13 the mattress pad may have been at the motel?
 14 A. No, I don't.
 15 MR. HULL: Your Honor, I would object to the
 16 smudge as no foundation of relevance having been shown to
 17 this incident.
 18 THE COURT: Overruled on relevance. And

19 Exhibit 9 is admitted.
 20 (Plaintiff's Exhibit No. 9 was admitted.)
 21 BY MS. GARDNER:
 22 Q. Officer, I'm going to show you those
 23 photographs now from Exhibit 9. Could you just tell us at
 24 what point in you taking the pictures that you took this
 25 picture.

1 A. When all the items had been stripped off the
 2 bed that was just the bare mattress. I don't know at what
 3 point. It probably was roughly halfway through when the
 4 picture had been taken.
 5 Q. Had you already taken the photograph of the
 6 footprint at that point?
 7 A. Yes.
 8 Q. And at what point was this picture taken?
 9 A. Right before the previous one that was shown as
 10 the mattress pad that covers the mattress.
 11 Q. Had you taken the picture of the footprint at
 12 this point?
 13 A. No.
 14 MR. HULL: Your Honor, I would object to the
 15 constant characterization of it as a footprint when he
 16 said it was a footprint-like smudge.
 17 THE COURT: That objection is overruled.
 18 BY MS. GARDNER:
 19 Q. And what is this a picture of?
 20 A. It's the bed with the fitted sheet on the
 21 mattress.
 22 Q. Is that just prior to or after the picture we
 23 just showed?
 24 A. It should be after.
 25 Q. At this point had you taken the picture of the

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1 print.
 2 Q. Can you recall in which direction that shoe
 3 print was facing if I show you this picture again?
 4 A. No. I don't remember where the print was
 5 oriented on there, the sheet itself.
 6 Q. And what is this a picture of?
 7 A. It's the bed with the flat sheet. Same with
 8 the picture before.
 9 Q. And is this prior to removal? Prior to you're
 10 taking the picture of the shoe print?
 11 A. Yes.
 12 Q. Okay. So there was this blanket. Sorry. All
 13 right.
 14 And in this picture you see that there's a
 15 cover on the bed?
 16 A. Yes.
 17 Q. All right. Can you tell us if that blanket was
 18 immediately under this cover?

19 A. Yeah. The gray, wool blanket was underneath
 20 that spread there.
 21 Q. And then following that layer there was the
 22 sheet?
 23 A. The flat sheet.
 24 Q. That you took the picture of the --
 25 A. It would have been: The bedspread, the wool

1 shoe print?
 2 A. Yes.
 3 Q. And could you show us where on this picture you
 4 located that footprint.
 5 THE COURT: Before doing so, if you would step
 6 down into the middle area there. It's not good for those
 7 to be pointed near where people can look into it.
 8 MS. GARDNER: Okay.
 9 THE WITNESS: As I recall, it was off to the
 10 side over here on the side of the mattress a little.
 11 BY MS. GARDNER:
 12 Q. So where -- again, where you just --
 13 A. Closest to the wall. This is the wall right
 14 here. And the bed, it was kind of in this area over here.
 15 Q. And it was on this particular sheet that you
 16 noted that?
 17 A. Yes.
 18 Q. Finally, what is this a picture of?
 19 A. It looks to me like it was a shoe print.
 20 Q. Okay. And that is the print that we've been
 21 talking about?
 22 A. Yes.
 23 Q. Does there appear to be one shoe print or more
 24 than one?
 25 A. As I recall it was just the single one -- shoe

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1 blanket, the flat sheet, and then the fitted sheet.
 2 Q. Okay. And just to clarify was it the fitted
 3 sheet or the other sheet on top that the imprint --
 4 A. The fitted sheet.
 5 Q. The fitted sheet.
 6 Can you tell us what this picture -- where this
 7 was taken.
 8 A. That was in the rest room.
 9 Q. Is this the pile of towels that you referred to
 10 previously?
 11 A. Yes.
 12 Q. Is this the pile of towels that you see here in
 13 this picture underneath the sink?
 14 A. Yes, it is.
 15 Q. Was it just one pile of towels?
 16 A. Um -- as I recall, yes. Everything was in the
 17 corner underneath the sink.
 18 Q. Can you tell us what this is.

19 A. Those are the underwear that I took as
 20 evidence.
 21 Q. Okay. And so you -- did you take this picture
 22 before removal of those underwear?
 23 A. Yes, I did.
 24 Q. Are these the same underwear you submitted to
 25 your evidence?

1 A. Yes.
 2 Q. You didn't submit any other underwear, did you?
 3 A. No.
 4 Q. Did you observe any injuries on Danielle?
 5 A. Not that I recall.
 6 Q. Did you ask her about any injuries?
 7 A. Not that I recall off the top of my head.
 8 Q. Did you direct her to go to Kootenai Medical
 9 Center?
 10 A. Yes.
 11 Q. And was that in the form of you are directed to
 12 go there or you can go there?
 13 A. Well, I can't really make her go there. It was
 14 kind of you should go kind of thing.
 15 Q. And what is your understanding as far as
 16 whether she complied with that and went to Kootenai
 17 Medical Center?
 18 A. I know that she went there because I spoke to
 19 her there.
 20 MS. GARDNER: Thank you. I don't have any
 21 other questions.
 22 THE COURT: Cross-examination.
 23 MR. HULL: No cross, Your Honor.
 24 THE COURT: That means you may step down.
 25 May this witness be excused?

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1 Q. And could you spell your first and last name.
 2 A. First name: Sean, S-e-a-n. Last name: Cook,
 3 C-o-o-k.
 4 Q. And how old are you, Mr. Cook?
 5 A. I'll be 39 tomorrow.
 6 Q. And what sort of work have you done most
 7 recently?
 8 A. Most recently I was doing construction-type
 9 stuff, roofing -- um -- I lost my job at Aspen Landscaping
 10 when this whole thing occurred, so I had to find something
 11 else.
 12 MS. GARDNER: Objection. Nonresponsive.
 13 THE COURT: Overruled.
 14 BY MR. HULL:
 15 Q. And around April 7th or 8th, where were you
 16 working?
 17 A. Aspen Landscaping.
 18 Q. And you've indicated because of this incident
 19 you lost that job?
 20 A. Um -- complications through this. It wasn't
 21 exactly because of it, but the drama that went along with
 22 it, yes.
 23 Q. Now, do you know Danielle Whitten?
 24 A. Yes, I do.
 25 Q. And how long have you known Danielle Whitten?

STATE OF IDAHO VS COOK

SUPREME COURT DOCKET 41449

1 MS. GARDNER: Yes, Judge.
 2 MR. HULL: Yes, Judge.
 3 THE COURT: And you are also excused.
 4 The State may call its next witness.
 5 MS. GARDNER: The State has no further
 6 witnesses and will rest at this time.
 7 THE COURT: Is the defense ready to call
 8 witnesses? Or do you need any kind of break at this
 9 point?
 10 MR. HULL: We're prepared, Your Honor.
 11 THE COURT: All right. The defense may then
 12 call a witness.
 13 MR. HULL: I would call Sean Cook, Your Honor.
 14 THE COURT: Sir, if you'd please come forward
 15 and do what the other witnesses have done, face Madam
 16 Clerk.
 17 ---oOo---
 18 SEAN COOK,
 19 having been duly sworn by the Clerk of the Court, was
 20 examined and testified as follows:
 21 DIRECT EXAMINATION
 22 QUESTIONS BY MR. HULL:
 23 Q. Could you state your name for the record,
 24 please.
 25 A. Yes. My name is Sean Cook.

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1 A. I've known her for close to ten years, maybe.
 2 Eleven years.
 3 Q. And besides court appearances when was the last
 4 time you saw Danielle Whitten?
 5 A. Um -- that would have been on April 8th? Is
 6 that the day in question?
 7 Q. That's a date that's been used.
 8 A. Okay.
 9 Q. It's close. But you remember this incident
 10 with meeting with Danielle at the liquor store?
 11 A. Yes, I do.
 12 Q. And besides court appearances is that the last
 13 time you saw Danielle Whitten?
 14 A. Yes. That's the last time.
 15 Q. All right. And why were you at the liquor
 16 store?
 17 A. Getting some liquor.
 18 Q. What did you buy?
 19 A. I bought a pint of Crown Royal.
 20 Q. And during that process you at some point
 21 became aware of Danielle Whitten?
 22 A. Yes.
 23 Q. And when during that process did you become
 24 aware of Danielle Whitten?
 25 A. I was inside the liquor store. And she came

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1 walking in. And I saw her. And [redacted] greeted.
 2 Q. And how did you greet one another?
 3 A. I smiled. And I said: "Hey, it's been a long
 4 time." Gave her a hug and --
 5 Q. And did you and Danielle talk at that point in
 6 time?
 7 A. Yeah.
 8 Q. And do you remember how long you talked?
 9 A. Probably no more than four minutes. Four or
 10 five minutes.
 11 Q. Was there any discussion of meeting later?
 12 A. Yes.
 13 Q. And did you gain information about where
 14 Danielle was?
 15 A. Yes.
 16 Q. And where was that?
 17 A. That was at the Motel 6.
 18 Q. And after you left the liquor store what did
 19 you do?
 20 A. I went home. I had a coworker with me in a
 21 different car. We had just come from cashing our checks.
 22 And I was supposed to cut his hair because I've got hair
 23 cutting stuff. And so we went to my house -- um -- I cut
 24 his hair, I took a shower, and got dressed, and then took
 25 off.

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1 Q. Did you leave the motel room?
 2 A. Yeah.
 3 Q. And did anyone leave with you?
 4 A. No.
 5 Q. Where did you go after this discussion?
 6 A. Oh, I got you. No -- uh -- we had discussed
 7 going to the Mouse Trap -- Danielle and I.
 8 Q. Okay.
 9 A. And so we decided to leave. She said she had
 10 been sitting there, you know, all day.
 11 MS. GARDNER: Objection. Hearsay.
 12 THE WITNESS: Okay.
 13 THE COURT: Your response?
 14 MR. HULL: Sounds like hearsay to me. I was
 15 just asking him if he left.
 16 THE COURT: Sustained.
 17 MR. HULL: Okay.
 18 BY MR. HULL:

19 Q. So after the discussion of going to the Mouse
 20 Trap, did you leave the motel room?
 21 A. Yes.
 22 Q. And did you leave with anyone?
 23 A. Yes.
 24 Q. And who did you leave with?
 25 A. Danielle Whitten.

1 Q. And look off to where?
 2 A. To the motel.
 3 Q. And what did you do when you reached the motel?
 4 A. I knocked on the door. And Danielle answered
 5 the door.
 6 Q. And after Danielle answered the door what did
 7 you do?
 8 A. Um -- sat in there. I had a six-pack and what
 9 was left in the bottle -- um -- me and the fellow
 10 co-worker had taken some shots when I was at my house.
 11 And I bought a six-pack on the way over there. And so I
 12 came into the room, sat down, started talking to Danielle
 13 and offered her a beer. And we just had a beer and sat
 14 there and talked for about a half hour.
 15 Q. And do you recall talking about anything in
 16 particular?
 17 A. Sure. Um -- there was what we had been doing
 18 for the last four months -- um -- because I hadn't seen
 19 her for a little while since we lived together, where
 20 Brian was, that's her boyfriend, what he's doing, who he's
 21 working for. Stuff like that. Just how you been doing?
 22 Just catching up, basically.
 23 Q. And after that discussion did the change of
 24 scene change?
 25 A. Change of scene?

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1 Q. And where did you go?
 2 A. To the Mouse Trap.
 3 Q. Okay. And what happened at the Mouse Trap?
 4 A. We ordered a couple of drinks. We sat down by
 5 the pool table. I sat and talked to somebody for a little
 6 bit there at the bar that I knew -- um -- and just said:
 7 "Hey. What's up?" To a couple of the bartenders. And we
 8 went picked a table, racked the pool balls, sat, and
 9 played pool, and sat back down, drank, played pool. You
 10 know, bar stuff.
 11 Q. Now, have you attempted to locate any of the
 12 people that you saw at the bar there that night?
 13 A. Yes.
 14 Q. Have you been able to locate anyone who
 15 recalled anything about the incident?
 16 A. No, I haven't.
 17 Q. After the playing pool and sitting down and
 18 what you've described, what did you do next?

19 A. Um -- well, we had played pool for a little
 20 bit. And Danielle had called our mutual friend Elizabeth
 21 Cann who we used to be roommates with. She was staying
 22 out in Spirit Lake. And so I talked to Elizabeth a little
 23 bit on the phone. She talked to Elizabeth a little bit on
 24 the phone. And then there was supposedly -- we were
 25 talking about going out and picking her up, but it was a

1 long ways to Spirit Lake. And we had been drinking
 2 so -- um -- we just kind of, you know, pooted out on that
 3 idea, but -- um --
 4 Q. And did you leave the bar at some point?
 5 A. Yes.
 6 Q. And who did you leave with?
 7 A. I left with Danielle Whitten.
 8 Q. And where did you go?
 9 A. Well, there was something that had happened
 10 before that.
 11 Q. Okay. What happened before that? Before you
 12 left?
 13 A. Okay -- um -- much to my surprise -- um --
 14 well, before that. Danielle was sitting there chewing
 15 gum. And I said: "Are you going to drink the rest of
 16 your beer?" And she's, like: "No. I don't want it."
 17 Because we had already had a couple of shots. And she
 18 just decided she didn't want to drink anymore, apparently.
 19 And she was chewing on gum. And I said: "Well, that's no
 20 fair that you have gum, and I don't." And she goes: "Do
 21 you want some?" I said: "Yeah." And so she came over to
 22 me. I'm sitting like this. She sat in my lap. And I
 23 thought no real big deal about that, but she gave me the
 24 gum. I started chewing on it. And she looked at me like
 25 this. And I looked at her. And we came together. And

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1 THE COURT: Go ahead. And ask your next
 2 question.
 3 BY MR. HULL:
 4 Q. After this episode of kissing on the bed, what
 5 did you do?
 6 A. What did I do? Um -- we were moving towards
 7 other things. Making out, you know, unbuttoning things.
 8 And, you know, pretty soon it was click, hit the light.
 9 And we got completely undressed.
 10 Q. Okay. Now, did you -- who removed your
 11 clothes?
 12 A. I removed my clothes.
 13 Q. And who removed Danielle Whitten's clothes?
 14 A. I helped her unbutton her pants and unzip her
 15 pants. And she lifted her rear end, so I could pull off
 16 her jeans. They were tight. And -- um -- she removed her
 17 shirt laying down. I was over her, like, this on my knees
 18 standing up. I undid my belt. I pulled down my pants.
 19 Kind of kicked them off. You know, my shoes were already
 20 off. I kicked them off when we got on the bed -- um --
 21 then kissing and sex.
 22 Q. Now, there's been some testimony and some
 23 pictures about some redness on Danielle's neck. Do you
 24 have any theory of how she might have got redness on her
 25 neck?

1 she kissed me. And I was, like, okay. So she gets up off
 2 my lap, goes and sits down again. And she goes: "Do you
 3 want to go to my room?" And I said: "Yeah, sure." But I
 4 had a drink left. And I'm, like, you know, so I start
 5 sipping on the drink. And she's, like, ready to go? And
 6 I said: "Okay." So we went.
 7 Q. And where did you go?
 8 A. We went to the motel, her room.
 9 Q. And what happened at the motel?
 10 A. Um -- well, first of all, I took Bruce out for
 11 a walk because he was spasing out.
 12 Q. Now, who's Bruce?
 13 A. Bruce is the dog, the pit bull.
 14 Q. And. Okay. Go ahead.
 15 A. And -- um -- so I took him out for a walk --
 16 um -- then I came back in. Danielle was sitting on the
 17 bed. I came in. I cracked a beer and started sipping on
 18 it. Asked her if she wanted one. She didn't want one at
 19 the time. And we started talking a little bit. And I sat
 20 down by her. And we kissed a little bit sitting up on the
 21 bed with our feet hanging over the side of the bed. And
 22 we both laid down. And I kissed her. She kissed me. It
 23 was a totally mutual thing -- um -- then --
 24 MS. GARDNER: Objection to the narrative
 25 continuation of his response.

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1 A. Um -- yeah. I kiss and suck necks a lot. So
 2 I can't explain how she would get red marks on her neck
 3 other than me sucking on her neck probably.
 4 Q. Did you at any time, or did you not, grab her
 5 neck with your hand?
 6 A. Uh -- no.
 7 Q. So you and Danielle have your clothes off.
 8 What happens?
 9 A. Um -- we have sex in a couple of different
 10 positions. I perform oral sex on her. Then I perform
 11 missionary style with her. And then I'm back down there
 12 orally and then turning over from behind, and, you know,
 13 just basically having sex, I mean.
 14 Q. At some point did you stop having sex?
 15 A. Yes, I did.
 16 Q. Now, prior to stopping having sex, had you or
 17 had you not had an ejaculation?
 18 A. No. Not even close.
 19 Q. And why, if there was a particular reason, did
 20 you stop having sex?
 21 A. Danielle said that she was beginning to get
 22 sore.
 23 MS. GARDNER: Objection to hearsay.
 24 THE COURT: Your response, Mr. Hull?
 25 MR. HULL: Your Honor, it's not offered to the

1 truth of the matter asserted. Sil to indicate why he
 2 stopped having sex.

3 THE COURT: Overruled.

4 THE WITNESS: Danielle complained of getting
 5 sore, so I said I was sorry. I wasn't there to hurt her.
 6 And I -- well, should I keep going on or is that a
 7 narrative?

8 BY MR. HULL:

9 Q. And after you stopped having sex, what did you
 10 do?

11 A. Um -- well, I sat there for a second, you know,
 12 up on my elbows over the top of her. And I was dripping
 13 sweat. So I scooted back down to the bottom of the bed.
 14 In the meantime, I had told her that she was very pretty.
 15 She said thank you -- um -- she told me to smile, like, we
 16 were getting along, you know.

17 So, anyway, to answer your question -- um -- I
 18 came to the bottom of the bed. And I sit there at the
 19 base of the bed with my feet hanging off.

20 Q. And while you're sitting at the base of the bed
 21 with your feet hanging off does anything in particular
 22 happen?

23 A. Right. Danielle scooted to the bottom of the
 24 bed. She put her legs around my legs and hugged me from
 25 behind and said: "You're so hot." That's what she told

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1 BY MR. HULL:

2 Q. After having been told the content of this
 3 phone call, at that point in time had you gotten your
 4 clothes on yet?

5 A. I was in the middle, you know.

6 Q. Okay. And had Danielle gotten her clothes back
 7 on?

8 A. No. That was pretty weird. She was standing
 9 there naked on the phone.

10 Q. After this being communicated, the content of
 11 this phone call, what did you do?

12 A. Um -- I think we -- after she got dressed --
 13 um -- she asked me where her panties were. And I didn't
 14 know -- um -- there were a couple of towels outside the
 15 room. The only thing I can think of is that -- well, she
 16 was asking where her underwear was. And I said I didn't
 17 know.

18 MS. GARDNER: Objection. His answer is going
 19 to call for speculation.

20 THE WITNESS: Okay.

21 BY MR. HULL:

22 Q. These towels that were outside of the room,
 23 where were they?

24 A. There was one by the bed and one that I dropped
 25 after drying off.

1 me.

2 Q. And did you respond to that?

3 A. I said: "You are, too."

4 Q. And after that exchange, what did you do if
 5 anything?

6 A. Um -- I got up and decided to dry off. So I
 7 went to the bathroom, grabbed a towel, and dried off
 8 completely and started getting dressed.

9 Q. Why were you getting dressed?

10 A. Because we were done.

11 Q. Was there or was there not a phone call at some
 12 point?

13 A. There was a phone call.

14 Q. Now, do you recall specifically whether it was
 15 a call in or a call out? ?

16 A. I didn't at the time. But I know that it was a
 17 call out?

18 Q. And what did you -- did you get anything
 19 communicated to you about this phone call?

20 A. Yes, I did.

21 Q. And what was that?

22 MS. GARDNER: Objection. Calls for hearsay.

23 THE COURT: Mr. Hull?

24 MR. HULL: That would be hearsay, Your Honor.

25 THE COURT: All right. Sustained.

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1 Q. And what did you do with the towel after you --
 2 the towel you dropped after drying off, what did you do
 3 with it?

4 A. I kicked them into the bathroom and under the
 5 sink.

6 Q. And so that was both towels?

7 A. That was those two towels and the towels that
 8 were on the floor inside the bathroom. I kicked
 9 everything into a pile underneath the --

10 Q. And after you did that when you did that were
 11 you or were you not clothed?

12 A. Yes.

13 Q. And you indicated that around that time
 14 Danielle had gotten her clothes back on?

15 A. Yes. She was, you know, in the process of
 16 getting dressed.

17 Q. Then after you guys got dressed what did you
 18 guys do?

19 A. We made the bed.

20 Q. Okay. And why did you make the bed?

21 A. Because Hoss and Hank were coming over.

22 Q. And after making the bed did you do anything?

23 A. Um -- sat down and cracked a beer.

24 Q. And how many times did you walk the dog that
 25 evening?

1 A. Once when I got there. Once when we got to the
 2 room -- um -- I think that's it. The dog likes to go out
 3 a lot, so, I mean, and I walked the dog all time when we
 4 lived together, too, so --
 5 Q. And the dog was -- other than when you were
 6 walking him was always in the room?
 7 A. Yes.
 8 Q. Okay. And he was in the main portion of the
 9 motel room?
 10 A. Yes.
 11 Q. After you cracked a beer what happens next of
 12 note?
 13 A. Um -- not much -- um --
 14 Q. Does anyone --
 15 A. We sat there talked a little bit, smoked a
 16 couple of cigarettes and --
 17 Q. Did someone appear at some point?
 18 A. Yes. Hoss and Hank arrived.
 19 Q. And when was that in relationship to your being
 20 told of a phone call?
 21 A. Um -- being told of a phone call? Can you
 22 repeat that again. I'm sorry. I was thinking.
 23 Q. You've indicated that you became aware that a
 24 phone call had been made.
 25 A. Yes.

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1 what they did. They came in and sat down.
 2 Q. And then at some point did those people -- did
 3 anyone leave the room?
 4 A. Um -- no.
 5 Q. So you're still sitting in that motel room?
 6 No. I'm sorry.
 7 A. Yeah.
 8 Q. You left the motel room at some point?
 9 A. Yes.
 10 Q. Had anyone else left the motel room prior to
 11 you leaving?
 12 A. No.
 13 Q. Okay. So you were the first one to leave?
 14 A. Yes, I was.
 15 Q. And where did you go when you left?
 16 A. I went down to the car and warmed my car up and
 17 -- um -- flipped through some CDs. And then I took off.

18 Q. And where did you go?
 19 A. Home.
 20 Q. And where was home at that time?
 21 A. Um -- 1377 Ninth Street.
 22 Q. And who were you living with?
 23 A. Um -- a mutual friend of my girlfriend's and
 24 mine named Kerry -- Kerry Brice (phonetic).
 25 Q. And when -- at some point after this, did you

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1 Q. When in relationship to that, did Hoss and Hank
 2 appear?
 3 A. Um -- probably 20 minutes. And I did walk the
 4 dog again.
 5 Q. Okay. So you walked the dog after the
 6 encounter in bed?
 7 A. Well, yes.
 8 Q. Okay. And was that prior to or after Hank and
 9 Hoss showed up?
 10 A. It was before they got there.
 11 Q. And you were back at the motel room when Hank
 12 and Hoss appeared?
 13 A. Yes.
 14 Q. And what ensued at that point in time when they
 15 appeared?
 16 A. They came inside -- um -- I said: "Hey,
 17 what's going on?" I hadn't seen Hoss in a while. Shook
 18 his hand. He introduced me to his brother. I hadn't met
 19 him before -- um -- Hank sat down across from me on the
 20 table. And Hoss sat on the ledge of, like, there's a
 21 ledge for the T.V. right here. And then it kind of drops
 22 down like that. And then there's, like, a little area for
 23 setting whatever. There's nothing on it, but it's just a
 24 countertop that runs down. He was sitting on that. It's
 25 kind of low. It was a lot lower than this. So that's

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1 -- um -- get contacted by the police?
 2 A. Yes.
 3 Q. And, approximately, when was that?
 4 A. About a month after I saw Danielle.
 5 Q. Okay. And did you make actual contact with the
 6 police officer at some point?
 7 A. No. No. My boss, who is my upper boss, he's
 8 not my direct boss -- um -- my direct boss is his son.
 9 And we came back from working out of town. And my upper
 10 boss, Dave McKee, told me, oh, yeah, Sean --
 11 MS. GARDNER: Objection to hearsay.
 12 THE COURT: Mr. Hull?
 13 MR. HULL: I'm just offering it for whether he
 14 was aware that the police were trying to contact him, so I
 15 don't really know.
 16 THE COURT: I'll sustain the objection.
 17 BY MR. HULL:

18 Q. So at some point either by phone or otherwise
 19 did you talk to a police officer?
 20 A. Are you talking about before I saw
 21 Tracy Martin?
 22 Q. I'm talking about they've objected to what
 23 you've heard from anybody about the police officers as
 24 hearsay.
 25 A. Okay.

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1 Q. And I'm trying to skip over that part.
 2 A. I became -- I became aware --
 3 THE COURT: Hold on. Have a question, and then
 4 an answer.
 5 THE WITNESS: Okay.
 6 BY MR. HULL:
 7 Q. Did you talk to Tracy Martin on the phone at
 8 some point? I mean, Detective Martin on the phone at some
 9 point?
 10 A. Yes, I did.
 11 Q. Had you talked directly to a police officer
 12 before that after this incident?
 13 A. No.
 14 Q. So that's the first time you talked directly?
 15 A. It was the first time I talked directly to a
 16 police officer.
 17 Q. And did you or did you not agree to go in and
 18 see the police officer?
 19 A. Yeah.
 20 Q. When in relationship to that direct phone
 21 contact with the police officer did you go in and talk to
 22 the police officer?
 23 A. We were working out of town. And I called
 24 Tracy Martin, probably, 2:00 or something like, maybe, on
 25 my lunch hour -- um -- he said: "Can you come in and talk
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1 Q. Now, when roughly was it that you were housed
 2 with Paul Nelson?
 3 A. I was housed with Paul Nelson, approximately,
 4 two days after my incarceration.
 5 Q. And when would that roughly be? What month?
 6 A. That was in July. July 2nd, maybe.
 7 Q. Okay. And at some point after July 2nd and
 8 after being housed with Paul Nelson did you get out of
 9 jail?
 10 A. Yes, I did.
 11 Q. And, approximately, when was that?
 12 A. That was in August. Probably -- I don't know
 13 the exact date in August.
 14 Q. And how long were you out of custody? And how
 15 did you get out of custody?
 16 A. I got out of custody by my mother putting up
 17 \$5,000 and signing over a \$50,000 signature bond for me to
 18 be out.

19 Q. And after posting that bond, how long were you
 20 out of custody?
 21 A. I was out of custody for two months.
 22 Q. And then was a new charge brought against you?
 23 A. Yes, there was.
 24 Q. And what was that charge?
 25 A. The charge was intimidating a witness.
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1 to me?" And he said: "Yeah." And he goes: "How soon
 2 can you get here?" And I said: "Well, we're out of town.
 3 We're past Spokane working, but I could probably come in
 4 after that" -- um -- and he asked me: "When?" And I
 5 said: "Probably by 4:00." And he said: "That would be
 6 fine." So I made it in there by 4:00.
 7 Q. Now, at some point after that point in time,
 8 were you arrested for this charge?
 9 A. After?
 10 Q. After -- some time after the time when you had
 11 the phone call when Tracy -- Detective Martin and went in
 12 and talked to him were you arrested for this?
 13 A. I turned myself in.
 14 Q. Okay. But you were put into jail because of
 15 this charge?
 16 A. Yes, yes.
 17 Q. And when you were in jail were you housed with
 18 Paul Nelson who's testified?
 19 A. Yes, I was.
 20 Q. Okay. Now, did you ever talk to Paul Nelson
 21 about the allegations against you?
 22 A. Absolutely I did.
 23 Q. Okay. Did you or did you not ever tell
 24 Paul Nelson that you raped Danielle Whitten?
 25 A. No. I never said that. Sorry, hum-um.
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1 Q. And what's your understanding of the witness
 2 you were supposedly intimidating?
 3 A. It's my understanding that Paul Nelson -- um --
 4 pressed these charges against me.
 5 Q. And that was for conduct that allegedly
 6 occurred while you were in jail previously?
 7 A. To my understanding, yes. That hasn't come to
 8 court yet so --
 9 Q. Now, the two months that you were out of
 10 custody, did you make any effort to do anything at all to
 11 Danielle Whitten?
 12 A. No.
 13 Q. Did you see her?
 14 A. No.
 15 Q. Did you try to see her?
 16 A. No.
 17 MR. HULL: I don't have any further questions,
 18 Your Honor.

19 THE COURT: Before we go to cross-examination,
 20 we're going to take a ten-minute morning break.
 21 So, Members of the Jury, enjoy a break. Don't
 22 talk about the case or form any opinion about it, please.
 23 Ten minutes.
 24 THE BAILIFF: All rise.
 25 (The Jury left the courtroom.)
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1 THE COURT: Anything for the record before
 2 we're on break?
 3 MS. GARDNER: No, Your Honor.
 4 MR. HULL: No.
 5 THE COURT: Ten minutes, then.
 6 (Recess taken.)
 7 THE COURT: We're back on the record in State
 8 v. Cook.
 9 And before we bring the Jury back, I want to
 10 inquire of counsel, does the defense, if you want to say
 11 or can say, intend to produce other witnesses after
 12 Mr. Cook?
 13 MR. HULL: No, Your Honor.
 14 THE COURT: Will the State be calling any
 15 rebuttal witnesses as far as you know right now?
 16 MS. GARDNER: No, Your Honor.
 17 THE COURT: How long does the State expect that
 18 its cross-examination of Mr. Cook might be?
 19 MS. GARDNER: Um -- 30 minutes.
 20 THE COURT: Okay. My thought would then be to
 21 release the Jury before lunchtime, have our instruction
 22 conference right after we're done with the examination of
 23 this particular witness after both sides have rested.
 24 And, maybe, even bring the Jury back a little bit later
 25 after lunch, so we can get those instructions prepared and

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1 Q. What is that?
 2 A. It's whiskey. Canadian whiskey.
 3 Q. How big was the bottle?
 4 A. A pint.
 5 Q. How big is that? Just show us.
 6 A. (Witness indicating.)
 7 Q. You say you drank that bottle or a portion of
 8 that bottle upon your return to your home?
 9 A. Yes.
 10 Q. And how many shots -- how many shot glass-sized
 11 drinks of that bottle did you have?
 12 A. Uh -- we mixed one. Because I had couple of
 13 diet Cokes. So we mixed a drink. And then we both did,
 14 probably, two shots. So two people, two drinks, two
 15 shots.
 16 Q. You did, then, dividing that, one mixed drink
 17 with a shot in it?

18 A. A couple of shots, probably.
 19 Q. A couple of shots?
 20 A. Yeah, in a drink.
 21 Q. In a drink. And then another shot of straight?
 22 A. Yes, ma'am.
 23 Q. So that equals three shots. Right?
 24 A. Um -- or so.
 25 Q. Or so?

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1 do instruction and closings this afternoon or we could do
 2 it tomorrow morning. I'm willing to hear from you.
 3 MR. HULL: I would guess doing it today would
 4 be -- there's no reason not to do it today.
 5 MS. GARDNER: I'm fine with doing it today,
 6 Judge.
 7 THE COURT: We'll try for that and see. So no
 8 lunch for today.
 9 Any reason to not bring the Jury back?
 10 MS. HULL: No, Your Honor.
 11 MS. GARDNER: No, Your Honor.
 12 THE COURT: All right. Mr. Cook, you may
 13 resume the stand.
 14 (The Jury entered the Courtroom.)
 15 THE COURT: The record should reflect the Jury
 16 has returned, and they're appropriately seated.
 17 And, Ms. Gardner, you may cross-examine.
 18 MS. GARDNER: Thank you.
 19 CROSS-EXAMINATION
 20 QUESTIONS BY MS. GARDNER:
 21 Q. All right. Mr. Cook, you gave your testimony
 22 talking about what you purchased at the liquor store. So
 23 I want to ask you about that. You purchased a bottle of
 24 Crown Royal?
 25 A. Yes.

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1 A. I wasn't keeping track.
 2 Q. Okay. When you arrived at the hotel room, you
 3 had that bottle of Crown Royal with you. Right?
 4 A. Yes, ma'am.
 5 Q. And you finished it off there, didn't you?
 6 A. Yes, ma'am.
 7 Q. And how much did you drink out of that bottle
 8 before you finished it off there at the hotel room?
 9 A. Before I finished it off?
 10 Q. When you arrived at the hotel room, how much
 11 was left in the bottle?
 12 A. Oh, probably, two shots, maybe. Maybe, a shot.
 13 Q. And you drank those over the course of the
 14 evening at the hotel room?
 15 A. Yes. No. I probably had them right when I got
 16 there.
 17 Q. Okay.

18 A. It's just one pull off the bottle.
 19 Q. And then you brought, you say, some beer. A
 20 six-pack of beer?
 21 A. Yes, ma'am.
 22 Q. An entire six-pack of beer?
 23 A. Yes, ma'am.
 24 Q. And what kind of beer was that?
 25 A. Pyramid Apricot Weizen.

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1 Q. And you gave Danielle one of those beers?
 2 A. Yes, ma'am.
 3 Q. And you drank how many beers?
 4 A. I had a couple of those, Hoss had one, and
 5 Danielle had two.
 6 Q. All right. So Danielle had a total of two.
 7 And you had two?
 8 A. Uh -- at least, yeah.
 9 Q. You may have had more than that?
 10 A. Well, there's only six to a six-pack. So all
 11 of them got drank.
 12 Q. So you had?
 13 A. Two or three, maybe.
 14 Q. Two or three?
 15 A. Yeah.
 16 Q. Hoss had one?
 17 A. One. And Danielle had two.
 18 Q. And Danielle had two. So that would mean you
 19 had three.
 20 A. Okay.
 21 Q. Um -- so you didn't -- when you left that hotel
 22 room that night you didn't take any beer or any alcohol
 23 with you?
 24 A. No.
 25 Q. Where did the bottle of Crown Royal end up?

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1 Q. And then you -- um -- when you left that hotel
 2 room that night you went to your car?
 3 A. Yes.
 4 Q. And you drove home?
 5 A. That is correct.
 6 Q. All right. And are you right or left-handed?
 7 A. I'm left-handed. But I'm ambidextrous with a
 8 lot of other things. I throw right. I kick with both
 9 feet. I write left. You know, I use my right hand and my
 10 left hand quite a bit.
 11 Q. But you're predominantly left-handed?
 12 A. With writing.
 13 Q. You say you didn't ejaculate?
 14 A. No.
 15 Q. And, yet, you say that you went to the
 16 bathroom. For what reason did you go to the bathroom?
 17 A. To grab a towel.
 18 Q. Grab a towel because?
 19 A. Soaking wet.
 20 Q. Because it was -- the sex was over?
 21 A. Yeah, sex was over.
 22 Q. All right. Had the phone call come in at that
 23 point?
 24 A. No.
 25 Q. All right. So the sex was over.

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1 A. Um -- you know, I might have taken some trash
 2 out when I walked the dog, but I don't recall. Unless
 3 they threw stuff away. I don't know.
 4 Q. So you went to the bar. And at the Mouse Trap
 5 bar, you had how much? You said something about having a
 6 shot of Tequila?
 7 A. No. She had a shot of Tequila.
 8 Q. What did you have a shot of?
 9 A. I had a Jager Blaster. And a bottle of -- I
 10 think it was Sierra Nevada Pale Ale. And I also had,
 11 maybe, one other beer or one other drink. Oh, yeah, a gin
 12 and tonic, Tanqueray and tonic.
 13 Q. So one beer one, is gin and tonic, and a Jager
 14 Blaster. What is that?
 15 A. It's Red Bull mixed with Jagermeister.
 16 Q. What is a Jagermeister?
 17 A. Jagermeister is a dark liquor. It's flavored
 18 like licorice.
 19 Q. You described your intoxication level to
 20 Detective Martin during that interview as pretty lit.
 21 Pretty well lit.
 22 A. A decent buzz, yeah. I have a very high
 23 tolerance for alcohol, yeah.
 24 Q. Were you intoxicated?
 25 A. Um -- over the legal limit for sure.

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1 A. I wasn't aware of the phone call at that point.
 2 We'll just say that. I don't know if the phone call had
 3 been made or not.
 4 Q. All right. You went to the bathroom. And my
 5 understanding of your testimony is that there was a towel
 6 at the foot of the bed that you grabbed on the way to the
 7 bathroom?
 8 A. No.
 9 Q. Where did you grab the towel?
 10 A. Out of the bathroom.
 11 Q. All right.
 12 A. One of the ones that's folded up in the little
 13 rack there.
 14 Q. Did your testimony previously -- didn't you
 15 previously testified that there was a towel in the
 16 bedroom?
 17 A. There was a towel on the floor of the motel
 18 room, but I didn't use it.
 19 Q. So you used the towel in the bedroom --
 20 A. Out of the bathroom. It was a clean one, yeah.
 21 Q. Let me finish my question. That was hanging
 22 up. You grabbed it. And you wiped yourself off.
 23 A. Correct.
 24 Q. And then you put it underneath the sink?
 25 A. No. I think I dropped it on the floor.

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1 Q. All right. And you said at one point you
 2 shoved everything under the sink.
 3 A. Yeah. That was when we were cleaning up the
 4 room.
 5 Q. And that includes that towel.
 6 A. Correct.
 7 Q. And you say you guys were both together
 8 cleaning up the room.
 9 A. That's correct.
 10 Q. And besides making the bed, are you saying that
 11 you picked up items off the floor?
 12 A. No. I kicked towels into the bathroom and
 13 under the sink.
 14 Q. Okay. And at that point when you were kicking
 15 towels around, Danielle was still undressed?
 16 A. She was looking for her underwear.
 17 Q. Was she dressed?
 18 A. Um -- she hadn't put her pants on yet, but she
 19 had her shirt on.
 20 Q. So she had her shirt on but no underwear?
 21 A. Yeah. She was looking for her underwear.
 22 Q. And had she told you at that point -- well, she
 23 had. Right? That you were expecting guests.
 24 A. That's correct. She told me that when she was
 25 standing naked on the phone.

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1 A. What kind of shoes was I wearing?
 2 Q. Yeah.
 3 A. Um -- tennis shoes.
 4 Q. Now, we talked about this preliminary hearing.
 5 You talked about you then bonding out. You bonded out
 6 after the preliminary hearing.
 7 A. Correct.
 8 Q. Mr. Nelson had testified at that preliminary
 9 hearing. Right?
 10 A. Yes.
 11 Q. And you had actually asked for a bond reduction
 12 at that preliminary hearing. Right?
 13 A. We went for it, yeah.
 14 Q. And Mr. Nelson had provided some testimony
 15 about your threats to the victim at that preliminary
 16 hearing. Right?
 17 A. Um -- I don't recall if he said things about me

18 threatening the victim there or if it was later. I
 19 haven't reviewed the Court transcript so --

20 Q. At that hearing you were present for that
 21 entire hearing. Right?
 22 A. Yes, I was.
 23 Q. And you heard the argument from the State about
 24 your attempts to leave the jail. Correct?
 25 A. I heard your argument, yeah.

1 Q. And you say that the two of you made the bed
 2 together.
 3 A. That's correct.
 4 Q. Do you agree that the bed was completely
 5 stripped?
 6 A. That is incorrect.
 7 Q. Okay.
 8 A. It was down to the sheet. It was down to the
 9 fitted sheet.
 10 Q. The fitted sheet was on there. Okay. And your
 11 testimony is that Danielle participated in putting
 12 together this bed.
 13 A. Absolutely.
 14 Q. What specifically did she do?
 15 A. Um -- she participated in putting together the
 16 bed with me. Same thing. Like, grabbing one side of the
 17 cover, pulling up the thing, doing that. I went to fold
 18 over the bedspread over the pillows. And she said:
 19 "Don't do it like that. Put it under here. That's how I
 20 do it."
 21 Q. What about the pillows? Were those pillows off
 22 the bed?
 23 A. Yes.
 24 Q. Um -- what kind of shoes were you wearing that
 25 night?

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1 Q. All right. And the Judge at that hearing
 2 denied the bail reduction. Right?
 3 A. Correct.
 4 Q. And then shortly after that you saw a copy of
 5 the letter that Mr. Nelson sent. Correct?
 6 A. Shortly after that?
 7 Q. Yes.
 8 A. Um -- I have seen a copy. I don't know if it
 9 was that day or not.
 10 Q. You were informed before the -- before you
 11 bonded out of Mr. Nelson's claim that you had made threats
 12 against the victim.
 13 A. Um -- he said a lot of stuff. So I don't know
 14 exactly what you're talking about here.
 15 Q. Are you saying that you did not know that
 16 Mr. Nelson had come out about your threats against
 17 Danielle before you bonded out?

18 A. I knew Mr. Nelson was lying about me, but I
 19 didn't know to what degree he was lying about me so --

20 Q. So is it your testimony that you didn't know
 21 anything about the allegations or threats against
 22 Danielle Whitten before you bonded out?
 23 A. No. That's not -- no. That's not necessarily.
 24 I mean -- um -- there's been so many things said. Well --
 25 MS. GARDNER: Just --

1 MR. HULL: Your Honor, give him a chance to
 2 answer the question.
 3 THE COURT: I think the witness should be
 4 allowed to answer that question, so you may answer.
 5 THE WITNESS: There's been so many lies told
 6 that I have a hard time keeping track. So you saying when
 7 did he say you made threats about Danielle? You know,
 8 there's been so much said that I have a hard time keeping
 9 track. So I'm sorry about that. I am aware -- I'd have
 10 to say I was aware that -- um -- he had said some things
 11 that made it so I couldn't get a bail reduction, but
 12 exactly what those things were I can't recall because
 13 there's so much material. Does that make sense?
 14 MS. GARDNER: No further questions.
 15 THE COURT: Any redirect?
 16 REDIRECT EXAMINATION
 17 QUESTIONS BY MR. HULL:
 18 Q. Did you ever threaten Paul Nelson?
 19 A. No.
 20 MR. HULL: No further questions.
 21 THE COURT: Any recross?
 22 MS. GARDNER: No, Your Honor.
 23 THE COURT: That means you may step down.
 24 The defense may call its next witness.
 25 MR. HULL: The defense rests, Your Honor.

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1 instructions.
 2 Have both counsel had an opportunity to review
 3 them?
 4 MS. GARDNER: No, Judge. I just realized these
 5 were placed at the table. If I could just have a second.
 6 THE COURT: You bet. Take a moment.
 7 While you're doing that, the record should
 8 reflect that the State has proposed about six
 9 instructions, no supplementals. The defense did not
 10 propose any instructions, nor did the defense supplement
 11 any.
 12 MR. HULL: Your Honor, I have no objection to
 13 the instructions as proposed in the numbered packet.
 14 THE COURT: Very well.
 15 MS. GARDNER: I have no objection to the
 16 instructions, Judge.
 17 THE COURT: The record should also reflect that
 18 in the informal conference the Court had ask asked the
 19 attorneys whether either side requested an instruction
 20 limiting the Jury's use of felony conviction evidence.
 21 Neither party requested an instruction at the time that
 22 evidence was introduced. And the Court wanted to put on
 23 the record neither party requested the giving of a
 24 limiting instruction on that evidence in the closing
 25 instruction.

1 THE COURT: Does the State intend to call any
 2 rebuttal witnesses?
 3 MS. GARDNER: The State has no rebuttal
 4 witnesses.
 5 THE COURT: Members of the Jury, that will then
 6 conclude the evidentiary portion of this trial. It takes
 7 a little bit of time to put the Jury instructions
 8 together, so I'm going to release you for a long lunch at
 9 this time and ask you to be back at 1:30, hopefully, ready
 10 to go with the final closing instructions at that point
 11 and the closing arguments of the attorneys.
 12 Continue to not talk about the case, please.
 13 Continue to not form or express any opinion about it until
 14 the matter has been completely submitted to you and enjoy
 15 your lunch.
 16 (The Jury left the courtroom.)
 17 THE COURT: If counsel can please join me in
 18 chambers. We'll informally talk about instructions.
 19 (Lunch recess taken.)
 20 THE COURT: All right. We're on the record in
 21 State v. Cook. There has been an informal chambers
 22 conference. The Jury is not present at this point. And
 23 counsel and the Court have discussed jury instructions at
 24 this point. And the Court has handed or at least made
 25 available to counsel the numbered proposed final

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1 Does counsel agree with that?
 2 MS. GARDNER: Yes, Judge.
 3 MR. HULL: Yes, Your Honor.
 4 THE COURT: All right. In that informal
 5 conference the State had proposed a statutory definition
 6 of the crime of rape that included both the theory of the
 7 commission of that offense of the victim's resistance
 8 being overcome by fear or force or the victim being
 9 prevented from resisting by the threats or the attempts or
 10 by the infliction of bodily harm. The Court declined that
 11 particular instruction because the Information alleges
 12 only the theory the commission of that offense of
 13 resistance being overcome by fear or force. There was
 14 some discussion about whether the State could amend the
 15 pleadings to conform and evidence that may have supported
 16 that alternative theory. But the Court determined not to
 17 allow that in that the State did not move to amend the
 18 pleadings to conform to the evidence until after they had
 19 rested. And there was no formal motion. It was more in
 20 the line of discussion. And I did disallow that.
 21 Does that accurately reflect the State's
 22 recollection?
 23 MS. GARDNER: It does, Judge. And the State
 24 has no further comment on that.
 25 THE COURT: Thank you. And the defense?

1 MR. HULL: Yes, Your Honor.

2 THE COURT: Very well, then. We will be in

3 recess for just a couple of three minutes. I told the

4 jurors 1:30, so I want to make sure they're here and ready

5 to go.

6 THE BAILIFF: They're here. They're ready.

7 THE COURT: All right. Any reason to not bring

8 them in, then?

9 MS. GARDNER: No.

10 MR. HULL: No.

11 THE COURT: All right. Let's bring the Jury

12 in.

13 (The Jury entered the Courtroom.)

14 THE COURT: All right. The should reflect that

15 the Jury has returned and are properly seated.

16 Members of the Jury, the Court will now

17 instruct you on the final instructions as to the law. The

18 Court has previously read you instructions 1 through 7

19 before the evidence began. And you'll have these

20 instructions back with you. You'll also have two or three

21 copies of them with you as well, so you don't have to

22 memorize them as I read them. But I have already read you

23 one through seven. And I begin with Instruction No. 8.

24 "You have now heard all the evidence in the

25 case. My duty is to instruct you as to the law.

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1 overcome by force or violence.

2 Thirteen, in order for the Defendant to be

3 guilty of rape, the State must prove each of the

4 following: One, on or about the 8th day of April, 2008;

5 two, in the State of Idaho; three, the Defendant, Sean

6 Michael Cook, caused his penis to penetrate, however

7 slightly, the vaginal opening of Danielle Whitten, a

8 female person. And, four, Danielle Whitten resisted, but

9 her resistance was overcome by force or violence.

10 If any of the above has not been proven beyond

11 a reasonable doubt, then you must find the Defendant not

12 guilty. If each of the above has been proven beyond a

13 reasonable doubt, you must find the Defendant guilty.

14 Fourteen, although Danielle Whitten must have

15 resisted the act of penetration, the amount of resistance

16 need only be such as would show Danielle Whitten's lack of

17 consent to the act.

18 Fifteen, I have outlined for you the rules of

19 law applicable to this case and have told you of some of

20 the matters which you may consider in weighing the

21 evidence to determine the facts. In a few minutes counsel

22 will present their closing remarks to you, and then you

23 will retire to the Jury room for your deliberations.

24 The arguments and statements of the attorneys

25 are not evidence. If you remember the facts differently

1 You must follow all the rules as I explain them

2 to you. You may not follow some and ignore others. Even

3 if you disagree or don't understand the reasons for some

4 of the rules, you are bound to follow them. If anyone

5 states a rule of law different from any I tell you, it is

6 my instruction that you must follow.

7 Nine, in every crime or public offense there

8 must exist a union or joint operation of act and intent.

9 Ten, it is alleged that the crime charged was,

10 committed, quote, "on or about," a certain date. If you

11 find the crime was committed, the proof need not show that

12 it was committed on that precise date.

13 Eleven, you are instructed that the Defendant,

14 Sean Michael Cook, is charged with the crime of rape,

15 allegedly committed as follows: That the Defendant, Sean

16 Michael Cook, on or about the 8th day of April, 2008, in

17 the County of Kootenai, State of Idaho, did penetrate the

18 vaginal opening of Danielle Whitten, a female person, with

19 his penis, where Danielle Whitten resisted, but her

20 resistance was overcome by force or violence. To this

21 charge the Defendant has pled not guilty.

22 Twelve, you are instructed that rape is defined

23 as the penetration, however slight, of the oral, anal, or

24 vaginal opening with the perpetrator's penis accomplished

25 with a female where she resists but her resistance is

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1 from the way the attorneys have stated them, you should

2 base your decision on what you remember.

3 The attitude and conduct of jurors at the

4 beginning of your deliberations are important. It is

5 rarely productive at the outset for you to make an

6 emphatic expression of your opinion on the case or to

7 state how you intend to vote. When you do that at the

8 beginning, your sense of pride may be aroused, and you may

9 hesitate to change your position even if shown that it is

10 wrong. Remember that you are not partisans or advocates,

11 but are judges. For you, as for me, there can be no

12 triumph except in the ascertainment and declaration of

13 the truth.

14 As jurors you have a duty to consult with one

15 another and to deliberate before making your individual

16 decisions. You may fully and fairly discuss among

17 yourselves all of the evidence that you have seen and

18 heard in this courtroom about this case, together with the

19 law that relates to this case as contained in these

20 instructions.

21 During your deliberations, you each have a

22 right to re-examine your own views and change your

23 opinion. You should only do so if you are convinced by

24 fair and honest discussion that your original opinion was

25 incorrect based upon the evidence the Jury saw and heard

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1 during the trial and the law as given you in these
 2 instructions.
 3 Consult with one another. Consider each
 4 others' views, and deliberate with the objective of
 5 reaching an agreement, if you can do so without disturbing
 6 your individual judgment. Each of you must decide this
 7 case for yourself; but you should do so only after a
 8 discussion and consideration of the case with your fellow
 9 jurors.

10 However, none of you should surrender your
 11 honest opinion as to the weight or effect of evidence or
 12 as to the innocence or guilt of the Defendant because the
 13 majority of the Jury feels otherwise or for the purpose of
 14 returning a unanimous verdict.

15 Sixteen, you have been instructed as to all the
 16 rules of law that may be necessary for you to reach a
 17 verdict. Whether some of the instruction will apply will
 18 depend upon your determination of the facts. You will
 19 disregard any instruction which applies to a state of
 20 facts which you determine does not exist. You must not
 21 conclude from the fact that an instruction has been given
 22 that the Court is expressing any opinion as to the facts.

23 Seventeen, the original instructions and the
 24 exhibits will be with you in the Jury room. They are part
 25 of the official court record. For this reason please do

1 not alter them or mark on them in any way.
 2 The instructions are numbered for convenience
 3 in referring to specific instructions. There may or may
 4 not be a gap in the numbering of the instructions. If
 5 there is, you should not concern yourselves about such
 6 gap.

7 Eighteen, upon retiring to the Jury room select
 8 one of you as the presiding officer, who will preside over
 9 your deliberations. It is that person's duty to see that
 10 discussion is orderly; that the issues submitted for your
 11 decision are fully and fairly discussed; and that every
 12 juror has a chance to express himself or herself upon each
 13 question.

14 In this case, your verdict must be unanimous.
 15 When you all arrive at a verdict, the presiding officer
 16 will sign it and you will return it into open court. Your
 17 verdict in this case cannot be arrived at by chance, by
 18 lot, or by compromise.

19 If, after considering all of the instructions
 20 in their entirety, and after having fully discussed the
 21 evidence before you, the Jury determines that it is
 22 necessary to communicate with me, you may send a note by
 23 the Bailiff. You are not to reveal to me or anyone else
 24 how the Jury stands until you have reached a verdict or
 25 unless you are instructed by me to do so.

1 A verdict form suitable to any conclusion you
 2 may reach will be submitted to you with these
 3 instructions."

4 Ms. Gardner, on behalf of the State, you may
 5 give your closing argument.

6 MS. GARDNER: Thank you.

7 Well, now after three long days, you all have
 8 heard a lot of evidence in this case. You heard from
 9 numerous witnesses. And you've seen and will be able to
 10 see quite a lot more physical evidence when you go in
 11 there to deliberate. You can see everything that has been
 12 admitted into evidence thus far. The clothing that was
 13 tested, the forensic reports, of which there's three, the
 14 photographs of the scene, and photographs of Danielle's
 15 injuries. And you'll be able to look at all that and make
 16 your final decision.

17 In making that decision you must be careful to
 18 distinguish between what is evidence and what me or
 19 Mr. Hull have said to you such as what we said to you in
 20 opening. Because that was not evidence -- um -- you're
 21 going to be looking at evidence that in your mind either
 22 goes to the guilt of Sean Cook or absolves him of the
 23 guilt.

24 We've got two people in this case, as we

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1 what occurred in that hotel room. And that's
 2 Danielle Whitten and Sean Cook. That's why it's so
 3 important to look at the evidence, also. The evidence
 4 will either corroborate what Danielle told you, or it will
 5 corroborate what Sean told you.

6 The State submits here that there's certain
 7 several points of evidence that corroborate what Danielle
 8 told you and the fact that this rape did occur.

9 First, look at the fact that Sean Cook and
 10 Danielle Whitten have been acquaintance for nine, ten
 11 years. During that time they have never had any type of
 12 intimate relationship. Sean admitted that. Danielle
 13 admitted. They've never kissed. They've never held
 14 hands. She's never sat on his lap. They've never had any
 15 type of an intimate, sexual type relationship.

16 We know that that night Danielle was not
 17 drinking heavily. Sean even says that she had a beer and
 18 then the neck or a sip of a beer that he finished for her.
 19 He even said that she had one shot of liquor at that bar.
 20 He says nothing about that bottle that she purchased at
 21 the liquor store. And the only evidence you have is that
 22 she purchased that bottle at the liquor store and then put
 23 it into her backpack and never opened it up until several
 24 days when she split it with her boyfriend.

25 We know that Sean was drinking 1826428. And we

1 all know what heavy drinking can do to our decision-
 2 making skills and our inhibitions.
 3 Sean had had part of a bottle -- a pint bottle
 4 of Crown Royal with his friend. He had had several shots
 5 of that liquor. He had several shots at the bar of
 6 another type of liquor. He had a Jagar Blaster, I
 7 believe, is what he called the drink. He had a gin and
 8 tonic. And he had several beers. He brought a six-pack
 9 of beer over to the hotel. And he had more beers while he
 10 was at the bar. So as he characterized it, he was feeling
 11 "pretty lit" at that point. He was pretty intoxicated.
 12 He was intoxicated to the point where he was in his
 13 opinion over the legal limit and shouldn't have been
 14 driving. So he returns to that hotel room with Danielle
 15 in that state. You have to look at those circumstances in
 16 which this occurred.

17 We know, also, from the evidence where
 18 Danielle's jeans and panties were removed from her. They
 19 were removed at that bedside at the end of that bed. We
 20 know that because the jeans, there's no testimony from
 21 Sean or from her that those jeans were ever not at the
 22 foot of that bed. The panties were removed at the same
 23 time the jeans when they were at the foot of that bed.
 24 Danielle never went into that bathroom. So those panties
 25 had to have gotten there by way of Sean. He's the only

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1 person that went into that bathroom after this sexual
 2 intercourse occurred. And he even tells you that he,
 3 however accidentally or not you want to believe, shoved
 4 those panties in there underneath the towels under the
 5 kitchen or the bathroom sink.

6 We know that Danielle's friends, Hoss and Hank,
 7 were called by Danielle immediately upon Sean entering
 8 that bathroom. We know that they received in their minds
 9 a frantic call for help from her. And we know that
 10 Danielle told Sean: "Hank and Hoss are coming over here."
 11 Those are all undisputed facts both by Sean and by
 12 Danielle.

13 We know that this dog of Danielle's likes to go
 14 out a lot. And Sean even corroborated that, that he had
 15 taken that dog out several times that evening. This
 16 corroborates Danielle's version of the events and Hank's
 17 and Hoss' versions of the events that, after Sean left
 18 with that dog on a walk or wherever he took the dog
 19 outside of the hotel room, that's when they discussed
 20 Danielle wanting Sean to be out of that room and an excuse
 21 to get him gone.

22 We also know Danielle's demeanor when Hank and
 23 Hoss entered that room was not her typical demeanor.
 24 Danielle is typically a very talkative person, a very
 25 happy person. They describe her as being that type of

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1 person, however, when they entered that room, they saw
 2 that she was not talking. She was -- um -- separating
 3 herself from the conversation and sitting there looking
 4 very worried and upset about something. She wouldn't even
 5 go into the convenience store when it was just the three
 6 of them. She had Hank go in the convenience store instead
 7 and buy her cigarettes for her, which was, again, an
 8 unusual way for her to act. She's an outgoing person that
 9 likes to be out and greeting people.

10 We know that Danielle had injuries that morning
 11 when she went to the hospital. And when she was in the
 12 hotel room explaining to Hoss what had happened, he
 13 observed injuries on her. Those injuries were a red mark
 14 on her right side of her neck and a lighter pink marking
 15 on the left side of her neck. The red mark and the pink
 16 mark were both attested to as being, like, finger marks on
 17 her neck. Nobody testified that those marks looked like

18 hickeys or sucking or lip-type marks. We know that Sean
 19 is left-handed. You can imagine from this evidence him
 20 grabbing her neck with his left hand and his stronger part
 21 of his hand being his fingers and that they would touch
 22 the right side of her neck whereas the less dominant
 23 part of his hand would be on her left side where the thumb
 24 is of her neck. So when you go in there to deliberate,
 25 look at this evidence and how it clicks together and how

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1 it fits and then think about the evidence that doesn't
 2 fit.

3 Danielle testified that Sean held her down when
 4 he was first on top of her, chest to chest. Held her down
 5 with his right forearm while he unbuttoned her jeans with
 6 his left hand. She told you about the pain that she had
 7 in the back of her neck. We later learned from Mr. Nelson
 8 that that pain, according to Sean, very well could have
 9 been his elbow in the back of her neck after he flipped
 10 her over. All she knew was that it hurt.

11 We know that Sean had tennis shoes on that
 12 night. And we also know according to Sean that everything
 13 was off of the bed except that fitted sheet. That's what
 14 Danielle said, too. Everything was off that bed.
 15 Everything. The cover, the blanket was all stripped off.
 16 And according to Danielle, Sean put everything back on the
 17 bed when he realized they were going to have visitors.

18 We know -- from looking at that shoe print on
 19 that mattress on top of that fitted sheet we know at that
 20 point Sean was having sex with Danielle on top of that
 21 mattress with everything removed with that fitted sheet
 22 with his shoes on. Not with his shoes off as he told
 23 you. The imprint of that shoe correlates a lot with
 24 Danielle's testimony. And it goes a lot against what Sean
 25 told you happened. When you see that shoe print -- and

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1 you can bring up the pictures again and observe them
2 enlarged. But when you see that shoe print, it doesn't
3 make sense that this act occurred as Sean tells you. They
4 engaged in some kissing and some mutual undressing, turned
5 off the lights, and both of them are completely undressed.
6 That doesn't match up with the evidence.

7 We know that Sean then left the scene, taking
8 the risk of driving under the influence because he knew
9 Danielle was going to tell her friends what had just
10 happened. Think about what he's faced with at that point.
11 He's just committed a rape on this girl. Her friends have
12 just shown up. Not his friends, her friends. And her
13 boyfriend's friends. And he knows that that is going to
14 be most likely what the discussion is going to be about.
15 And that's most likely why they're there. They didn't
16 call that hotel room. She called them.

17 Sean's testimony contradicts this evidence that
18 you are going to look at. If this was a secret sexual
19 scenario between him and Danielle, then why would she call
20 these two brothers to the scene of where they had just had
21 sex? So that they could tell her boyfriend who they're
22 also very good friends with? That doesn't make sense.
23 It makes sense when you think of the fact that this woman
24 is a victim. And this woman is calling the person that
25 she knows are in this area that can help her get away from

1 Sean Cook. Why didn't she call Sean when he was in the
2 bathroom if this was consensual sex? She called. She got
3 that phone as soon as he walked into that bathroom. And
4 as soon as he was in there, she called. And as soon as he
5 got out of there she was, like, "Hoss and Hank are coming
6 over" in the hopes that he would leave, in the hopes that
7 he would realize, "you can't rape me any further because
8 there's people coming, and there's help coming." What he
9 did at that point is when he decided to cover up what he
10 could in that hotel room and make it look like nothing
11 happened.

12 How did the panties get from the foot of the
13 bed to the bathroom sink, underneath the sink? Sean moved
14 them there. There's no other evidence that shows you
15 anything else happened. He picked them up. They had
16 ejaculate on them. He had ejaculated them along with the
17 jeans at the same time. And that's the only reason that
18 you can have a forensic report that says there is sperm on
19 the panties and on the jeans, because he had ejaculated
20 somewhere between the time he got off of that bed and went
21 into that bathroom. Read the report. I believe it's
22 Exhibit No. 6, the first forensic report which you'll see
23 in the line of three of them. That report says what items
24 are tested and what was found on those items.

Danielle could not remember him ejaculating

1 when she testified here. But when it was freshest in her
2 mind, within hours of the incident, she told the nurse
3 that she remembers that. Something about something that
4 happened that evening made her believe that he had
5 ejaculated. She couldn't see that because her face was
6 being shoved down into a mattress. But something she
7 heard or felt or something made her have an opinion that
8 he ejaculated. And that's why she told that nurse that he
9 had ejaculated.

10 So Sean Cook was arrested. And when he was
11 arrested, he sat in the jail for a little while. And
12 during this time he got to know his cellmate, Paul Nelson.
13 Paul Nelson and him started studying the Bible together,
14 started taking about getting right with God, and
15 confessing their bad things that they've done in their
16 lives. And after Sean had initially told his cellmate
17 that: "No. I just had sex with this girl, and she cried

18 rape. It was consensual, though." After that initial
19 time and after they got to know each other more and after
20 they started studying the Bible together, there were two,
21 three, four times that Sean said: "No. I'm getting
22 right. I'm going to be honest. I did force her. I did
23 rape this victim." There was nothing in that conversation
24 to make Sean think that there was going to be
25 repercussions to him later. He was disclosing this to his

1 cellmate. He was disclosing this to another person that
2 was in custody, then, that was already praying with them.
3 Paul Nelson was probably the safest person that
4 Sean could have confessed this to. He's not a choir boy.
5 He's got a criminal history. He's in jail, also. And
6 people in jail don't rat on each other. And there's
7 reasons for that, and you've seen some of those reasons in
8 the testimony from Mr. Nelson.

9 There's a lot of corroboration between what
10 Paul Nelson says that Sean told him and what happened. Go
11 back over what Paul Nelson told you. He knows that Sean
12 met this gal that he had known for a while. She wasn't a
13 stranger to him. He knows that they went to this Motel 6.
14 He knows where it occurred. He knows that they went to a
15 bar beforehand. He knows that when, she was on that bed,
16 that Sean had rolled her over onto her stomach and had his
17 elbow in her neck while he was raping her. He knows

18 details about this crime that he couldn't know without
19 Sean telling him. And if it was consensual sex, then why
20 would Paul Nelson remember that one detail about him
21 having his elbow in her neck while holding her down in the
22 bed? That doesn't sound like consensual sex.

23 When you're looking at your evidence, you can
24 already consider the motives of the different witnesses.

25 I submit that the State's witnesses have no motive here

1 but the truth. Sean, however, has a different motive
 2 altogether. He's facing a serious criminal charge here.
 3 Sean has had several weeks to look at what he
 4 did and think about how he was going to tell Tracy Martin
 5 what had happened. He's had several months to think about
 6 how he's going to tell you about what had happened and put
 7 himself in the best light. He claims that he didn't know
 8 anything about these threats to kill Danielle if he was
 9 able to escape from jail when he posted bail. But when
 10 faced with the fact that that was brought up at his
 11 preliminary hearing he simply says: "Well, I can't -- I
 12 can't remember all these lies." You better bet that, when
 13 he bonded out, he was on his best behavior. He wasn't
 14 going to have any contact with Danielle, then, because it
 15 was already out. And Danielle had already testified
 16 against him at the preliminary hearing. So his threat had
 17 no weight anyway. If something had happened to Danielle
 18 after his release, he would have been the first person
 19 that would have been suspected.
 20 Paul Nelson testified. He told you he was
 21 telling you the truth. He felt that this was the right
 22 thing to do. He knew he was going to prison. He's
 23 already in prison. He knew before that he was going to
 24 prison. Back when he testified back at the preliminary
 25 hearing, he knew he was going to prison. He was in

1 she's lying, why would she call the Dillon brothers and
 2 sabotage her relationship with her boyfriend if she's
 3 having consensual sex with this person? What would she
 4 accomplish by making any of this up?
 5 And you also can consider whether or not she
 6 seemed to be a person that's cunning enough to plant sperm
 7 on her panties and jeans knowing they're going to be
 8 tested by the laboratory, and that she's cunning enough to
 9 have injured herself and be able to say exactly how they
 10 were caused. Hoss and Hank Dillon haven't given you any
 11 reason to believe that they're being dishonest. They left
 12 a job site at the end of their work, but still they left
 13 the job site and they came to her aid. Her voice
 14 convinced them that something was wrong. And they've come
 15 into court to tell you what they observed. They have no
 16 motivation to lie. They have no reason to make up a story
 17 against Sean Cook.

18 In voir dire we discussed the question of
 19 whether you would look at the evidence and not at the
 20 suaveness of the Defendant and the likability of the
 21 Defendant. And your promise was to look at the evidence.
 22 Look at the evidence, look at the forensic reports. Look
 23 at the demeanor of the witnesses, look at Danielle's
 24 demeanor. In looking at this evidence and not whether you
 25 like somebody or dislike somebody, you should come to the

1 custody, and he wasn't going anywhere. His only
 2 was -- after Sean made this threat to him about his
 3 family, his only concern was that he be put in another
 4 jail beside this man so he could protect his family,
 5 because when his family came to visit, he didn't want
 6 anybody -- friends with Sean Cook to be following them and
 7 harming them as Mr. Cook had threatened. That was his
 8 only request. His wife has been a victim of rape. Her
 9 daughter has been a victim of rape. And she could
 10 sympathize with this girl, the victim of Sean Cook. He
 11 knows what treatment prisoners get when they rat out other
 12 prisoners. If anything, the rational thing for Paul
 13 Nelson to have done was to come in here and say: "I can't
 14 testify. I don't know anything," but he didn't do that.
 15 Danielle, you can recall her demeanor. She was
 16 sober that night. This was not a drunken mistake. Her
 17 boyfriend and her were together at the time. In fact, he
 18 had rented a room for her to stay with her dog for several
 19 days. They were on good terms. Sure, they had some
 20 disagreements from time to time, but that happens. She
 21 might have even complained to Sean about that. She
 22 doesn't recall. That's not something significant that
 23 sticks out in her mind. She has no motive to come in here
 24 and make up a story about Sean Cook. There's no motive
 25 that you can see that she would have to do that. And if

1 same conclusion, all of you, that Sean Cook is guilty
 2 rape. Thank you.
 3 THE COURT: Mr. Hull, on behalf of the defense
 4 you may give your closing argument.
 5 MR. HULL: Thank you, Your Honor.
 6 Good afternoon, Ladies and Gentlemen. To start
 7 out, I'd like to thank you for your attention in this
 8 matter. And I saw a few of you in the hallway during the
 9 proceedings and kind of ignored you. And that's because
 10 the Judge said we're supposed ignore each other in the
 11 hall way. So I didn't mean to be offensive to anyone if
 12 they took it that way.
 13 The Judge read you an instruction at the
 14 beginning of the case that I want to reread to you because
 15 it's a very important instruction. And it's the
 16 reasonable doubt instruction. And it's Instruction No. 2.
 17 And it tells you what the burden of proofs are in this

18 case.
 19 "Under our law and system of justice, the
 20 Defendant is presumed to be innocent. The presumption of
 21 innocence means two things. First, the State has the
 22 burden of proving the Defendant guilty. The State has
 23 that burden throughout the trial. The Defendant is never
 24 required to prove his innocence. Nor does the Defendant
 25 ever have to produce any evidence at all. Second, the

1 State must prove the alleged crime beyond a reasonable
 2 doubt. A reasonable doubt is defined as follows. It is
 3 not mere possible doubt because everything relating to
 4 human affairs and depending on moral evidence is open to
 5 some possible or imaginary doubt. It is the state of the
 6 case which, after the entire comparison and consideration
 7 of all the evidence, leaves the minds of the jurors in
 8 that condition that they cannot say they feel an abiding
 9 conviction to a moral certainty of the truth of the
 10 charge." So those are the burden of proofs in this case.

11 To start out, actions speak louder than words
 12 is an old saying but has a lot of merit. Let's look at
 13 the action of various people in this case. There are some
 14 undisputed actions in this case. There is Danielle
 15 Whitten's phone call to the Dillon brothers. Now, she
 16 doesn't leave the motel room. Her testimony is she could
 17 have left the motel room. There isn't any evidence she
 18 couldn't have left the motel room. But instead of leaving
 19 the motel room, even though she's testified she has her
 20 car, she has her keys, she has every reason to believe
 21 that the Arby's in the area and the Mouse Trap bar are
 22 open, she stays in the motel room.

23 Now, her version of events is she is staying in
 24 a motel room with a man who has just violently raped her.
 25 In your common sense is that an action that is expressing

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1 there for ten minutes and trying to think of some excuse
 2 while Sean is sitting there to get Danielle out of the
 3 room because Danielle seems kind of upset and suggests,
 4 you know, they go to the store. His testimony at the
 5 trial is, is that that isn't what happened, but that Sean,
 6 at some point after the Dillon brothers appear, takes the
 7 dog for a walk. So, you know, it might even be better for
 8 Sean to say: "Oh, well, yeah, I did go for a walk when
 9 the Dillon brothers got there." Well, certainly, "you
 10 guys sit here and talk while I go walk the dog" is totally
 11 inconsistent with any guilty conscience on the part of
 12 Mr. Cook. And sometimes I mess up names. And you've
 13 probably noticed that. And I apologize for that, but I
 14 hope you know the scenario well enough, if I say a wrong
 15 name, that I don't mean to say the wrong name. I just
 16 sometimes do. But Sean doesn't get on the stand and agree
 17 with that when it's not true. He goes: "No. I walked

18 the dog before they got there." Which certainly doesn't
 19 bolster his case. It's just his best recollection of what
 20 happened. And it's true. So how Hoss' testimony at the
 21 preliminary hearing is consistent with his testimony at
 22 the trial on this leaving is they just aren't consistent.
 23 To say: "Well, nobody asked if he took the dog out for a
 24 walk." It just -- when he's trying to think up some
 25 reason to get Danielle out of the room so he can talk with

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1 consistency with an allegation like this? To remain in a
 2 motel room under those circumstances.

3 There's another action of Danielle Whitten that
 4 is not disputed. And that, is when the Dillon brothers
 5 arrive at the door, she opens the door. And there's two
 6 of her friends there. She doesn't step out of the room
 7 and say: "Thank God you're here. I just got raped." She
 8 lets them in, and she goes back to the bed. Now, there's
 9 some dispute where she sits on the bed. When Danielle was
 10 pointing with her pointer at the pictures, she indicates
 11 that she was sitting in the middle of the side of the bed
 12 right next to the chair where Sean Cook is sitting. Now,
 13 is this an action that is consistent with having been
 14 violently raped? You can use your own common sense and
 15 determination to determine whether that's an action that
 16 is consistent with the allegation.

17 Then there is some dispute about when Sean
 18 walks the dog the last time. His testimony is he walked
 19 the dog before the Dillon brothers get there. Her
 20 testimony is and the Dillon brothers now is that he
 21 walked the dog after they got there.

22 Now, Hoss Dillon's testimony evolved
 23 dramatically from the time he first testified at the
 24 preliminary hearing. At that hearing, when we were going
 25 through the questions and answer, he's talking about being

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1 her isn't consistent with, well, Mr. Cook took the dog for
 2 a walk and then he came back.

3 Then we have under either scenario that there
 4 isn't any allegation of rape by Danielle to either Hoss or
 5 Hank at whatever point in time they leave the hotel room.
 6 Again, Hoss' testimony about when she alleges that
 7 Mr. Cook did something wrong seems to evolve over time,
 8 but we read the question at the preliminary hearing: "So
 9 it was the sixth time you asked her before she said there
 10 was any sexual assault?" And his answer to that at that
 11 time was: "Yes," while under oath. And then his
 12 testimony seemed to change somewhat at the trial where
 13 he's indicating where she was saying he was lying on top
 14 of her and things like that. But that's totally
 15 inconsistent with him trying to figure out what's going
 16 on. I mean, if your friend is telling you this guy is
 17 lying on top of you trying to do things to you, that's an

18 allegation of sexual assault. That's not: Oh, gee, you
 19 know, he's being rambunctious.

20 So why does the testimony of Hoss Dillon evolve
 21 overt time? There was some clues given to you in his
 22 answers. He indicates at this point in time he's working
 23 at Center Partners with Danielle and with Danielle's
 24 father, that he's discussed this situation with Danielle
 25 from time to time and that he's discussed this with Hank.

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1 Hank testifies he's discussed it with -- um -- Hoss. So
 2 they're talking to each other about this.
 3 Now, do we have to attribute some evil motive
 4 to Hoss Dillon to have his testimony evolving over time
 5 and not being that accurate? No. We don't have to
 6 attribute some evil motive to it. He thinks that because
 7 Danielle has told him that Sean Cook has raped her, and
 8 he's trying to help her out. And he's talking to her
 9 about it. And these scenarios change. So it's not like,
 10 well, gee, Hoss Dillon has got this thing out for
 11 Sean Cook. And he's an evil guy. You don't have to go
 12 there, and it's not necessary to go there. It's just can
 13 you see that the testimony is evolving? Can you see that
 14 he would have a motive to see this thing as a partisan in
 15 Danielle's point of view? And certainly he does. And you
 16 can see that.
 17 So you have a lot of strange activity that is
 18 inconsistent on Danielle's part that has to do with being
 19 raped. Then in the same vein of actions speaking louder
 20 than words, you have the actions of Sean Cook. Now, Sean
 21 Cook is supposedly, under the State's theory of the case,
 22 violently raped a woman and is told that her friends are
 23 coming and hangs around. That in itself is an odd
 24 circumstance under the State's theory of the case.
 25 Then he helps Danielle make the bed. And

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1 about Danielle. And I'll tell them that I had sex with
 2 Danielle although I don't know if it's really any of their
 3 business." But he makes it clear to Officer Martin --
 4 Detective Martin testified he didn't want to give up the
 5 names initially of Hoss and Hank because he thought they
 6 might have done something. And it was only after he was
 7 told that there was an allegation of rape that he gave up
 8 the name of Hoss and Hank. Well, if you had raped
 9 somebody, that's when you wouldn't want to give up the
 10 names of Hoss and Hank. They're supposedly witnesses to
 11 the aftermath of the rape. So that is totally
 12 inconsistent with guilt. That is conduct that is beyond
 13 the -- just totally not consistent with guilt.
 14 Now, who else's actions speak louder than
 15 words? There is another witness. This was another person
 16 or another being in that motel room. And that being was
 17 the dog. This is a pit bull. This is a pit bull that

18 belongs to Danielle Whitten. This is a pit bull she's had
 19 for quite a while. There isn't an ounce or a shred of
 20 evidence that the pit bull did anything at all. Now,
 21 under the State's theory of the case, there was a violent
 22 rape that was performed on the owner of the pit pull in
 23 the presence of a pit bull, and the pit bull didn't do
 24 anything. Now, that is actions that are inconsistent with
 25 guilt. I mean, common sense would tell you that a pit

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1 everybody's testimony, even Danielle's, is they make the
 2 bed together. I don't know that she said she did help,
 3 but she said she could have helped. Then he walked the
 4 dog. Under his testimony he walks the dog and comes back
 5 to the hotel room. Then the Hoss brothers -- I mean, the
 6 Dillon brothers show up. And then he sits and offers them
 7 a beer and hangs around and acts relaxed. And then they
 8 say they're going. So he gets up and says: "Well, I'll
 9 go, too." And then -- he doesn't think there's anything
 10 that that happened, of course. So he goes on about his
 11 life and finds out that the cops are looking for him. And
 12 ultimately they get in touch with each other.
 13 And I think a very telling thing about actions
 14 being inconsistent -- being consistent with innocence was
 15 a very telling thing that Detective Martin said about what
 16 Sean was doing when he's making his statements of
 17 innocence to Detective Martin sometime later. And that is
 18 he doesn't want to give up the name of Hoss. And he
 19 doesn't want to give up the name of Hank because he's
 20 thinking that Hoss and Hank must have done something wrong
 21 after he left. And he doesn't want to get them in
 22 trouble. Now, if there's any kind of conduct that is
 23 totally inconsistent with guilt it's that. Not only is he
 24 saying: "Well, I'll go down, and I'll talk to the police
 25 voluntarily. And I'll tell them what they're asking me

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1 bull would probably do something if its owner is violently
 2 attacked. And there just isn't any evidence about the pit
 3 bull at all except for Sean walks the dog. Sean makes the
 4 bed. Sean walks the dog. There isn't any evidence that
 5 the pit bull did anything in response to a supposedly
 6 violent rape.

7 Now, what other evidence do we have besides the
 8 actions of people? There is the red mark on the neck.
 9 Now, the nurse describes it as a faint red mark dot and a
 10 faint red area. She says there is no bruising. There is
 11 no abrasions. There is this redness. Now, under the
 12 testimony at trial, Danielle and Hoss say that it was at
 13 the motel room prior to Brumbaugh coming that they were
 14 discussing this and saw this red mark. Now, Hoss at the
 15 preliminary hearing didn't mention any red mark. And, of
 16 course, we know that he's had an opportunity working with
 17 Danielle and her father to discuss this on at least a few

18 occasions that he's admitted to could have been how many
 19 times. But was -- isn't that consistent with the rest of
 20 the evidence? Brumbaugh is asked by the prosecutors:
 21 "Did you notice any injuries on Danielle?" He says:
 22 "No." "Did you have any reason, you know, to look for any
 23 injuries itself?" "No." So apparently under the trial
 24 testimony, which is different than the preliminary hearing
 25 testimony, there's this discussion between Hoss and

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1 Danielle about this red spot which Moss is characterizing
 2 as a handprint, but nobody points that out to Brumbaugh.
 3 That doesn't make a lot of sense.
 4 Now, there's also the forensic tests. And the
 5 forensic tests -- Danielle admitted on the stand that she
 6 told Brumbaugh she didn't believe there was ejaculation.
 7 She testified on the stand that she did not tell the nurse
 8 that there was ejaculation. The nurse testified that she
 9 was typing as Danielle talked. And she said there was
 10 ejaculation vaginally. And that brings us to No. 6 --
 11 Exhibit No. 6, and that you guys really haven't had a
 12 chance to look at that. But it indicates that there were
 13 vaginal swabs, oral swabs, jeans and panties. And there
 14 was -- semen was confirmed by the presence of spermatozoa
 15 in the panties. Semen was detected on the jeans by the
 16 presence of the specific protein T-30, however, no
 17 spermatozoa was observed which is insufficient for further
 18 testing at this time. No identifiable spermatozoa were
 19 depicted on the vaginal swab. Semen was not detected on
 20 the oral swab. And then down here, it says: "If
 21 additional testing is desired, please contact the
 22 laboratory regarding this request." So the prosecution
 23 wants to argue that somehow these tests are consistent
 24 with Danielle's testimony. No spermatozoa vaginally. So
 25 that's not consistent with what Danielle told the nurse.

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1 -- that's just mere speculation. But it's certainly the
 2 forensic tests aren't consistent with what the State is
 3 saying about where spermatozoa may or may not have been
 4 found because there isn't any evidence from what Danielle
 5 Whitten is saying that would cause there to be spermatozoa
 6 on the panties or spermatozoa on the jeans.

7 Now, I asked Danielle: "Did you bathe or wash
 8 in any way between this alleged incident and going to the
 9 hospital?" And she said: "No, she didn't do anything
 10 like that." So there isn't any reason that, if there were
 11 spermatozoa in her, there wouldn't have continued to be
 12 spermatozoa in her. And there's absolutely no evidence
 13 that this spermatozoa that's on the panties and on the
 14 jeans has anything to do with this because, if it were
 15 possible to connect it to Mr. Cook, no additional testing
 16 was requested. So we don't know if this is Mr. Cook's
 17 spermatozoa. And there's been testimony that he was in

18 jail certainly and could have his cheek swabbed if they
 19 were interested in finding out, but they didn't. And it
 20 isn't consistent with their -- with their theory of the
 21 case.

22 So -- um -- what other evidence do we have
 23 besides what people did, the red mark, the forensic test.
 24 The other forensic test is a fingerprint, a thumbprint, I
 25 think on a plastic cup of Mr. Cook's, which is okay. I

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1 There's spermatozoa on the jeans. Not enough to test, but
 2 there's spermatozoa on the panties well -- and there isn't
 3 any further testing to determine whose spermatozoa it is.
 4 Now, you have to recall the burden of proof is on the
 5 State.

6 So how is that consistent with the State's
 7 evidence? The State's evidence is that Sean Cook and
 8 Danielle Whitten testified puts his forearm across her
 9 chest. While leaving his forearm across her chest, he
 10 totally removes her jeans. And her panties probably come
 11 off with her jeans. Now, you can decide for yourselves
 12 whether that's physically possible with a woman Danielle
 13 Whitten's size to leave your arm across her chest and
 14 totally remove her panties while doing that. But her
 15 testimony is that stuff is done prior to any sexual
 16 activity. And she specifically talks about Mr. Cook's
 17 pants coming after that. After the jean and the jeans are
 18 gone. So we have spermatozoa on jeans and panties, but we
 19 don't have any evidence of how it gets there.

20 So, apparently, in their closing statement the
 21 State is arguing that somehow Mr. Cook takes the panties
 22 into the bathroom and gets semen on them in there. Now,
 23 there isn't any evidence other than there's some testimony
 24 from both Mr. Cook and Danielle that he went into the
 25 bathroom. That that happened, I mean, that is the kind of

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1 mean, Mr. Cook doesn't deny that he was there. So it
 2 establishes that Mr. Cook held the plastic cup. So you
 3 can look that over, but that's basically what it
 4 establishes. And when you're looking at that one, it's a
 5 little tricky because they list what the specimens are
 6 that were collected, the bottle caps, beer bottles,
 7 plastic cup. And you have to sort of match up 5A and find
 8 which one is 5A. But if you go through all that, my
 9 interpretation anyway, was that it was the clear, plastic
 10 cup that had an identifiable fingerprint of Mr. Cook on
 11 it.

12 Then we have Paul Nelson's testimony. Now, a
 13 reasonable person could conclude that Paul Nelson's
 14 testimony was nonsense. Basically, his testimony is that
 15 Sean Cook told him that he stalked this woman, that he had
 16 met this woman in a bar -- not previous, that he stalked
 17 her for four days to determine where she was living, that

18 upon determining where she's living, he knocked on the
 19 motel room door, forced the door opened, knocked her down,
 20 and raped her. Now, that -- that's for what it's worth --
 21 um -- I guess. But it doesn't seem to have anything to do
 22 with the trial we have been at. And it doesn't make any
 23 sense in the context of this case certainly.

24 Now, are there reasons to think that Mr. Nelson
 25 might have had motive to be making stuff up? Well,

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1 Mr. Nelson testifies when he's also talking about all
 2 these allegations that have been made to me -- um -- "I
 3 have this bad medical problem. I may lose my leg. I'm
 4 not going to get any medical attention in prison; so I
 5 need to get out early. Maybe, if I cooperate, they will
 6 cut me loose early." Another reason to question his
 7 reliability as a witness is he's been convicted of two
 8 felonies in 2003, and he's currently in custody on a
 9 felony. How would he know stuff about this case? Well,
 10 there was testimony from Mr. Cook that they talked about
 11 the allegations. But certainly if a person were going to,
 12 you know, in prayer study confess to a crime, it would
 13 have something to do with the evidence that's before you.
 14 And what Mr. Cook has to say, it doesn't jive. It doesn't
 15 make any sense. Mr. Nelson. I always say the wrong name.
 16 Mr. Nelson's story doesn't make any sense because it just
 17 doesn't match. Now, he also had contact with his wife
 18 about this. We heard some testimony from her that they
 19 talked about it. They -- you know, I don't -- it doesn't
 20 bear your consideration what Mr. Nelson has to say, not
 21 what Mr. Nelson has to say.

22 Now, although we didn't have to put on any
 23 evidence, we did put on evidence. We put Sean on the
 24 stand. All fumbling with names aside, Sean could have
 25 just said things that agreed with the evidence that he had

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1 Then Sean shows up. They talk. They go out to
 2 the Mouse Trap. They drink. Now, Sean certainly isn't
 3 minimizing the amount he had to drink. He testified to
 4 drinking more than what Danielle said he was drinking.
 5 And that's the reason that you can rely on the things he
 6 has to say. Because why wouldn't he just go, "oh, you
 7 know, I had a sip here and a sip there"? He talks about
 8 having a Jager Blaster. He talks about having a gin and
 9 tonic. He talks about having some beers and some
 10 Crown Royal. Now, there isn't any reason for him to say
 11 all that unless it's true because it certainly doesn't
 12 help his case. And there hasn't been any testimony in
 13 that regard before. But he says it anyway, but one can
 14 conclude that it's true.

15 He says that Danielle unexpectedly comes over.
 16 She's chewing gum. Now, Danielle had admitted to chewing
 17 gum all the time and sits on his lap. He says that, "it's

18 not fair that I don't have any gum." Then she kisses him
 19 unexpectedly. And he's kind of taken back by that, but
 20 certainly not offended. They join hands and go back to
 21 the motel room and have a few drinks and have sex. She at
 22 one point during the sex says: "Hey, it's hurting."
 23 Something like that. Sean quits and goes into the
 24 bathroom. He comes out. She says: "Hoss and Hank are
 25 coming over." He goes: "Wow, we better clean up the

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1 heard. He had been sitting here hearing it, but Sean made
 2 a concerted effort to tell you what actually happened.
 3 And that wasn't consistent with what the Dillon brothers
 4 are currently saying or what Danielle Whitten is saying.
 5 He said he knew Danielle Whitten. He liked Danielle
 6 Whitten. They had been kind of interested in each other
 7 for some time now. Danielle, when asked: "Did you have
 8 any romantic interest in Mr. Cook?" She didn't say: "No,
 9 I don't." She said: "Well, not really." You know, well
 10 not really. And they met when she was very young, and now
 11 she is in her 20s.

12 Danielle is at the liquor store at 3:00 in the
 13 afternoon buying a bottle of tequila. Danielle's
 14 testimony is that she goes out specifically at 3:00 in the
 15 afternoon to the liquor store from the motel to buy a
 16 bottle of tequila. Not to take it home to drink but to
 17 take it home. And I asked her: "Did you take this back
 18 to the hotel?" She said: "Yes." She put it in her
 19 backpack. Now, certainly one might conclude Danielle is
 20 kind of minimizing the amount she had to drink. You can
 21 think to yourself that that kind of conduct makes a lot of
 22 sense to go out to the liquor store in the middle of the
 23 afternoon when you're sitting around a motel room bored
 24 just to buy liquor to put in your backpack, but it does
 25 seem somewhat inconsistent conduct.

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1 place. I don't want Mertins to find out. That would
 2 really be, you know, not a good thing. So they get
 3 together and they make the bed. Then the Hoss (sic)
 4 brothers show up. And depending on which scenario you
 5 want to believe, he could go out and walk the dog while
 6 they were there to give them every opportunity to chat
 7 this over and then come back and sit there and wait for
 8 the police to arrive apparently. Or he walks the dog
 9 before the Dillon brothers get there, then he waits for
 10 the Dillon brothers to get there and offers them a beer
 11 when they get there. He says: "Well, you know, how you
 12 doing and everything?" They all act nice. And then
 13 there's some talk about Danielle leaving; so they leave.
 14 Now, that's a scenario that fits the facts.

15 This smudge on the bed, number one, we aren't
 16 even certain what the smudge on the bed is. Brumbaugh
 17 says he thinks it's a footprint, but they don't do

18 anything at all to test this theory that it's a footprint.
 19 They don't take it to the lab which, obviously, they have
 20 to see what this substance is that's on there. We don't
 21 know how long this piece of bedding has been on the bed.
 22 We don't know who might have been standing on the bed over
 23 how many years. I mean, it's asking you to speculate.
 24 Wow.

25 Now, the burden of proof is on the State. The

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1 burden of proof isn't on the defense. The defense never
 2 has to present any evidence. So you can't speculate in
 3 the favor of the prosecution's case because it's not what
 4 the rules allow for. So Mr. Cook's scenario makes sense.
 5 Now, what is the prosecution's scenario? The
 6 prosecution's -- and one more thing. The prosecution
 7 goes: "Well, if there weren't a rape, why would Danielle
 8 say there was a rape?" Well, it's obvious at some point.
 9 She became uncomfortable during this sexual encounter.
 10 She calls her friends. She admitted on the stand she did
 11 not expect Hoss Dillon to be cross-examining her about any
 12 sexual contact she might have had with Mr. Cook. He does
 13 that. She admits that she was reluctant to accuse
 14 Mr. Cook of rape, but ultimately she does that. She
 15 admits on the stand, when I asked her, that she felt
 16 committed to maintaining that position after having made
 17 that accusation. She admitted on the stand to having
 18 problems with her boyfriend. She denied on the stand that
 19 she had any concern about her boyfriend finding out about
 20 her sexual contact with Mr. Cook. One could conclude
 21 certainly that she did have some concern about that. She
 22 had buyer's remorse. She engaged in sex with a man
 23 consensually. She thought better of it. Maybe, she
 24 sobered up a little bit. Even by her own testimony she
 25 was drunk. Maybe, something hurt. She said something

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1 the rebuttal statement. And we're off the record.
 2 (Pause in proceedings.)
 3 THE COURT: All right. We're back on the
 4 record.
 5 Ms. Gardner, on behalf of the State, you may
 6 give your rebuttal argument.
 7 MS. GARDNER: Thank you, Judge.
 8 The defense attorney keeps talking about this
 9 being a violent rape, a violent rape. There are different
 10 levels of violence. There's the violence of being dragged
 11 from a location and hidden and violently raped with a
 12 knife or a weapon. There's many different variations and
 13 varieties of violence.
 14 In this scenario you have a lesser form of
 15 violence that's occurring. Obviously, there's no weapon
 16 being used. There's no screaming going on. We have a
 17 dog. And you have to go with your own memories. I don't

18 recall there ever being any statement or testimony about
 19 where that dog was when they returned to the room. The
 20 dog could have been in the bathroom. I don't know. I
 21 don't believe that there was any testimony about exactly
 22 where the dog was sitting, or lying, or located at the
 23 time of this rape. But we do know that Sean Cook here had
 24 bonded with that dog. We know that Danielle had had that
 25 dog about three or four months. And we knew that from the

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1 hurt, and Mr. Cook stopped. Maybe, she gets frightened.
 2 This makes perfect sense.
 3 But this scenario of the prosecution doesn't
 4 make any sense. You don't get violently raped, call your
 5 friends and wait around with a violent rapist. You don't,
 6 when your friends are on their way, help the violent
 7 rapist make the bed. Your dog just doesn't sit there and
 8 wag its tail during a violent rape. You don't, when your
 9 friends get there, go back into the place where the
 10 violent rape took place, sit down on the bed next to the
 11 violent rapist, and watch everybody have a beer. You
 12 don't then leave and deny after being asked five times by
 13 your friend whether you've been raped that you have been
 14 raped. And then, when he keeps pushing it, say you have.
 15 That's the State's version of the facts.

16 Mr. Cook's version of the facts make a great
 17 deal more sense than the prosecution's version of the
 18 facts. And Mr. Cook's scenario and Mr. Cook's demeanor on
 19 the stand mean that there's a reasonable doubt that a rape
 20 took place. And you certainly must acquit Mr. Cook of
 21 this rape because there is just not the evidence here to
 22 justify a conviction. Thank you.

23 THE COURT: Before the rebuttal argument let's
 24 everyone just stand in place for, maybe, one minute.
 25 We've been at it for about an hour. And then we'll hear

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1 testimony Danielle wasn't screaming. She wasn't
 2 floundering about, like, she was violently attacked as the
 3 defense is trying to portray here. It's very possible
 4 that if that dog was in the room, we just don't know the
 5 dog -- I mean, the dog may not have felt inclined to break
 6 it up. It may not have thought that his owner was in some
 7 kind of danger. And from what we've heard of the
 8 testimony, there's no indication that she screamed or
 9 alerted the dog to herself being in danger. She said:
 10 "No, Sean. No. Stop it. No. I don't want this." But
 11 she never testified that she was screaming and alerting
 12 the entire hotel of this rape.

13 The defense also mentioned that Hoss and his
 14 brother testified that they have been talking about this
 15 case with Danielle and her dad at work and each other.
 16 And, again, you have to go on your own memories, but I
 17 don't recall that ever being said. You have to go on your
 18 memory of what they said in response to that question.
 19 My recollection is that they said it's not been talked
 20 about -- this incident. But, yes, Hoss does work at the
 21 same place as Danielle and her dad now.

22 There's a lot of fault being placed by the
 23 defense counsel here on the preliminary hearing and what
 24 wasn't said at the preliminary hearing. You have to
 25 realize that a preliminary hearing is just that. It's a

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1 very minimal hearing where there's not details brought out
2 and specific testimony about every little thing that was
3 done as there is in a trial. We're talking about a half
4 hour or an hour hearing where people come in and
5 basically are saying the gist of it. Certain things were
6 not asked at that preliminary hearing; so certain things
7 were not answered at that preliminary hearing. The
8 details the defense tells you about were not asked at the
9 preliminary hearing.

10 Officer Brumbaugh, again, you have to go on
11 your memory. I don't believe that Officer Brumbaugh was
12 ever asked if Danielle ever said that Sean Cook ever
13 ejaculated. I don't believe that question was ever asked.
14 He never testified anything about ejaculate. He also was
15 asked: "What was Danielle's demeanor?" A trained officer
16 is supposed to observe people's demeanor. He didn't
17 testify that she was drunk. If you recall, he didn't
18 testify about anything as far as her intoxication state or
19 anything that he noticed as far as her being intoxicated.

20 Tracy Martin talked about the DNA in the state
21 laboratory and what they test and what they don't test.
22 And he told that, in cases where there's a claim by the
23 suspect that it was consensual sex, he let the laboratory
24 know this. And they don't continue the testing. In this
25 case they did not continue this testing matching up

1 had been raped. And there's a reason why. Because Sean
2 Cook was a friend of hers. And she needed to think.
3 Hoss Dillon asked her: "What's wrong?" She didn't want
4 to talk about it. "Nothing." He asked her a few more
5 times. Don't want to talk about it. She waits until she
6 gets into the comfort of her hotel room where she knows
7 there aren't people around her. She's embarrassed by what
8 just happened. She's ashamed. And she's frightened. She
9 doesn't know what's going on. She doesn't know what's
10 happening. So she gets back to her hotel room with her
11 friend. And that's when she breaks down. And that's when
12 she tells her friend what happened. He talked her into
13 calling the police. "You've got to tell the police about
14 this." That wasn't her motive. That wasn't her idea
15 until Hoss talked to her and told her: "This is what you
16 do. This is the right thing to do."

17 ~~Defense talks about reasonable doubt. When~~
18 you're playing golf and you hit the golf ball and it falls
19 into a pond, you know where that golf ball has gone. You
20 know where that golf ball is. You watched it fall in
21 there. And you go to the pond and you try to fish it out
22 with your golf club. And it gets murky, and it gets
23 confusing. And you can't see where the ball is anymore,
24 but you know that it's there. You know beyond a
25 reasonable doubt that it is. Exactly what you

1 Sean Cook's DNA with that sperm because there's no
2 question about that. Because Sean Cook said he had sex
3 with her. So there's no question about the identification
4 of the owner of that sperm.

5 This is a case of rape of a different type than
6 some of us imagine. Some of us imagine rape as a stranger
7 grabbing you when you're walking down a dark alley and
8 you're forced into a corner or a hidden spot and you're
9 taken against your will by this stranger. This case we
10 have Danielle, who has known Sean Cook since she was
11 14 years old. Ten years now. Sean Cook is older than
12 her. Didn't go to high school with her. Noticeably older
13 than her. She has this rape happen to her suddenly
14 without warning. And she is weighing what just happened.
15 All she knew in her mind at that point is that she needs
16 to get away from Sean Cook and get him out of that room
17 and figure out what's going on. She doesn't want to tell
18 her friends. She doesn't even want to think about it.
19 She doesn't want to talk about it. She just wants her
20 friends to help her get him out of that room so she can
21 assess what just happened to her.

22 We talked about in voir dire rape victims do
23 not act the same way. They don't act as we expect them to
24 sometimes. Danielle didn't go running out of that hotel
25 room into the night screaming at the top of her lungs she

1 have here. There is no reasonable doubt Sean Cook
2 committed rape. Thank you.

3 THE COURT: All right. That will be the end of
4 the closing arguments.

5 At this point we are going to ask our Bailiff
6 to take a particular oath. If you would please, sir.

7 (The Bailiff is sworn.)

8 THE COURT: Thank you. Now, also, we are going
9 to randomly select one of you to be the alternate juror.
10 That means you will not go back.

11 THE BAILIFF: We don't have an alternate.

12 THE COURT: Oh, that's right. We only have 12.

13 THE BAILIFF: Yes.

14 THE COURT: Thank you. I get used to saying
15 the same thing. So thank you for that. We will not
16 select an alternate.

17 All the times that you have left the courtroom

18 I've told you: "Don't talk about the case or form an
19 opinion." Now you are to talk about the case and form an
20 opinion to the best of your abilities. And you are
21 excused.

22 (Jury out for deliberation at 2:52 p.m.)

23 THE COURT: Counsel, please be within ten
24 minutes of returning to the courtroom for either a
25 verdict.

1 MS. GARDNER: Judge, I have a -- um --
 2 obviously, we have a projector here and the computer set
 3 up with the photographs if the Jury wants to see them. So
 4 I intend just to leave it here. In case they do, then, we
 5 can reconvene and talk about that. It takes them a while
 6 to install it. That's my only --
 7 THE COURT: And what is -- is there software in
 8 the machine that projects? Is there a CD? What's in
 9 there that does that?
 10 MS. GARDNER: It's already been loaded, the
 11 software between the computer and this.
 12 MR. HULL: Your Honor, this has never been
 13 entered into evidence.
 14 THE COURT: That's my concern is that the
 15 photographs are -- those were pictorial enlargements to
 16 aid in testimony.
 17 MS. GARDNER: Okay.
 18 THE COURT: But I'm going not to allow that.
 19 MS. GARDNER: All right.
 20 THE COURT: All right. Thank you for that.
 21 Thank you for reminding me about the alternate,
 22 too, all of you.
 23 So thank you, counsel, for the way you treated
 24 each other, the Court, and all the witnesses.
 25 MS. GARDNER: Thank you, Judge.

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1 MS. GARDNER: No, Your Honor.
 2 MR. HULL: No, Your Honor.
 3 THE COURT: Please bring the Jury back in.
 4 (The Jury entered the Courtroom.)
 5 THE COURT: All right. The record should
 6 reflect the Jury has returned and are seated
 7 appropriately.
 8 Members of the Jury, I'm advised that you have
 9 reached a verdict. Is that the case?
 10 PRESIDING JUROR: Yes, we have, Your Honor.
 11 THE COURT: And if the presiding juror could
 12 hand the verdict to our Bailiff. And the Court will then
 13 review it.
 14 (Pause in proceedings.)
 15 THE COURT: All right. Madam Clerk, could you
 16 read the verdict, please.
 17 THE CLERK: State of Idaho versus Sean Michael

18 Cook. Verdict.
 19 "We, the Jury, duly empanelled and sworn to try
 20 the above entitled action, for our verdict, say that we
 21 find the Defendant guilty of rape."
 22 Dated this 6th day of November, 2008. Signed
 23 by the presiding juror.
 24 THE COURT: Members of the Jury, is this your
 25 verdict?

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1 MR. HULL: Thank you.
 2 (Recess taken.)
 3 ---oOo---
 4 (DAY NO.: 3 - November 6, 2008 - 7:04 p.m. - VERDICT)
 5 P R O C E E D I N G S
 6 THE COURT: We're on the record in First
 7 District Court with State versus Sean Cook. And the Jury
 8 is not present. The parties and the attorneys are
 9 present.
 10 And the Court has been advised that there is a
 11 verdict from the Jury. And so we'll bring that jury in
 12 shortly.
 13 Just for observers in the courtroom to
 14 understand, regardless what the verdict is, oftentimes
 15 these things are very emotional. The verdict may make
 16 observers happy. It may make them unhappy. The observers
 17 in the courtroom and the parties themselves are to make no
 18 display at all of their happiness or unhappiness. The
 19 citizen jurors have worked hard. And they deserve to be
 20 free of any kind of emotional display at all. So I'll ask
 21 you to do your best on that. In fact, make that an order
 22 of the Court, that you keep your emotions down so that the
 23 jurors can render their decision without any influence by
 24 that. So I know you'll do your best.
 25 Any reason not to bring the Jury back?

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1 THE JURY PANEL: Yes, it is.
 2 THE COURT: All right. Do either of the
 3 parties ask that the Jury be polled?
 4 MS. GARDNER: The State doesn't.
 5 MR. HULL: Yes, Your Honor.
 6 THE COURT: All right.
 7 THE CLERK: Juror No. 1, is this your verdict?
 8 JUROR NO. 1: Yes, it is.
 9 THE CLERK: Number 2, is this your verdict?
 10 JUROR NO. 2: Yes.
 11 THE CLERK: Number 3, is this your verdict?
 12 JUROR NO. 3: Yes.
 13 THE CLERK: Number 4, is this your verdict?
 14 JUROR NO. 4: Yes.
 15 THE CLERK: Number 5, is this your verdict?
 16 JUROR NO. 5: Yes.
 17 THE CLERK: Number 6, is this your verdict?

18 JUROR NO. 6: Yes.
 19 THE CLERK: Number 7, is this your verdict?
 20 JUROR NO. 7: Yes.
 21 THE CLERK: Number 8, is this your verdict?
 22 JUROR NO. 8: Yes.
 23 THE CLERK: Number 9, is this your verdict?
 24 JUROR NO. 9: Yes.
 25 THE CLERK: Number 10, is this your verdict?

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1 JUROR NO. 10: Yes.

2 THE CLERK: 11, is this your verdict?

3 JUROR NO. 11: Yes.

4 THE CLERK: 12, is this your verdict?

5 JUROR NO. 12: Yes.

6 THE COURT: Thank you. All right. The Jury

7 having been polled, then, Members of the Jury, I thank you

8 for your service. You're going to be released here in

9 just a moment.

10 I do want to advise you of one thing before

11 you're released, though. Sometimes the attorneys in cases

12 like this would like to talk to jurors about what they

13 thought about, what worked in terms of evidence, what was

14 meaningful to them. You may talk about that with the

15 attorneys as much or as little as you want. You can share

16 what you want to about your impressions. You don't have

17 to talk at all. You can talk a little.

18 The only thing I ask of you is to remember that

19 your fellow jurors shared their views with you with the

20 expectation of confidentiality. So if you do talk with

21 either of the attorneys, please share only your

22 impressions and your thoughts and what was important to

23 you. I would also remind you, though, it is very helpful

24 to the attorneys to learn this from jurors. It makes

25 their jobs better and they do better at it.

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1 scheduled for December 22nd, 2008, at 3:30 in the

2 afternoon. 22 December, 2008, at 3:30.

3 And will the State present an appropriate order

4 regarding the bail, please.

5 MS. GARDNER: Yes, Judge.

6 THE COURT: Anything else from the State?

7 MS. GARDNER: No, Your Honor.

8 THE COURT: Anything else from the defense?

9 MR. HULL: Is there a presentence investigative

10 questionnaire?

11 THE COURT: Here it comes.

12 Have I forgotten anything that you can think

13 of?

14 Anything more?

15 MR. HULL: No, Your Honor.

16 THE COURT: We are adjourned. You are excused.

17 (The proceedings concluded at 7:06 p.m. on

18 November 6, 2008.)

19 ---oOo---

20

21

22

23

24

25

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1 With that, Members of the Jury, I thank you for

2 your service. You are discharged. And you need not call

3 back into the Bailiff's office. And I thank you very

4 much. You are excused.

5 (The Jury left the Courtroom.)

6 THE COURT: All right. Mr. Cook, having

7 received the verdict of the Jury, the Court will now set a

8 sentencing date. I'll also advise that I am exonerating

9 any bail that has been posted, but I am ordering that you

10 be held without bail at this point since you no longer

11 enjoy the presumption of innocence. So if we can have a

12 sentencing date.

13 I will order that a presentencing investigation

14 be prepared. And that report is to be distributed to the

15 parties and to the Court seven days prior to sentencing.

16 Are there any evaluations that are being

17 requested as part of this presentence investigation

18 report?

19 MR. HULL: Not that I can think of right now,

20 Your Honor.

21 THE COURT: Any from the State?

22 MS. GARDNER: The State is not requesting any.

23 THE COURT: I'm here that day.

24 THE CLERK: Yes.

25 THE COURT: Sentencing in this matter is

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IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF KOOTENAI

--oOo--

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR 08-13006
)	
vs.)	
	)	SENTENCING HEARING
SEAN COOK,)	
)	
Defendant.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AT: Kootenai County, Coeur d'Alene, Idaho

ON: ~~Friday, January 16, 2009, 8:25 a.m.~~

BEFORE: The Honorable Lansing L. Haynes, District Judge

LAURIE A. JOHNSON, CSR 720, Official Court Reporter

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A P P E A R A N C E S

P R O C E E D I N G S

For the Plaintiff:

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For the Defendant:

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Coeur d'Alene, ID 83814

--oOo--

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1 social security numbers listed. The correct social
2 security number is: [REDACTED]
3 THE COURT: I'll cross out that bottom number,
4 then.
5 MR. HULL: Again, on Page 1, there is an
6 indication of religion not applicable. Mr. Cook would
7 like Christian put there.
8 THE COURT: I will do that.
9 MR. HULL: On Page 7 in the education comments,
10 in the third line, there's an indication of possession of
11 pot seeds and a pot pipe. Mr. Cook indicates he had seeds
12 in a vile. He was suspended not convicted or arrested.
13 It indicates he was arrested, but he was suspended from
14 school.
15 THE COURT: So I'll cross out -- I'll have it
16 read "Mr. Cook was suspended from the 8th grade" and
17 cross out the phrase: "After having been arrested and

18 convicted." So it reads: "He was suspended from the 8th
19 grade for possession of pot seeds."
20 MR. HULL: That would correctly reflect his
21 recollection of the incident, Your Honor.
22 THE COURT: All right. I'll cross out the
23 phrase, "and a pot pipe."
24 MR. HULL: On Page 10, in the investigator's
25 comment in the first paragraph, seventh line, I

1 THE COURT: The next matter this morning is
2 State v. Cook. This is State of Idaho versus Sean M.
3 Cook. And it's Kootenai Criminal Case: 08-13006.
4 Mr. Cook is present. He is in custody.
5 Mr. Jonathan Hull represents him. Ms. Donna Gardner is
6 here on behalf of the State.

7 This is the time set for sentencing in this
8 matter, are the parties ready for that sentencing?
9

10 MS. GARDNER: The State is ready, Judge.

11 MR. HULL: Yes, Your Honor.

12 THE COURT: The Court has reviewed the
13 presentence investigation in this case. That report is 12
14 pages in length. I've reviewed Coeur d'Alene police
15 reports that have page numbers at the bottom right of
16 Pages 1 through 10. I have reviewed an Aspen Behavioral
17 Counseling substance abuse evaluation, that evaluation is
18 five pages in length.

19 Is that the PSI as the parties see it?

20 MS. GARDNER: Yes, Judge.

21 MR. HULL: Yes, Your Honor.

22 THE COURT: Any corrections that the defense
23 would like to make?

24 MR. HULL: Your Honor, beginning with the
25 presentence investigation on the first page there are two

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1 have a seventh line. There's an indication that in the
2 last line of the second paragraph that the charge of
3 intimidating a witness arose while Mr. Cook was on release
4 from the instant offense. That allegation was made
5 supposedly about conduct Mr. Cook made while in jail prior
6 to release.

7 THE COURT: So it should read: "Incurred while
8 the instant offense was pending"?

9 MR. HULL: That would be more accurate,
10 Your Honor, but he was not on release when that arose.
11 The allegation was that it occurred while he was on this.

12 THE COURT: I understand. I have made that
13 correction.

14 MR. HULL: And those are the corrections to the
15 presentence report itself.

16 In the substance abuse evaluation on Page 3,
17 there is an indication in the chemical history, the first

18 paragraph, the last line, that his last drink was on 4/1,
19 2008. His last drink was on 10/1, 2008.

20 THE COURT: Drink?

21 MR. HULL: Yeah.

22 MS. GARDNER: I'm sorry. I'm not finding that.

23 MR. HULL: The last line of the first paragraph
24 of chemical use history, the last complete line.

25 MS. GARDNER: Oh, 10/1, 2008.

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1 THE COURT: And does he agree that that
 2 included the Jagermeister and two beers?
 3 MR. HULL: He doesn't dispute that, Your Honor.
 4 THE COURT: I'll make that change.
 5 MR. HULL: On Page 3, in the chemical history
 6 on ecstasy, which is the last section, they seem to
 7 indicate he ate 28 spoonfuls. He ate one spoonful. He's
 8 not sure what the 28 referred to. It was one spoonful.
 9 Those are the additions and corrections to the
 10 presentence materials that I have, Your Honor.
 11 THE COURT: Does the State have any corrections
 12 to make?
 13 MS. GARDNER: No, Your Honor.
 14 THE COURT: Do either of the parties intend to
 15 call any witnesses today?
 16 MS. GARDNER: The State has no witnesses.
 17 MR. HULL: No, Your Honor. Mr. Cook and I have
 18 discussed that, and he's indicated he's prepared to
 19 proceed to sentencing without calling witnesses.
 20 THE COURT: Any documents to be presented by
 21 either party?
 22 MS. GARDNER: The State has no documents.
 23 MR. HULL: Your Honor, we submitted the
 24 substance abuse evaluation, that would be the document.
 25 THE COURT: Very well. Mr. Cook, this is time

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1 There were certain disadvantages the State always has in
 2 these kinds of cases where we don't have witnesses other
 3 than the victim and the Defendant. And this was, I guess,
 4 a classic case of having a credible victim having to have
 5 corroborating evidence and pictures and so forth. And
 6 then we had even more with the Defendant's admissions to
 7 his cellmate -- um -- his cellmate who had nothing to gain
 8 by coming forward and everything to lose.
 9 I agree with the PSI that Mr. Cook is not
 10 amenable to probation. The State believes that Mr. Cook
 11 is a danger to the community if left free. He's been in
 12 prison before on a burglary charge. I'm not aware of the
 13 specific details of that charge. But some of the
 14 conversations, as you recall, with Mr. Nelson were
 15 involving his connections, ties to that community.
 16 My recommendation is for prison. I'm asking
 17 for a lengthy fixed and indeterminate. I'm asking for ten

18 years fixed plus 20 years for a total of 30 years. Thank
 19 you, Judge.
 20 THE COURT: Thank you. I'll listen to the
 21 defense's recommendation.
 22 MR. HULL: Thank you, Your Honor. There were a
 23 lot of things that are indisputable in this case. But
 24 there is one thing that I believe is indisputable in this
 25 case and that is that Mr. Cook has a serious substance

STATE OF IDAHO VS COOK

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1 set, then, for the sentencing in your case. Do you know
 2 of any legal reason why sentencing should not take place
 3 today?

4 THE DEFENDANT: No.
 5 THE COURT: Is there anything that you would
 6 like to say about this case or the sentence that you
 7 should receive? You don't have to say anything, but if
 8 you would like to I'd happy to listen.

9 THE DEFENDANT: Actually, I don't really have
 10 anything planned out, but I was told by several different
 11 parties that in order to get a lighter sentence or provide
 12 whatever I could to enable me to get a lighter sentence,
 13 I'd have to show that I'm able to be rehabilitated, which
 14 means that I have to take accountability for the matter
 15 that I've been convicted of. Even though a jury of 12
 16 people convicted me, and you have to consider that truth,
 17 I have a real problem admitting to something that I know
 18 in my heart I did not do. As God is my witness I can't
 19 say that I did that. And it breaks my heart because I
 20 know I'm going to get a stiffer sentence because of it. I
 21 just ask for mercy. That's all I got.

22 THE COURT: Thank you. I'll listen to the
 23 State's recommendation.

24 MS. GARDNER: Judge, fortunately in this case,
 25 you were the trial judge and heard all the evidence.

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1 abuse problem. If you look back at his record, it's
 2 primarily substance abuse related reasons. The reasons he
 3 didn't do well on probation and didn't do well on parole
 4 was because of substance abuse problems. He freely admits
 5 to substantial substance abuse problems. We're in a
 6 difficult situation here for a number of reasons.

7 One is, as Mr. Cook points out, he took the
 8 stand and testified and denied that he raped Ms. Whitten.
 9 He doesn't deny that he had sex with Ms. Whitten. He
 10 doesn't deny that he was with Ms. Whitten, but he does
 11 deny that he forced her to have sex with him. That is a
 12 situation where some sort of disposition involving sex
 13 offender treatment probably isn't going to do Mr. Cook any
 14 good in that regard.

15 But I think another thing that isn't in dispute
 16 is that he knew Ms. Whitten. This wasn't a situation,
 17 like, was testified to by Mr. Nelson, where he stalked a

18 victim and broke in a door and hunted this person down.
 19 If this situation was a rape, it was a situation like
 20 Ms. Gardner characterized it in closing statements at the
 21 trial and that is there's different degrees of rape.

22 In response to my argument that Ms. Whitten
 23 didn't do things you might expect a person to do who had
 24 been forcibly raped, Ms. Gardner in her argument argued
 25 that, hey, this isn't the most violent rape in the world.

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1 And I think we can all agree that under the law Mr. Cook
 2 is guilty of rape, but Mr. Cook isn't guilty of the most
 3 violent rape in the world. He's guilty of what might be
 4 characterized as a date rape. He has no history of sexual
 5 offenses. And he has been in prison, but it hasn't been
 6 for a very long time.

7 If he were placed in prison with a
 8 recommendation of doing the Therapeutic Community to
 9 address his substance abuse evaluation, he would not be
 10 put in the Therapeutic Community because he is convicted
 11 of a sex offense. Why that is a disqualification from the
 12 Therapeutic Community, I do not know. But I know that it
 13 is a disqualification from the Therapeutic Community.

14 I think what is very likely to enhance
 15 Mr. Cook's ability to abide by the terms of a probation
 16 and what is very likely to help society from any sort of
 17 problems from Mr. Cook if Mr. Cook's substance abuse
 18 problems are addressed. And certainly he seems more than
 19 amenable to substance abuse treatment. To get him into
 20 substance abuse treatment in the Idaho Corrections system
 21 with the disqualification from the Therapeutic Community,
 22 the only way I'm aware of doing that would be to impose a
 23 sentence to retain jurisdiction and recommend the
 24 New Directions program. And I think that is an
 25 appropriate sentence in this matter.

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1 I don't belittle the nature of the crime
 2 Mr. Cook was convicted of. He's been convicted of a very
 3 serious crime. But in the range of that crime, this is
 4 not anywhere near the most serious type allegation for
 5 that kind of crime.

6 And, as well, if Mr. Cook hadn't had a
 7 substance abuse problem, this event would not have
 8 occurred. Whatever that event was he was out partying.
 9 And that's why this happened. If he had been clean and
 10 sober, he wouldn't have been at the liquor store. He
 11 wouldn't have seen Ms. Whitten. He wouldn't have wanted
 12 to go to the bar. And he wouldn't have ended up in
 13 Ms. Whitten's hotel room because it was all revolving
 14 around a night on the town for lack of a better phrase.

15 So, Your Honor, my recommendations are that the
 16 Court impose a two year fixed term, eight years
 17 indeterminate and that it retain jurisdiction and
 18 recommend the New Directions program. Thank you.

19 THE COURT: Thank you.

20 Mr. Hull, do you and Mr. Cook have a figure of
 21 the number of days served already?

22 MR. HULL: Your Honor, it's a little confusing;
 23 so we do not because --

24 THE COURT: All right.

25 MR. HULL: -- he was in on one charge for a

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1 while and not this one until the Court revoked his bond.

2 THE COURT: When was the bond on this one
 3 revoked? Do you know?

4 MR. HULL: When the verdict was returned, you
 5 revoked the bond on this one.

6 THE COURT: So he was released at that point.
 7 And then the bond was revoked on this charge.

8 MR. HULL: He had a bond posted if you recall.

9 THE COURT: I do recall.

10 MR. HULL: There was some --

11 MS. GARDNER: He was in custody on this charge
 12 back in, I'm thinking, July, the beginning of July.

13 THE DEFENDANT: July 1st.

14 THE COURT: And he was released on August 13th.
 15 And then he came back into custody after that.

16 MS. GARDNER: Right. Then he was in custody on
 17 the other charge. And then he was placed into custody on

18 this charge at the Jury verdict.

19 THE COURT: And that jury verdict, I think, was
 20 November 5?

21 MS. GARDNER: November 6th --

22 THE COURT: Sixth.

23 MS. GARDNER: -- according to my notes.

24 THE COURT: So I calculate 115 days credit at

25 this STATE OF IDAHO VS COOK

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1 Mr. Cook, anytime the Court sentences an
 2 individual, there are four factors of sentencing that the
 3 Idaho Court of Appeals and the Supreme Court have told the
 4 Courts they need to consider.

5 The first and the foremost of those factors are
 6 the protection of society. A second factor is a sentence
 7 that will deter you from this kind of conduct and will
 8 deter other people that are in similar situations from
 9 this kind of conduct. A third factor is the punishment
 10 that society expects for this offense under these
 11 circumstances. And the fourth factor is how to facilitate
 12 any rehabilitative measures that are in place. And I have
 13 those four factors in my mind.

14 One of the first things that I want to note is
 15 that you'll be ordered as part of your sentence to submit
 16 to a DNA database sample. The Idaho Bureau of Criminal
 17 Identification requires a mouth swab and a thumbprint for
 18 anyone convicted of this offense.

19 You will not receive a more harsh sentence
 20 because you are not admitting to all of the facts that
 21 Ms. Whitten indicated. And the Court does not operate
 22 that way.

23 The Court accepted as true from her frame of
 24 reference everything that Ms. Whitten said. And the Court
 25 accepted that she testified truthfully on 4/28/08

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1 perceptions of things. The Court also recognizes that
 2 your perception of things can be very, very different.
 3 Two people involved in the same activities can see it from
 4 completely different points of view.

5 What the Court cannot ignore is that 12 jurors
 6 found beyond a reasonable doubt that Ms. Whitten did not
 7 consent to this conduct, that she resisted you, but that
 8 resistance was overcome by forceful conduct on your part.
 9 And 12 people, who don't know you and don't know
 10 Ms. Whitten, agreed beyond a reasonable doubt that that's what
 11 happened. And the Court has to take that as the judgment
 12 of the community then and as the situation.

13 I do not see where rehabilitative measures are
 14 necessarily in place for the Court here at this point
 15 because -- well, let me say two things. Rehabilitation
 16 regarding the substance abuse is not a primary motivator
 17 for the Court. The Court is not convinced that this would
 18 not have happened but for the substance abuse. I don't
 19 know. It may have happened. It may not have happened but
 20 for the level of alcohol consumption that you were
 21 involved in. But I can't take it as a fact that it
 22 wouldn't have happened if you hadn't been abusing alcohol
 23 for a long time.

24 Now, with respect to the sex offender
 25 treatment, I don't know that sex offender treatment

1 requires a person to say everything that Ms. Whitten said
 2 is true. And, "I renounce my testimony at court. And I
 3 accept everything she said as true."

4 Sex offender therapy may be available for a
 5 person who says: "I want to find out what I did that
 6 caused Ms. Whitten to do what she did." And what I mean
 7 by that, Mr. Cook, is the Court cannot accept as a fact
 8 that Ms. Whitten was a willing participant in this act.
 9 And then went through the trauma and the indignity and the
 10 upset of going through a rape kit at the hospital if
 11 something bad didn't happen to her. If something mildly
 12 disturbing happened to her, she had every reason to
 13 withdraw from that kind of medical treatment. It wasn't
 14 required. The reason that a person normally will submit
 15 themselves to that is that in their feelings and mind
 16 something very bad happened to them. And they're willing
 17 to go through that indignity to get the evidence of that
 18 thing.

19 The Court also thinks you are going to need in
 20 any kind of rehabilitative measures to talk about why
 21 would Ms. Whitten call her friends in a very upset state
 22 of mind if the event happened as you saw it? Because
 23 those individuals that came and testified for her said
 24 they could tell by her voice right away that something bad
 25 had happened. Certainly she engaged in activities, like,

1 making the bed and that sort of thing. That doesn't seem
 2 like an activity that one normally associates with a
 3 person who has been through a traumatic event. But
 4 everybody reacts differently to traumatic events. So you
 5 have the potential of rehabilitation if you begin to look
 6 at this in terms of I did something that night that hurt
 7 Ms. Whitten. It hurt her on the inside of her. It hurt
 8 her dignity. It caused her to go through very unpleasant
 9 things. Not to mention to come to court and testify in
 10 front of total strangers. And you could see how affected
 11 she was by it.

12 So you were the one who had engaged in a
 13 significant level of alcohol consumption that night. Your
 14 perceptions were affected by that consumption. And you --
 15 whether you know it now or feel it now -- you hurt
 16 Ms. Whitten that night in a way that is significant to
 17 her. And if you can begin to explore that from her point

18 of view, you may be amenable to sex offender treatment.
 19 And you don't have to admit everything she said was true,
 20 but you did things that hurt her that night. And if you
 21 can start exploring that within your heart and from her
 22 point of view, you can be amenable to treatment. But none
 23 of that is in place right now. And that's something down
 24 the road.

1 as well in the matter. You come before the Court with a
 2 long criminal history. You went to St. Anthony's as a
 3 juvenile on a burglary charge. You got another burglary
 4 when you were 18 years of age. And you did the retained
 5 jurisdiction in about 1988 or so. You came back from that
 6 retained jurisdiction and committed a petty theft in 1991
 7 for which you did some jail time. And then another
 8 probation violation on the burglary, I presume. And you
 9 went and finished off about five months in the prison
 10 system. You had a parole violation in 1992. And you
 11 topped out that burglary sentence. So you don't have a
 12 demonstration in your young adulthood of having done well
 13 on parole or on probation. After topping out that
 14 sentence, you have convictions for open container in 1994,
 15 misdemeanor possession of marijuana and unlawful entry in
 16 1995, petty theft in 1995. You have a conviction for
 17 dispensing or providing liquor to a minor when you're 28
 18 years old, a DUI when you're 29 in 1999, drunk in public
 19 in 2006. Probation violation for that in 2007. And then
 20 this charge, the rape conviction, and the pending case of
 21 the witness intimidation.

22 So you come before the Court with a criminal
 23 history where had you shown any inclination to
 24 significantly and seriously address substance abuse
 25 problems, you've had many, many opportunities throughout
 DOCKET 41449 177 of 428

1 your life, and now here at age 39, say: "Well, let's
2 fashion a sentence that addresses your substance abuse
3 problems," that cannot be a focus of the Court here.
4 Because you haven't shown any real inclination or
5 seriousness about addressing it up to now.

6 The Court is concerned about the level of your
7 substance abuse. The PSI indicates that you were
8 intoxicated essentially on a daily basis for several
9 months leading up to your arrest. There's been a lifelong
10 use of illegal controlled substances and marijuana.
11 Methamphetamine use for the last 14 years. Sometimes
12 people say: "Well, those are victimless crimes. You're
13 only hurting yourself," but that's not true. You hurt
14 society. You commit crimes under the influence of things.
15 You committed these crimes against Ms. Whitten
16 significantly under the influence of alcohol.

17 I'm going to follow the recommendation of the
18 State in this matter. Your unified sentence in this case
19 will be a 30 year unified sentence. It will consist of
20 ten years fixed, followed by 20 years indeterminate. I am
21 recommending the Therapeutic Community for you because I
22 don't know what the rules are going to be ten years from
23 now, or, actually, ten years minus 115 days.

24 I do this primarily for the reasons stated.
25 Again, I don't address rehabilitative measures in this

569

1 instance. I'm addressing the protection of society. You
2 have had a significant criminal history, and this is a
3 significant conviction. There is a particular amount of
4 punishment that society expects for this type of a crime
5 with this type of criminal history. And any lesser
6 sentence depreciates the seriousness of this crime under
7 these circumstances and could not act as a deterrent to
8 you or to anyone else under these particular
9 circumstances.

10 Are there any questions from the State?

11 MS. GARDNER: No, thank you, Judge.

12 THE COURT: Any questions from the defense?

13 MR. HULL: No, Your Honor.

14 THE COURT: You will also be handed a notice
15 here of your duty to register as a sex offender under
16 Idaho law.

17 You're excused. And we are in recess.

18 Oh, the record should reflect that the no
19 contact order is being terminated as having been part of
20 the final judgment.

21 (The proceedings concluded at 8:50 a.m.)

22 ---o0o---

23
24
25

570

1 CERTIFICATE

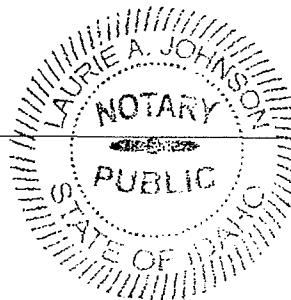
2 STATE OF IDAHO)
3) SS.
4 COUNTY OF KOOTENAI)
5

6 I, Laurie A. Johnson, a duly qualified and
7 Certified Shorthand Reporter for the First Judicial
8 District of the State of Idaho, DO HEREBY CERTIFY:
9 That the above-within and foregoing transcript
10 contained in pages numbered 1 through 572 is a complete,
11 true and accurate transcription to the best of my ability
12 of my shorthand notes taken down at said time and place;

13 I FURTHER CERTIFY, that said transcript contains
14 all material designated in the MOTION AND ORDER FOR
15 PREPARATION OF TRIAL TRANSCRIPT or any requests for
16 additional transcript which have been served on me.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 affixed my official seal this 4th day of June, 2009.

19 *Laurie A. Johnson*
20 LAURIE A. JOHNSON, C.S.R. No.: 720
21 Official Court Reporter
22 First Judicial District, State of Idaho
23 My Commission Expires 2/6/10
24
25



571

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

2012 JAN -6 PM 4:11

CLERK DISTRICT COURT
Frank Lawson
DEPUTY

SEAN M. COOK,)
)
Plaintiff,)
)
vs.)
)
STATE OF IDAHO,)
)
Defendants.)

ORDER OF REASSIGNMENT

CV 2011-10315

IT IS HEREBY ORDERED that the above matter is reassigned to the Honorable **John R. Stegner**, Administrative District Judge for the Second Judicial District, for the reassignment to a District Judge from the Second Judicial District for all further proceedings. Pursuant to the Idaho Supreme Court Amended Order for Assignment of Judges to the First Judicial District dated November 2, 2011, this reassignment shall be considered an appointment by the Supreme Court pursuant to Idaho Rule of Civil Procedure 40(d)(1)(iii).

DATED this 6th day of January, 2012.

John T. Mitchell

JOHN T. MITCHELL
Administrative District Judge for the
First Judicial District

CERTIFICATE OF MAILING

I hereby certify that on the 6 day of Jan, 2012, a true and correct copy of the foregoing was sent via facsimile, to the following:

Honorable John R. Stegner
Faxed: (208) 883-5719 ✓

Honorable Judge Haynes
Interoffice ✓

#2828

Kootenai County Prosecutor
Faxed: (208) 446-1833 ✓

Sean Michael Cook
I.C.C. Unit K
P.O. Box 70010
Boise, ID 83707
Mailed ✓

CLIFFORD T. HAYES
CLERK OF THE DISTRICT COURT

By Glenn Clausen
Deputy Clerk

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 1/23/12
AT 9:25 O'CLOCK A.M.
CLERK DISTRICT COURT

James Hoffman
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

SEAN M. COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

ORDER ASSIGNING JUDGE .

It is **ORDERED** that Judge John R. Stegner, whose chambers are located in Moscow, Idaho, is assigned to preside over all further proceedings in the above-entitled matter.

Since the original case file remains in Kootenai County, the attorneys are directed to send copies of any pleadings filed to Judge Stegner's chambers in Moscow, Idaho. The mailing address is PO Box 8068, Moscow, ID 83843 and the facsimile number is 208-883-5719.

DATED this 19th day of January 2012.

John R. Stegner

John R. Stegner
Administrative District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copies of the foregoing ORDER ASSIGNING JUDGE were transmitted by facsimile to:

Kootenai County Prosecutor
(208) 446-1833

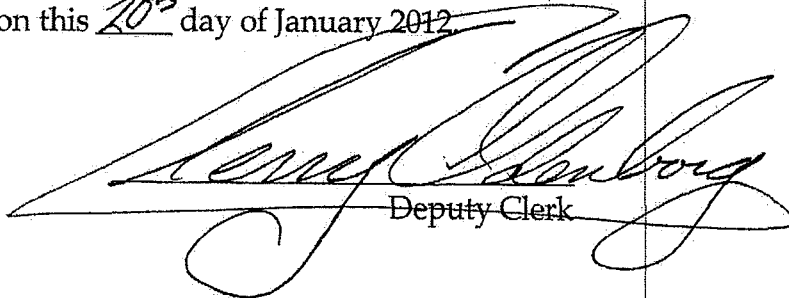
and mailed to:

Sean Michael Cook
I.C.C. Unit K
PO Box 70010
Boise, ID 83707

and sent by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 20th day of January 2012



Deputy Clerk

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

2012 JAN 23 AM 10:49

CLERK DISTRICT COURT
Susan Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	RESPONDENT'S ANSWER TO
vs.	)	PETITION FOR
	)	POST-CONVICTION RELIEF
STATE OF IDAHO)	
Respondent.)	
_____)	

RESPONDENT, STATE OF IDAHO, through the office of the Kootenai County Prosecuting Attorney, Donna Gardner, Deputy Prosecuting Attorney, responds to the allegations contained in the above referenced Petition for Post-Conviction Relief filed by the Petitioner and states as follows:

I

Respondent DENIES all allegations not specifically admitted herein.

II

Respondent ADMITS the allegations contained in paragraph(s) 3 and 7 of the

Petition for Post-Conviction Relief.

III

The Respondent DENIES the allegations contained in paragraph 2, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49 of the Petition for Post Conviction Relief.

IV

The Respondent Lacks Sufficient Knowledge of the allegations contained in paragraphs 1 and 5 of the Petition for Post Conviction Relief, and therefore DENIES those allegations.

V

DEFENSES

First Affirmative Defense

The Petition for Post-Conviction Relief fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The Petition for Post-Conviction Relief fails to allege sufficient facts that would vest jurisdiction in this Court.

Respondent, having fully answered all allegations contained in the Petition

for Post-Conviction Relief filed herein, Respondent hereby respectfully prays as follows:

- 1.) that this matter be dismissed for lack of jurisdiction;
- 2.) that his matter dismissed for failure to state a claim;
- 3.) that this matter be dismissed on its merits;
- 4.) that petitioner take nothing by way of the Petition for Post-Conviction Relief.
- 5.) for such further relief as the Court deems just.

DATED this 20 day of Jan, 2012.

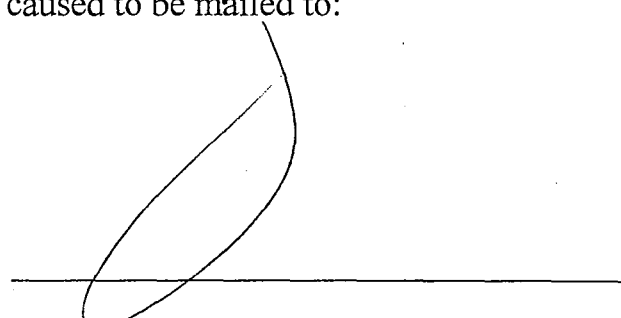
BARRY MCHUGH
Prosecuting Attorney for
Kootenai County, Idaho


DONNA GARDNER
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of Jan, 2012, a true and correct copy of the foregoing was caused to be mailed to:

SEAN COOK
I.C.C. Unit K
P.O. Box 70010
Boise, ID 83707


RESPONDENT'S ANSWER TO PETITION
FOR POST CONVICTION RELIEF: Page 3

STATE OF IDAHO } ss
COUNTY OF KOOTENAI

FILED: 3/8/12

AT 4:51 O'CLOCK P.M.
CLERK, DISTRICT COURT

Arlen Hoffman
DEPUTY

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

SEAN M. COOK,)
)
Petitioner,)
)
v.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

**ORDER GRANTING
LEAVE TO PROCEED
WITHOUT PAYMENT OF
COURT FEES AND ORDER
APPOINTING COUNSEL**

The Petitioner, Sean M. Cook ("Cook"), has moved this Court for leave to proceed on partial payment of court fees for purposes of pursuing his post-conviction claim and for the appointment of counsel to represent him in this action. Cook filed a Verified Petition for Post-Conviction Relief with this Court on December 28, 2011.

**ORDER GRANTING LEAVE TO
PROCEED WITHOUT PAYMENT
OF COURT FEES AND ORDER
APPOINTING COUNSEL**

BACKGROUND

In Kootenai County Case No. CR-F-08-13006, a jury found Cook guilty of the charge of Rape, a felony in violation of I.C. § 18-6106. *See Judgment* (entered Jan. 30, 2009). Cook was then sentenced to not less than ten and not more than thirty years imprisonment. *Id.* at 2. The court later entered an order reducing Cook's sentence to not less than ten and not more than twenty years imprisonment upon Cook's motion. *Order Reducing Sentence* (entered Feb. 4, 2009). Cook later appealed from his judgment of conviction alleging prosecutorial misconduct and an excessive sentence. *See State of Idaho v. Sean M. Cook*, Unpublished Opinion, Docket No. 36145 (Ct. App. Nov. 22, 2010). The Idaho Court of Appeals upheld Cook's conviction finding that the prosecutor did not impermissibly vouch for the State's witnesses in the prosecutor's un-objected to closing argument. *Id.* at 5. The court of appeals also held that the district court did not abuse its discretion in sentencing Cook. *Id.* The Idaho Supreme Court denied review and issued a Remittitur to this Court on January 14, 2011.

ANALYSIS

A. Leave to proceed without payment of court fees.

Court filing fees are not charged in post-conviction proceedings. I.C. § 31-3201A(1)(b)(xii). In addition, Cook established through his Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees that he has very limited financial resources. Accordingly, Cook should be granted leave to proceed without

ORDER GRANTING LEAVE TO
PROCEED WITHOUT PAYMENT
OF COURT FEES AND ORDER
APPOINTING COUNSEL

Page 2

payment of court fees even though it is technically not necessary.

B. Appointment of counsel.

A court presented with a request for appointment of counsel should rule on that issue before reaching the substantive merits of the post-conviction petition. *Judd v. State*, 148 Idaho 22, 25, 218 P.3d 1, 4 (Ct. App. 2009). In post-conviction proceedings, a court-appointed attorney “may be made available” to an applicant. I.C. § 19-4904. The decision is left to the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004) (citation omitted). The court must determine whether the applicant “is able to afford counsel and whether this is a situation in which counsel should be appointed.” *Id.* at 793, 1112. “A needy applicant for post-conviction relief is entitled to court-appointed counsel unless the trial court determines that the post-conviction proceeding is frivolous.” *Id.* at 792, 1111. A proceeding is frivolous if it is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” *Id.* citing I.C. § 19-852(b)(3). If the petitioner has alleged facts “giving rise to the possibility of a valid claim, the trial court should appoint counsel in order to give the petitioner the opportunity to work with counsel and properly allege the necessary supporting facts.” *Judd v. State*, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009) (emphasis in original).

A claim of ineffective assistance of counsel may be alleged in a post-conviction application. *Kuehl v. State*, 145 Idaho 607, 610-11, 181 P.3d 533, 536-37

ORDER GRANTING LEAVE TO
PROCEED WITHOUT PAYMENT
OF COURT FEES AND ORDER
APPOINTING COUNSEL

Page 3

(Ct. App. 2008). To prevail on an ineffective assistance of counsel claim, the petitioner must show that: (1) his attorney's performance was below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for his attorney's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).


Cook has alleged a non-frivolous claim of ineffective assistance of counsel based on his trial counsel's alleged errors. Cook has alleged facts showing that his trial counsel's performance in failing to exclude certain evidence may have fallen below the objective standard of reasonable representation and that but for those errors, there is a reasonable probability that the jury would have found him not guilty of the crime charged. Accordingly, counsel should be appointed to assist Cook in pursuing his post-conviction claim.

Good cause appearing,

IT IS ORDERED, that Petitioner is GRANTED leave to proceed without payment of court fees.

IT IS FURTHER ORDERED, that the Petitioner's Motion for Appointment of Counsel is GRANTED. Daniel G. Cooper is APPOINTED to represent the Petitioner in this case.

DATED this 8th day of March 2012.


John R. Stegner
District Judge

ORDER GRANTING LEAVE TO
PROCEED WITHOUT PAYMENT
OF COURT FEES AND ORDER
APPOINTING COUNSEL

Page 4

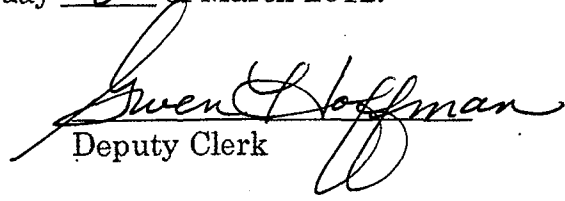
CERTIFICATE OF SERVICE

I do hereby certify that a full, true and correct copy of the foregoing was delivered in the following fashion:

Donna Gardner	<input type="checkbox"/>	U.S. Mail
Kootenai County Prosecuting Attorney	<input type="checkbox"/>	Overnight Mail
P.O. Box 9000	<input type="checkbox"/>	Fax
Coeur d'Alene, ID 83816	<input checked="" type="checkbox"/>	Hand Delivery <i>-IO</i>

Daniel G. Cooper	<input type="checkbox"/>	U.S. Mail
Attorney at Law	<input type="checkbox"/>	Overnight Mail
P.O. Box 387	<input checked="" type="checkbox"/>	Fax <i>- 765-5249</i>
Coeur d'Alene, ID 83816	<input type="checkbox"/>	Hand Delivery

On this day 8 of March 2012.


 Deputy Clerk

**ORDER GRANTING LEAVE TO
PROCEED WITHOUT PAYMENT
OF COURT FEES AND ORDER
APPOINTING COUNSEL**



ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS

DANIEL G. COOPER
Attorney at Law
408 Sherman Ave, Suite 203
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

2012 MAR 15 PM 4:12

CLERK DISTRICT COURT
Cathy Victoria
DEPUTY


IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	NOTICE OF APPEARANCE	
)		
v.)		
)		
STATE OF IDAHO,)		
)		
Respondent.)		

Notice is hereby given that the undersigned attorney, Daniel G. Cooper, hereby appears on behalf of the Petitioner, Sean M. Cook in the above-entitled matter pursuant to Court appointment.

You are hereby notified that all future correspondence and pleadings to be served upon Petitioner, Sean M. Cook should be mailed to the undersigned attorney at P.O. Box 387, Coeur d'Alene, ID 83816-0387 or sent by facsimile to (208) 765-5249, until further notice from the Court.

DATED this 15th day of March, 2012.

BY: 
DANIEL G. COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Notice of Appearance was personally served by placing a copy of the same in the U.S. Mails, postage prepaid or as otherwise indicated below on the 15th day of March, 2012 addressed to:

Donna Gardner, Deputy
Kootenai County Prosecuting Attorney's Office
P.O. Box 9000
Coeur d'Alene, ID 83816

[] U.S. Mail, Postage prepaid
[X] Facsimile (208) 446-1800



Daniel G. Cooper

DRAFT

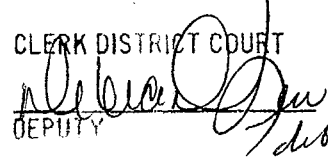
STATE OF IDAHO } SS
COUNTY OF KOOTENAI }

2012 MAR 21 PM 3: 32

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	RESPONDENT'S MOTION FOR
	)	SUMMARY JUDGMENT AND
	)	MEMORANDUM
	)	IN SUPPORT
vs.)	
)	
STATE OF IDAHO)	
)	
Respondent.)	
)	

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Donna Gardner,
Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby files Respondent's Motion
for Summary Judgment and Memorandum in Support.

PROCEDURAL HISTORY

Petitioner was charged with Rape and proceeded to jury trial, wherein a verdict of guilty
was returned. Petitioner was sentenced by First District Court Judge Lansing Haynes initially on
January 16, 2009, but this sentence was modified soon afterwards from a Rule 35 Motion raised
by defense and judgment was entered on January 30, 2009.

Petitioner then proceeded to file an appeal of the jury decision, raising two issues: the

denial of his motion for mistrial and his inability to fully cross-examine a state's witness, Hoss Dillon. Petitioner's appeals ended on January 14, 2011 with a denial by the Idaho Supreme Court of his petition for review of the appellate court's affirmation of the judgment of conviction.

PETITIONER'S CLAIMS

Petitioner filed this action on December 27, 2011. In this Petition, the Petitioner raises two (2) new issues: ineffective assistance of counsel and prosecutorial misconduct.

- a. Petitioner has failed to provide any supporting evidence of his claim of ineffective assistance of counsel and therefore that issue should be summarily dismissed without hearing.

The Petitioner's ineffective assistance of counsel claim revolves around two areas. The first claim is basically that the defense counsel's conceding the admissibility of some limited testimony, his actions fell below the standard of reasonableness and but for his concession, the jury outcome would have been different. This is Petitioner's argument with regard to the Court's decision to allow testimony from Mr. Nelson, a former cellmate of Petitioner, to whom Petitioner made admissions to committing the crime of forcible rape on Ms. Whitten and further made threats to Nelson when he learned Nelson was going to testify about his admissions. Interestingly, Petitioner argues that the admission of these threats could have also been interpreted by the jury as made because he had been falsely accused (See Petition, paragraph #13). Petitioner does not mention that the Court in allowing this limited testimony from Mr. Nelson, excluded evidence of prior similar acts with other victims, as the court found this to be more propensity evidence in the 404(b) balancing test (Trial Transcript pg. 111). The court also excluded testimony from Mr. Sawley, another inmate who would have testified that Petitioner made admissions to committing this crime to him also. Furthermore, the court did not permit

testimony from Sawley or Nelson regarding Petitioner's threats that he should have killed the victim after raping her (Trial Transcript pg. 325 and 366). Petitioner's attorney raised objections and argued successfully against the State's IRE 404(b) motion (Trial Transcript pgs. 107- 120). Petitioner's attorney conceded a small portion of this testimony as it clearly fell under the allowance of the Idaho Rules of Evidence. Any objection that defense counsel could have made, would have been meritless, and counsel is not required to make an objection that is without merit. *Lee v. Kemna*, 2001 WL 34093967 (U.S., 2001).

Furthermore, a small concession, especially in light of the fact that the evidence is clearly admissible, often goes a long way in obtaining exclusion of other, more damaging, evidence; and therefore defense counsel's actions appear to have been strategic decisions and not incompetence. Even so, the Court made its own analysis of this proposed evidence and made its own decision as to whether it would allow any of this testimony, irregardless of defense counsel's concessions. Petitioner has failed to show how defense counsel's conceding the admissibility of a couple of statements fell below the standard of reasonableness and further has failed to show any evidence of how objecting to all these statements would have made any difference in the Court's ultimate decision to admit this evidence and ultimately the jury's decision.

The second part of this argument of ineffective assistance of counsel goes to a witness', Hoss Dillon's, testimony of statements made by the victim to him minutes after the commission of the crime. Petitioner asserts that all statements made by the victim to this witness are inadmissible hearsay because they were not excited utterances. Actually, they were uttered within a short time after the commission of the crime while the victim was still emotionally

upset, and therefore were not clearly inadmissible as Petitioner claims (See Trial Transcript beg. pg. 225-229, 235, 239-248).

Additionally, the victim had already testified and had been subject to challenges to her credibility by defense counsel in cross-examination. Defense counsel challenged the victim's credibility and inconsistency of prior statements made both in previous court proceedings as well as out-of-court statements made to Dillon, the police and her boyfriend. Failure to object to these statements was more likely a strategic decision on the part of defense counsel used to bolster his defense that the victim made up the forcible rape claim as a means of avoiding responsibility for having an affair when she was in a relationship with a friend of Dillon. (See Trial Transcript of defense closing, pgs. 521-544). Again, Petitioner has failed to show how defense counsel not objecting to these statements made by the victim fell below the standard of reasonableness and further has failed to show any evidence of how objecting to these prior statements would have made a difference in the jury's decision.

- b. Petitioner's claim of prosecutorial misconduct in statements made by the prosecutor during closing arguments is unsupported by anything other than speculation and therefore that issue should be summarily dismissed without hearing.

Here, Petitioner claims that the prosecutor committed misconduct in closing statements when using a hypothetical scenario to assist the jury in understanding the burden of beyond a reasonable doubt. Petitioner then argues that the prosecutor committed misconduct again during closing when arguing that the jury could consider motives of witnesses in assessing the evidence. In both of these areas, the court had provided instructions. The prosecutor's comments were consistent with these court instructions.

LEGAL AUTHORITY IN SUPPORT OF SUMMARY DISMISSAL

1. An application for relief under I.C. §19-4901, et seq. must be sufficiently verified.

Idaho Code Section §19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative.

Summary dismissal of an application pursuant to I.C. §19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App.1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.App.1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct.App.1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct.App.1986).

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.App.1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must

contain much more than “a short and plain statement of the claim” that would suffice for a 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. I.C. § 19-4903. In other words, the **application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.** *Franck-Teel v. State*, 143 Idaho 664, 152 P.3d 25 (App.Ct., 2006) [emphasis added].

To justify an evidentiary hearing in a post-conviction relief proceeding, it is incumbent on the applicant to tender written statements from potential witnesses who are able to give testimony themselves as to facts within their knowledge. *Drapeau v. State*, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct.App.1982). Petitioner here has failed to submit such witness affidavit(s).

2. Legal Standards Applicable To Summary Dismissal Under Idaho Code §19-4906 (c).

Generally, a claim for post-conviction relief is subject to summary dismissal pursuant to §19-4906 if the applicant “has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof.” *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). However, Petitioner Cook’s claims that his trial counsel was ineffective for simply not voicing objections to certain evidence that was clearly admissible under the Idaho Rules of Evidence raises only questions of law, which the trial court weighed in ruling it admissible. *Brown v. State*, 137 Idaho 529, 533, 50 P.3d 1024, 1029 (Ct. App. 2002), review denied. A post-conviction claim that raises only a question of law is suitable for disposition on the pleadings. *Matthew v. State*, 113 Idaho 83, 85, 741 P.2d 370, 372 (Ct. App.

1987). Allegations are insufficient for a grant of relief when they do not justify relief as a matter of law. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975).

3. Standards Applicable To Cook's Ineffective Assistance Of Counsel Claim

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct.App.1992). An applicant seeking relief for ineffective assistance must meet a two-pronged test. First, he must show that the attorney's representation did not meet objective standards of competence, i.e., that counsel's conduct did not fall "within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Second, the applicant must demonstrate that he was prejudiced by his attorney's deficient performance. *Strickland*, 466 U.S. at 691-96, 104 S.Ct. at 2066-69; *Aragon*, 114 Idaho at 760-61, 760 P.2d at 1176-77. 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*, 114 Idaho at 761, 760 P.2d at 1177.

As explained by the Idaho Supreme Court in *Dunlap v. State*, 141 Idaho 50, 58-59, 106 P.3d 376, 384-85 (2005):

Article I, section 13 of the Idaho Constitution guarantees a criminal defendant 'reasonably competent assistance of counsel. *State v. Wood*, 132 Idaho 88, 95, 967 P.2d 702, 709 (1998) (quoting *Gibson v. State*, 110 Idaho 631, 635, 718 P.2d 283, 287 (1986)). Likewise, the Sixth Amendment via the due process clause of the Fourteenth Amendment assures a criminal defendant effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674, 691-92 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). There is a strong presumption that trial counsel was competent and that trial tactics were based on sound legal strategy *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; *State v. Mathews*, 133

Idaho 300, 306, 986 P.2d 323, 329 (1999); *Wood*, 132 Idaho at 95, 967 P.2d at 709; *Aragon*, 114 Idaho at 760, 760 P.2d at 1176.

Our Supreme Court adopted the *Strickland* two-prong test to evaluate whether a criminal defendant received effective assistance of counsel. *Mathews*, 133 Idaho at 306, 986 P.2d at 329; *Wood*, 132 Idaho at 95, 967 P.2d at 709; *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). A defendant must prove that counsel's performance was deficient and the deficiency prejudiced the case. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.E.2d at 693; *Mathews*, 133 Idaho at 306, 986 P.2d at 329; *Wood*, 132 Idaho at 95-96, 967 P.2d at 709-10. To show a deficiency the defendant must show the attorney's representation fell below an objective standard of reasonableness. *Gilpin-Grubb v. State*, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002). To prove prejudice, the defendant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.*

The "benchmark for judging any claim of ineffectiveness must be whether 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." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Even if a defendant shows that particular errors of counsel were unreasonable, the defendant must also show that they actually had an adverse effect on his defense. *Id.* at 693.

The Court in *Strickland* cautioned against the natural instinct to use the advantage of hindsight to find error:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." 466 U.S. at 689 (internal citations omitted).

Thus, a petitioner must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was "outside the wide range of professionally competent assistance." *Claibourne v. Lewis*, 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 690). As explained by the Idaho Supreme Court in *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992), "[t]he constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." Rather, Cook has the burden of showing that his trial counsel's deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *Ivey*, 123 Idaho at 80, 844 P.2d at 709.

Furthermore, defense counsel's failure to make certain objections at trial would not to be ineffective assistance where the evidence would have come in anyway. Petitioner made a prior inconsistent statement and statements against interest to cellmate Nelson. That evidence was clearly admissible. The victim, Whitten, testified to her statements made to Hoss. The evidence was already in. If anything, Hoss' testimony regarding the victim's statements might have been cumulative, but the admission of cumulative evidence does not make defense counsel's failure to raise an objection ineffective assistance. *United States v. Shuey*, 541 F.2d 845 (9th Cir.1976). *See also Callins v. Collins*, 998 F.2d 269 (5th Cir.1993) (counsel's failure to raise affirmative defense of self-defense in Texas murder prosecution did not amount to ineffective assistance in that robber has no right of self-defense against his victim); *Bertolotti v. Dugger*, 883 F.2d 1503

(11th Cir.1989) (counsel held to have provided effective assistance though counsel failed to raise voluntary intoxication defense to specific intent crimes of murder, robbery, and burglary where Florida Supreme Court held evidence of intoxication was not sufficient to warrant voluntary intoxication instruction); *York v. Lockhart*, 856 F.2d 61 (8th Cir.1988) (counsel's failure to raise a defense based on state's failure to adduce corroborating testimony of accomplice did not constitute ineffective assistance). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066. Thus, in order to obtain relief, Cook must show that the result in his case would have been different had the court sustained objections raised by defense counsel.

“Trial tactics and strategy choices are the province of trial counsel and will not be deemed deficient in the absence of evidence that the decision resulted from inadequate preparation, ignorance of the law or other objectively ascertainable shortcomings.” *Huck v. State*, 124 Idaho 155, 857 P.2d 634 (Ct.App.1993); *State v. Chapman*, 120 Idaho 466, 469, 816 P.2d 1023, 1026 (Ct.App.1991).

Even if the decision to object to admissible evidence coming in did rise to the level of incompetence, this Court cannot speculate as to the impact the absence of objection might have had on the judge's decisions and ultimately the jury. In other words, Petitioner Cook has not shown how he was prejudiced by his attorney's deficient performance.

4. Petitioner has failed to provide sufficient evidence to support his claim of prosecutorial misconduct in closing arguments.

Petitioner's claim of prosecutorial misconduct does not appear to have been raised in the appeal and should be barred from consideration in this proceeding. Regardless of this court's decision on that point, no prosecutorial misconduct occurred during the prosecutor's closing

or rebuttal arguments. No remark made by the prosecutor constituted vouching of state's witnesses nor did they refer to any evidence not contained within the record. Additionally, comments made by the prosecutor in its rebuttal constituted invited reply to the myriad of allegations and charges leveled by Petitioner during his closing argument.

a. Standard for prosecutor misconduct claims.

Questions of prosecutorial misconduct, absent a defense objection at trial, are governed by the plain error standard of review. *United States v. Sanchez*, 176 F.3d 1214, 1218 (9th Cir. 1999) (quoting *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994); *United States v. Young*, 470 U.S. 1, 14 (1985); *United States v. McChristian*, 47 F.3d 1499, 1506 (9th Cir. 1994); *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993). The Court of Appeals reviews claims of prosecutorial misconduct for abuse of discretion when the district court denied an objection to closing argument. *United States v. Tarn*, 240 F.3d 797, 802 (9th Cir. 2001). The defendant must show that it is more probable than not that the misconduct materially affected the verdict. *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

Counsel are entitled to a reasonable degree of latitude in the presentation of closing argument. *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). To obtain relief, the defendant must show that it is “ ‘more probable than not that the misconduct materially affected the verdict.’ ” *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998) (quoting *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994)). The prosecution's alleged misconduct cannot be viewed in a vacuum, but must be viewed in the context of the entire trial. See *Hinton*, 31 F.3d at 824.

On appeal, claims of prosecutorial misconduct must be reviewed against the entire record. *Young*, 470 U.S. at 16; *United States v. Sherlock*, 962 F.2d 1349, 1364-65 (9th Cir.

1989): *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990). This review includes looking at the conduct of defense counsel too. The reviewing court generally defers to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct. *United States v. Patterson*, 819 F.2d 1495, 1508 (9th Cir. 1987); *United States v. Rewald*, 889 F.2d 836, 860 (9th Cir. 1989), amended by, 902 F.2d 18 (1990) (claim of prosecution misconduct reviewed de novo); cf. *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) (abuse of discretion). A court should reverse only if, viewing the error in the context of the entire record, the impropriety seriously affected the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction, would amount to a miscarriage of justice. *United States v. Parker*, 991 F.2d 1493, 1498 (9th Cir. 1993). *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) reiterates:

According to the Supreme Court's most recent articulation of the plain error standard, before an appellate court may address and correct an error not raised at trial, several conditions must be satisfied: '[T]here must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' ' If all conditions are met, an appellate court may then exercise its discretions to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' *Johnson v. United States*, 520 U.S. 461, (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732, (1993))(citations and internal quotation marks omitted). *Id.* at 516.

To obtain a reversal for prosecutorial misconduct, a defendant must demonstrate that he was prejudiced by the misconduct. *United States v. Christophe*, 833 F.2d 1296, 1301 (9th Cir. 1987).

b. The prosecutor did not commit misconduct by "vouching" for the State's witnesses.

Cook alleges that the prosecutor improperly vouched for the credibility of witnesses Whitten and Nelson during its closing argument. This assertion lacks merit as: (1) none of the

argument was improper vouching; (2) the court instructed the jury that what the lawyers say is not evidence; (3) the court instructed the jury that it could consider motives of the witnesses in assessing credibility; and (4) the argument did not affect the verdict on the overwhelming evidence in this case.

Where appellant fails to object, the court must review for plain error. *See United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997); *United States v. Frederick*, 78 F.3d 1370, 1379 (9th Cir. 1996). This Court reverses “only if, viewing the error in the context of the entire record, the impropriety ‘seriously effected the fairness, integrity, or public reputation of judicial proceedings, or where failing to reverse a conviction would amount to a miscarriage of justice.’” *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)(quoting *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991)).

The Petitioner claims that the prosecutor committed misconduct by “vouching.” He specifically challenges statements made as to the evidence received from witnesses Nelson and Whitten. The prosecutor pointed out facts submitted through testimony and asked the jury to consider the demeanor and motives of the witnesses, just as the court had instructed the jury it was allowed to do. Contrary to defendant's assertions, the arguments are not vouching; each properly addressed the facts submitted through testimony and why the jury should believe or disbelieve that testimony.

In order to assess the defendant's claim, this Court must examine the entire context of the alleged misconduct. As the Supreme Court wrote: “... [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.” *United States v. Young*, 470 U.S. 1,11 (1985). A court

must examine the entire proceeding “to determine whether the prosecutor's remarks ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Viewed in context with the overall trial, the prosecutor's comments did not rise to the level of improper vouching.

“Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony.” *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). In evaluating allegations of improper vouching this Court should consider the following:

the form of the alleged vouching; whether the alleged vouching implied that the prosecutor had extra-record knowledge of or the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal opinion asserted; the timing of the alleged vouching; the extent to which the witness's credibility was attacked, the specificity and timing of the curative instruction; and the importance of the witness's testimony and the alleged vouching to the case overall. *Necoechea*. 986 F.2d at 1277,

The State here did not improperly vouch as: (1) there was no reference to any evidence outside the record; and (2) there was no suggestion that the prosecutor or the court were monitoring the veracity of the state witnesses. “This argument is not vouching as it in no way refers to evidence outside of the record nor does it suggest that the prosecutor or the court was monitoring the veracity of the witnesses.” *Necoechea*, 986 F.2d at 1277.

In this trial the defendant/Petitioner testified. The State in its closing addressed the weighing of credibility of all witnesses by the jury, as the jury necessarily had to make a determination of which version of events (Petitioner's or victim's) to believe. The State's reference to Nelson's testimony and his motives was a legitimate common sense inquiry. It is only logical that a jury is going to question the motives of a cellmate witness.

Additionally, in *United States v. Perez*, the court held that a prosecutor's comments during closing argument that witnesses were reliable and the jury "can count on them," as well as asking the jury to consider whether witnesses had a motive to lie were not reversible error. This ruling was based on the fact that the prosecutor did not suggest knowledge of facts not before the jury, and did not imply existence of extraneous proof of the witness' credibility. *United States v. Perez*, 144 F.3d 204, 210 (2nd Cir. 1998).

In the present case, much like *Perez*, the comment by the prosecutor did not suggest knowledge of facts not before the jury, nor did it imply the existence of extraneous proof of witness' credibility. *Id.*

- c. Even if the prosecutor's comments were in fact vouching, they would only amount to harmless error.

No matter how egregious the comment may be, once the appellate court determines that the comment was erroneous, it must still determine whether it was "harmless." *United States v. Solomon*, 825 F.2d 1292, 1300 (9th Cir. 1987); *United States v. Hastings*, 461 U.S. 499 (1983). Even errors of constitutional magnitude may be harmless if, based on a review of the entire record, it is clear beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Hastings*, 461 U.S. at 508-09; *Chapman v. California*, 386 U.S. 18, 24(1967).

Here, if there was any error, the error was harmless, as Petitioner cannot show any prejudice. See *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (holding that prosecutors reference to fact that a government witness could be prosecuted for perjury if he lied "was at worst mild vouching" which when "balanced against the other, 'non vouched' evidence" does "not amount to reversible error"); *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984) (There is no reversible error unless misconduct in closing argument was "so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge"); *United*

States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994) (To obtain a reversal for prosecutorial misconduct, a defendant must demonstrate that he was prejudiced in a manner which more probably than not materially affected the verdict); *United States v. Martinez*, 981 F.2d 867, 871 (6th Cir. 1992) (holding that an argument regarding a law enforcement officer risking his career by lying was unlikely to prejudice the defendant and was not reversible error).

More importantly, even if there was error, it did not rise to the level of “seriously affecting the fairness, integrity or public reputation of the judicial proceedings.” The jury, the judge of the facts, had all the evidence in front of it for its deliberations. The exhibits went back with the jurors for their inspection. They were free to consider and ignore what evidence they would need to arrive at their verdict. They were advised during trial that they determined the facts of the case, and that they could ignore what the lawyers said. Moreover, the court read verbatim to the jury advising them that the words of the attorneys were not evidence.

d. There was no prosecutorial misconduct in the “golfing hypothetical” given in rebuttal argument because the prosecutor made invited responses to the defense attorney's closing argument and did not diminish the state's burden.

The defendant claims that the Government diminished the state's burden of proof in its use of a “golfing hypothetical.” The example was used in rebuttal in response to defense counsel's addressing the state's burden in his closing argument and immediately launching into his “actions speak louder than words” argument (Trial Transcript, page 521). The Petitioner's claim that the state diminished its burden by defining “reasonable doubt” as no doubt is without any merit. If Petitioner's interpretation matched the jury's interpretation, then the jury would have placed a higher burden on the state, not a lesser. In other words, if the jury believed the hypothetical required that the state had to prove there was no doubt at all that the crime occurred, then the State significantly increased its burden to “beyond a shadow of a doubt.”

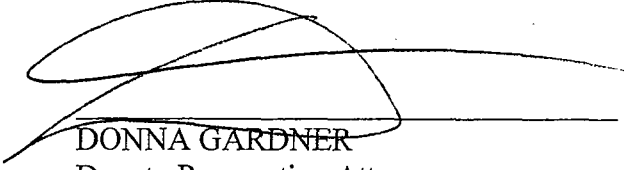
Every slight excess of a prosecutor does not require that a verdict be overturned and a new trial ordered. Prosecutorial misconduct does not require reversal unless the misconduct deprives the defendant of a fair trial. The test for determining whether prosecutorial misconduct requires a mistrial is whether the remarks were improper and whether they prejudicially affected substantial rights of the defendant. Also, misconduct does not require reversal where there is strong evidence of the defendant's guilt. 852 F.2d at 1539.

For the reasons discussed above, the prosecutor's remarks were not improper. However, even if they were, they did not deprive the defendant of a fair trial. In this case, the evidence of the defendant's guilt was strong. "[T]he presence of a factually strong case against a defendant runs contrary to the notion that improper remarks by the prosecutor materially affected the verdict." *United States v. McChristian*, 47 F.3d 1499, 1508 (9th Cir. 1995).

In reviewing the entire record, the allegations of prosecutorial misconduct fail because any supposed impropriety did not seriously affected the fairness, integrity or public reputation of judicial proceedings.

WHEREFORE, Respondent respectfully requests that this Court GRANT Respondent's requested relief and SUMMARILY DISMISS this cause.

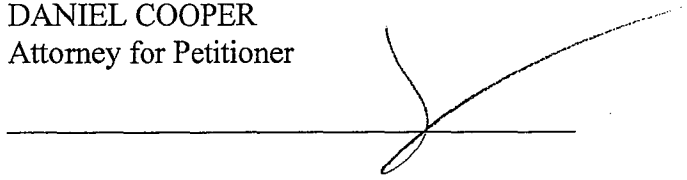
DATED this 21 day of March, 2012.


DONNA GARDNER
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 21 day of March, 2011, a true and correct copy of the foregoing RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT was caused to be faxed/hand delivered to:

DANIEL COOPER
Attorney for Petitioner



ORIGINAL

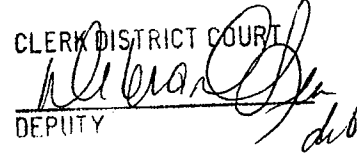
BARRY McHUGH
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, ID 83814
(208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss

2012 MAR 21 PM 3:31

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)

Petitioner,)

vs.)

STATE OF IDAHO,)


Respondent.)

Case No. **CV11-10315**

MOTION TO SET FOR HEARING

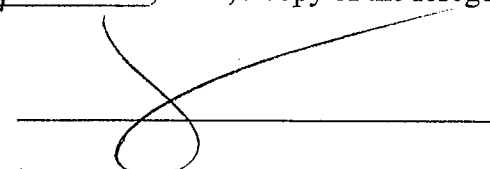
COMES NOW, DONNA GARDNER, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby moves the above entitled Court for its Order setting the above case for a Motion for Summary Judgment/Disposition based on the State's Motion for Summary Judgment previously filed herein.

DATED this 21 day of March, 2012.


DONNA GARDNER
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 21 day of March, 2012, a copy of the foregoing was caused to be FAXED as follows:
DAN COOPER



MOTION TO SET FOR
HEARING:

Page 1

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT

Arwen Hoffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315
ORDER SETTING HEARING

It is ORDERED that hearing of the respondent's Motion for Summary Judgment will be conducted commencing at 1:00 P.M. on April 24, 2012, at the Kootenai County Courthouse.

DATED this 29th day of March 2012.

John R. Stegner

John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full,
true and correct copy of the foregoing
ORDER SETTING HEARING was transmitted
by facsimile to:

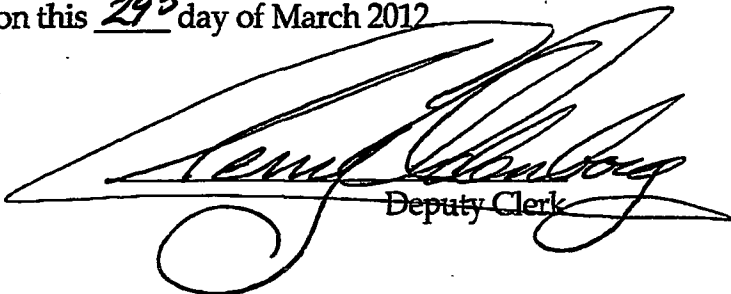
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 29th day of March 2012



Deputy Clerk



ORIGINAL

DANIEL G. COOPER
Attorney at Law
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS

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CLERK DISTRICT COURT
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DEPUTY
BS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
)	
Petitioner,	)	CASE NUMBER CV-2011-10315
)	
V.)	
	)	MOTION TO APPEAR
STATE OF IDAHO,	)	TELEPHONICALLY
)	
)	
Respondent.)	
)	

COMES NOW, Sean Cook, Petitioner in the above-entitled matter, by and through his Attorney, Daniel G. Cooper, and hereby moves the Court pursuant to Rule 7(b) of the Idaho Civil Rules of Procedure and Idaho Code § 19-4907, for an Order of the Court requiring applicant's participation in the Motion for Summary Judgment hearing scheduled in this matter for April 24, 2012 at 1:00 p.m. by telephonic means.

This motion is made for the reason that the hearing involves Petitioner's case and short of being transported to Kootenai County to participate personally at the hearing, Petitioner's telephonic appearance is the only manner in which Petitioner can participate.

DATED this 30th day of March, 2012.

DANIEL G COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox or as otherwise provided below on the 30th day of March, 2012, addressed to:

Kootenai County Prosecuting Attorney:

Fax: 208-446-1833



A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a cursive 'S' and 'C', with a horizontal line underneath.

DANIEL G. COOPER
Attorney at Law
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

STATE OF IDAHO
COUNTY OF KOOTENAI }
FILED: }SS

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CLERK DISTRICT COURT

[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	MOTION FOR EXTENTION OF TIME TO	
	)	FILE RESPONSIVE BRIEFING	
V.)		
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record hereby moves the Court pursuant to Rules 6(b), 7(b) (3), and 56(c) of the Idaho Rules of Civil Procedure and I.C. § 19-4906 for an order of the Court extending or shorting the time in which undersigned counsel is permitted to file Petitioner's brief in response to the State's Motion for Summary Judgment and Memorandum in Support [Thereof] filed herein on March 21, 2012.

This motion is made for the following reasons and based upon the following grounds:

1. The Court has scheduled this matter for hearing of the State's Motion for Summary Judgment on April 24, 2012. Pursuant to IRCP, Rule 56(c) Petitioner's responsive brief is therefore due to be filed on the 10th day of April, 2012.
2. Undersigned counsel believes good cause exists for the Court to relieve Petitioner from the time frame for filing his responsive brief for the reason that (1) undersigned counsel

was not a participant in the trial of the underlying criminal matter of *State of Idaho v. Seam M. Cook*, CR-201CR-08-13006 – though opposing counsel was a participant; (2) undersigned counsel was appointed in this matter on March 8, 2012 while the record demonstrates Petitioner's *pro se* Petition for Post Conviction Relief was served on the State on or about December 21, 2011; and (3) although, the State's Motion for Summary Judgment and Memorandum in Support [Thereof] was filed approximately 20 days ago, undersigned counsel has not had sufficient opportunity, in light of all his additional obligations, to review the State's motion and memorandum, the 540 plus pages of trial transcript and prepare an adequate response.

3. Undersigned Counsel deems another three (3) days time necessary to file Petitioner's responsive brief in this matter, which would make Petitioner's responsive brief due on Friday, April 13, 2012
4. Undersigned counsel attempted to contact on this 10th day of April, 2012 opposing counsel, Donna Gardner of the the Office of the Kootenai County Prosecuting Attorney to inquire whether the State had any objection to this motion being granted. However, undersigned counsel was informed that Miss Gardner had called in for the day and was not present. Accordingly, there is no stipulation to this motion be granted.
5. The issues raised by the State's Motion for Summary Judgment for determination are essentially legal issues and not factual issues for which a responsive brief may be of assistance to the Court.

Based upon the forgoing, Petitioner respectfully requests an additional three (3) days in which to file Petitioner's responsive briefing. Undersigned counsel requests a hearing on this

motion in the event the State has an objection thereto. The estimated time necessary for said hearing is 5 minutes.

DATED: APRIL 10, 2012.

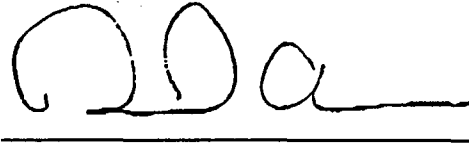


DANIEL G. COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 10th day of April, 2012, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833 *dw*



A handwritten signature in black ink, appearing to read 'Dona', is written above a solid horizontal line.

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 4/11/12
AT 4:30 O'CLOCK P.M.
CLERK, DISTRICT COURT
Law Mitchell
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI


SEAN M. COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

**ORDER GRANTING EXTENSION OF
TIME TO FILE RESPONSE BRIEF**

It is **ORDERED** that the deadline for defense counsel to file and serve the response
brief in this case is extended to April 13, 2012.

DATED this 11th day of April 2012.



John R. Stegner
Administrative District Judge

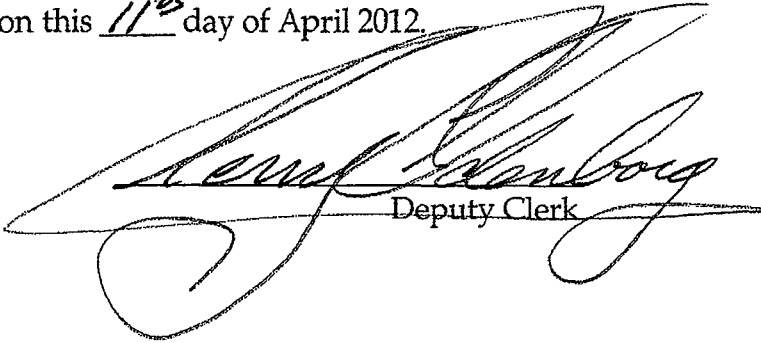
CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copies of the foregoing ORDER were transmitted by facsimile to:

Kootenai County Prosecutor
(208) 446-1833

Daniel G. Cooper
Attorney for Defendant
(208) 765-5249

on this 11th day of April 2012.



Deputy Clerk

DANIEL G. COOPER
Attorney at Law
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 4/11/12
AT 9:29 O'CLOCK P.M.
CLERK, DISTRICT COURT
Dawn Mitchell
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	ORDER FOR PETITIONER TO	
	)	PARTICIPATE TELEPHONICALLY	
V.)		
)		
STATE OF IDAHO,)		
)		
Respondent.)		

The Court having before it Petitioner's Motion to Participate Telephonically; the Court having reviewed the Motion; and the Court finding this an appropriate case in which to grant the motion, now, therefore:

IT IS HEREBY ORDERED that Petitioner, Sean Cook shall be permitted to appear and participate in the Motion for Summary Judgment Hearing scheduled for April 24, 2012 at 1:00 p.m.

IT IS FURTHER ORDERED that counsel for Petitioner shall arrange Petitioner's telephonic appearance with the Idaho Department of Corrections.

Entered this 11th day of April, 2012.

John R. Stegner

JOHN R. STEGNER
District Judge

CLERK'S CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 13 day of ~~March~~ April, 2012, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833

Daniel G. Cooper
Attorney for Petitioner
By Fax: (208) 765-5249

Idaho Correctional Center
Paralegal's Office
By Fax: (208) 331-2766



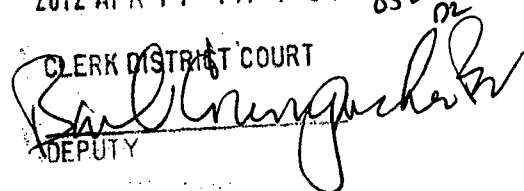
Deputy Clerk

ORDER FOR PETITIONER TO PARTICIPATE TELEPHONICALLY - Page 2

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED: }

2012 APR 17 PM 4: 37 852

CLERK DISTRICT COURT
DEPUTY



DANIEL G. COOPER
Attorney at Law
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	MOTION FOR ACCEPTANCE OF LATE	
	)	BRIEFING AND/OR IN THE ALTERNATIVE	
V.	)	MOTION TO CONTINUE HEARING	
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record hereby moves the Court pursuant to Rules 6(b), 7(b) (3), and 56(c) of the Idaho Rules of Civil Procedure and I.C. § 19-4906 for an order of the Court permitting undersigned counsel to file Petitioner's brief in response to the State's Motion for Summary Judgment and Memorandum in Support [Thereof] filed herein on March 21, 2012, beyond the established due date of April 14, 2012.

In the alternative, undersigned counsel moves pursuant to the same rules for an order of the Court continuing the hearing on the State's Motion for Summary Judgment filed in this matter on March 21, 2012.

This motion is made for the following reasons and based upon the following grounds:

MOTION FOR ACCEPTANCE OF LATE BRIEFING AND/OR IN THE ALTERNATIVE
MOTION TO CONTINUE HEARING - Page 1

1. The Court has scheduled this matter for hearing of the State's Motion for Summary Judgment on April 24, 2012. Pursuant to IRCP, Rule 56(c) Petitioner's responsive brief is therefore due to be filed on the 10th day of April, 2012.
2. Undersigned counsel believes good cause exists for the Court to relieve Petitioner from the time frame for filing his responsive brief for the reason that (1) undersigned counsel was not a participant in the trial of the underlying criminal matter of *State of Idaho v. Seam M. Cook*, CR-201CR-08-13006 – though opposing counsel was a participant; (2) undersigned counsel was appointed in this matter on March 8, 2012 while the record demonstrates Petitioner's *pro se* Petition for Post Conviction Relief was served on the State on or about December 21, 2011; and (3) although, the State's Motion for Summary Judgment and Memorandum in Support [Thereof] was filed approximately 20 days ago, undersigned counsel has not had sufficient opportunity, in light of all his additional obligations, to review the State's motion and memorandum, the 540 plus pages of trial transcript and prepare an adequate response.
3. Undersigned counsel did seek two (2) previous continuances in this matter asking for a total of 4 days additional time in which to prepare, file and serve Petitioner's responsive briefing in this matter which made undersigned counsel's brief due in this matter on April 14, 2012. Upon further work on Petitioner's responsive briefing, undersigned counsel has determined that his previous assertions that three (3) or one (1) additional days would be sufficient for time to fully prepare Petitioner's responsive brief were at best "hopeful assertions" and not based upon the reality of the time necessary for counsel to fully

MOTION FOR ACCEPTANCE OF LATE BRIEFING AND/OR IN THE ALTERNATIVE
MOTION TO CONTINUE HEARING - Page 2

acquaint himself with the record in this case, review and research Petitioner's claims in his verified Petition; review and research the state's claims in its Memorandum in Support of Summary Judgment, and draft a brief.

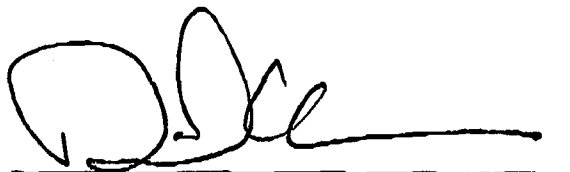
4. In further preparation of Petitioner's responsive brief in this matter, undersigned counsel has identified potential additional claims of ineffective assistance of counsel on the part of Petitioner's trial counsel which warrant further investigation and the potential amendment of claims for post conviction relief. Those additional potential claims include an additional ineffective assistance of counsel claims, including failing to object to the testimony of Mr. Nelson's wife, who was permitted to testify that she herself had been raped, that she had informed her husband of that, and that she possessed strong opinions about reporting those types of things.
5. Undersigned counsel contacted on this 17th day of April, 2012 opposing counsel, Donna Gardner of the the Office of the Kootenai County Prosecuting Attorney to inquire whether the State had any objection to either of the motions herein being granted. Pursuant to that conversation, there is no stipulation to this motion being granted.
6. The issues raised by the State's Motion for Summary Judgment for determination are essentially legal issues and not factual issues, based upon an established record for which a responsive brief may be of assistance to the Court.
7. This matter has not been set for trial. Accordingly, there is no prejudice to the state in the granting of this request – as granting the request would either (1) provide the state further time to clarify and prepare its arguments for oral argument, or (2) cause the state to

MOTION FOR ACCEPTANCE OF LATE BRIEFING AND/OR IN THE ALTERNATIVE
MOTION TO CONTINUE HEARING - Page 3

merely seek more time to respond to Petitioner's responsive brief. On the other hand, the potential for prejudice to Cook is substantial.

Based upon the forgoing, Petitioner respectfully requests the Court accept a late filed brief in this matter, or in the alternative an opportunity for additional time to respond in a wholly informed manner to the state's request to dismiss Petitioner's claims on summary judgment. Undersigned counsel requests a hearing on this motion in which to further argue in support of these alternative motions. The estimated time necessary for said hearing is 15 minutes.

Dated this 17th day of April, 2012.



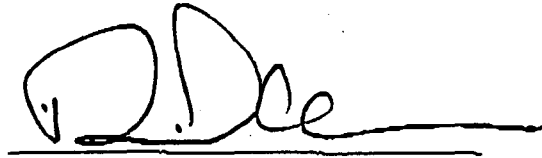
DANIEL G. COOPER
ATTORNEY FOR PETITIONER

MOTION FOR ACCEPTANCE OF LATE BRIEFING AND/OR IN THE ALTERNATIVE
MOTION TO CONTINUE HEARING - Page 4

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 17th day of April, 2012, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833

A handwritten signature in black ink, appearing to read "D. G. Cooper", is written over a horizontal line.

MOTION FOR ACCEPTANCE OF LATE BRIEFING AND/OR IN THE ALTERNATIVE
MOTION TO CONTINUE HEARING - Page 5

STATE OF IDAHO }
 COUNTY OF KOOTENAI } ss
 FILED: 5/10/12 }
 AT 5:54 o'clock P.M.
 CLERK DISTRICT COURT
Kevin Mitchell
 DEPUTY

**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

SEAN M. COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
)	
vs.	)	ORDER EXTENDING TIME
	)	FOR BRIEFING AND ORDER
STATE OF IDAHO,	)	GRANTING MOTION TO
	)	CONTINUE HEARING
Respondent.)	
_____)	

The petitioner's attorney has moved this Court to permit him to file his brief in response to the State's Motion for Summary Disposition beyond the deadline of April 14, 2012, and for a continuance of the hearing on the State's motion, which is scheduled for April 24, 2012.

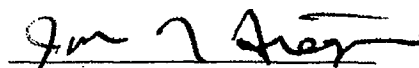
Good cause appearing,

IT IS ORDERED, that the Petitioner's brief in response to the State's Motion for Summary Disposition is due no later than May 10, 2012. The State's reply brief,

if any, is due no later than May 16, 2012.

IT IS FURTHER ORDERED, that the hearing on the State's Motion for Summary Disposition, scheduled for April 24, 2012, is VACATED. The hearing is rescheduled for 10:00 A.M. on May 18, 2012.

DATED this 20th day of April 2012.


John R. Stegner
District Judge

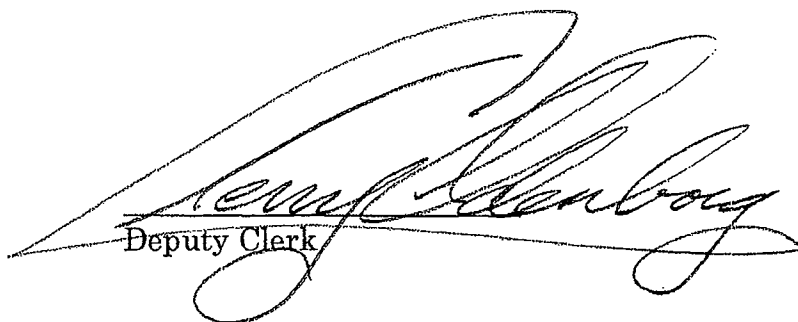
CERTIFICATE OF SERVICE

I do hereby certify that a full, true and correct copy of the foregoing Order was delivered in the following fashion to:

Donna Gardner [] U.S. Mail
Kootenai County Prosecuting Attorney [] Overnight Mail
P.O. Box 9000 [] Fax (208) 446-1833
Coeur d'Alene, ID 83816 [] Hand Delivery

Daniel G. Cooper [] U.S. Mail
Attorney at Law [] Overnight Mail
P.O. Box 387 [] Fax (208) 765-5249
Coeur d'Alene, ID 83816 [] Hand Delivery

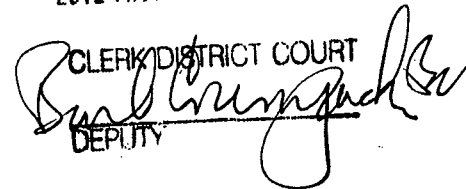
on this day 20th of April 2012.


Deputy Clerk

DANIEL G. COOPER
 Attorney at Law
 PO Box 387
 Coeur d'Alene, ID 83816
 Phone: (208) 664-5155; Fax: (208) 765-5249
 Bar Number: 6041

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI } 494
 FILED

2012 MAY 10 PM 4:56

CLERK DISTRICT COURT
 DEPUTY


IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	PETITIONER'S MEMORANDUM ON	
	)	SUMMARY JUDGMENT	
V.)		
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record, Daniel G. Cooper, Attorney at Law, hereby submits the following Petitioner's Memorandum on Summary Judgment for the Court's Consideration in the hearing of the State's Motion for Summary Judgment scheduled herein for April 24, 2012:

I.

PROCEDURAL HISTORY & STATEMENT OF FACTS

On June 23, 2008, Petitioner Sean Cook was charged with rape, in violation of I.C. § 18-6101 in Kootenai County Case, *State of Idaho v. Sean Michael Cook*, CR-2008-13006. Following his arrest and incarceration on the rape charge, Cook was also charged with intimidating a witness, in violation of I.C. § 18-2604 in the matter of *State of Idaho v. Sean Michael Cook*, CR-2008-20200. In the later case, the charge of intimidating a witness resulted

from allegations that Cook threatened his previous cellmate, Paul Nelson, and Nelson's family with harm should Nelson testify in the matter.

On October 23, 2008, a pretrial conference was held in the rape prosecution. (Exhibit A: Transcript on Appeal, pp. 1-14.) At the pretrial conference, Cook's appointed counsel, Jonathan Hull described to the court a proposed agreement with the state regarding consolidation of the rape case with the witness intimidation case and the agreement to continue the trial of the matters. (*Id.* at, p.5, ln. 9 –p.6, ln. 10.) The state and Mr. Hull disagreed regarding the effect of this agreement on Cook's bond status. (*Id.* at p. 6, ln. 13- p. 7, ln. 25.) Mr. Hull indicated that if the bond Cook previously posted in the rape case would not effectuate his release once the cases were consolidated, the defense would object to a continuance of the trial. (*Id.* at p. 8, ln. 1-24.) However, because he believed that the evidence in support of the intimidation of a witness charge would "come in anyway", Mr. Hull did not object to consolidation of the two charges into a single trial. (*Id.* at p. 8, ln. 16-20.) The state indicated that it would not be prepared to try the intimidation of a witness case on the scheduled trial date of November 3, 2008 and the matters were not consolidated for trial. (*Id.* at p. 9, ln. 12 - p. 12, ln. 1.)

On November 3, 2008, trial on the rape charge commenced. (*Id.* at p. 19, ln. 4 – p. 544, ln. 21.) At the conclusion of the trial, the jury found Cook guilty of rape. (*Id.* at p. 547, ln. 8 – p. 549, ln. 6.) On January 16, 2009, Cook was sentenced to an indeterminate term of 30 years imprisonment with 10 years fixed, which was later reduced to an indeterminate term of imprisonment of 20 years, with 10 years fixed. (*Id.* at p. 569, ln. 17 -23; Order Reducing Sentence entered February 4, 2009.)

On December 28, 2011, after exhaustion of his direct appeals, Cook filed a verified

Petition for Post Conviction Relief commencing the above-entitled action. In his Petition for Post Conviction Relief, Cook claimed that his attorney, Mr. Hull provided ineffective assistance in his defense and the prosecutor engaged in misconduct, thereby denying him his constitutionally guaranteed rights to the effective assistance of counsel and a fair trial. (*See, generally, Verified Petition for Post Conviction Relief.*) Principally, Cook's claims for relief include:

1. That defense counsel provided ineffective assistance by erroneously conceding the admissibility of alleged threats Cook made to a witness in the rape case;
2. That defense counsel provided ineffective assistance by failing to object to hearsay statements of two witnesses at trial;
3. That defense counsel provided ineffective assistance by failing to object to the prosecutor's closing argument which abrogated the reasonable doubt standard;
4. That defense counsel was ineffective for failing to object to the prosecutor's vouching for the state's witness in closing argument;
5. That the prosecutor's misconduct in closing argument in (1) abrogating the reasonable doubt standard and (2) vouching for the state's witnesses deprived him of his constitutional rights to a fair trial.

On March 21, 2012, the state filed its Respondent's Motion for Summary Judgment and Memorandum in Support [Thereof]. Cook makes the following arguments in opposition to that Motion.

II.

APPLICABLE LEGAL STANDARDS

An application for post-conviction relief initiates a proceeding that is civil in nature. *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v. Bearshield*, 104

Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.App.1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct.App.2002). An application for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). An application must contain much more than " a short and plain statement of the claim" that would suffice for a 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. I.C. § 19-4903. 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 Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. A claim for post-conviction relief will be subject to summary dismissal if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof. *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is

presented, an evidentiary hearing must be conducted. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct.App.1986).

" The right to counsel in criminal actions brought by the state of Idaho is guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho State Constitution." *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Baxter v. State*, 149 Idaho 859, 862, 243 P.3d 675, 678 (Ct.App.2010). 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. *McKeeth v. State*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004); *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

III.

ARGUMENTS

1. Defense attorney Hull was ineffective for failing to object to the Dillon brothers' hearsay testimony concerning Whitten's statements.

During trial, the state called Hoss Dillon and Harold Dillon to testify. At trial, the Dillon brothers testified that were called by Whitten to come to the motel room where she had been staying. (Exhibit A, p. 290, ln. 4-18; p. 338, ln. 18-21.) Upon their arrival at the room, Hoss and

Harold hung out with Whitten and Cook for awhile before Whitten left with them in one vehicle, while Cook left in another. (*Id.* at p. 301, ln. 20 – p. 302, ln. 24.) According to the brothers' testimony at trial, Whitten appeared upset and not her usual self that evening. (*Id.* at p. 290, ln. 8-15; p. 2954, ln. 14-24; p. 339, ln. 24 – p. 340, ln. 7.)

At trial, Hoss Dillon further testified, without defense objection, to the following statements attributed to Whitten:

“She just said that he was trying to get on her or whatever. And she kept trying to push him off or whatever.” (*Id.* at p. 303, ln. 11-13.)

“She said that he was on top of her and stuff like that... Well, I mean she said he was trying to hit on her and kiss her and just, like, trying to lay on her and stuff.” (*Id.* at 305, ln. 6-18.)

“She said that Sean raped her basically... She said that he forced sex on her... [She said it had happened] right before she called me...” (*Id.* at 306, ln. 3-7.)

Harold Dillon provided further testimony indicating that Whitten told the brother that she had been raped by Cook. (*Id.* at 342, ln. 18 – p. 343, ln. 24.)

Defender counsel was deficient in not objecting to this testimony because the testimony was hearsay and, had Mr. Hull objected, the district court would not have would not have been admitted the testimony.

Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Idaho R. Evid. 801(c). Hearsay is inadmissible except in those circumstances provided by the Idaho Rules of Evidence. I. R. E. 802; *State v. Thorngren*, 149 Idaho 729, 731, 240 P.3d 575 (Idaho 2010). One of the established exceptions to the hearsay rule is that of an excited utterance. The excited utterance

exception authorizes the admission of hearsay if the testimony recounts “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” I.R. E. 803(2); *state v. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 349 (Ct. App. 1999). To fall within the excited utterance exception, an out-of-court statement must meet two requirements. First, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and second, the declarant’s statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Hansen*, *supra* (citing, *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986); *State v. Burton*, 115 Idaho 1154, 1156, 772 P.2d 1248, 1250 (Ct.App.1989)).

In determining whether a statement constitutes an excited utterance, courts apply a totality of the circumstances test, which includes consideration of (1) the amount of time that elapsed between the startling event and the statement, (2) the nature of the condition or event, (3) the age and condition of the declarant, (4) the presence or absence of self-interest, and (5) whether the statement was volunteered or made in response to a question. *See, State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007).

At Cook’s trial, defense counsel, Mr. Hull was deficient for not objecting to this testimony from the Dillon brothers because the Dillon brother’s statements attributed to Whitten were not excited utterances. Rape certainly can be considered a startling event that renders inoperative the normal reflective thought process of a person experiencing that event. However, Whitten’s statements to the Dillon brothers identified above were not spontaneous statements concerning that event.

Pursuant to the testimony admitted at trial, there was not a great deal of time that passed

between the alleged incident of rape and when Whitten made her statements to the Dillon. Based upon the trial testimony, approximately 35 to 45 minutes may have elapsed. However, during that intervening time, Whitten assisted Cook in making the bed in her motel room. (*Id.* at p. 234, ln. 3-21.) In addition, during this time, Whitten and the Dillon brothers had a conversation with the Dillon brothers that she wanted Sean to leave the motel room and she and the Dillon brothers formulated a plan whereby she and the Dillon brothers were going to inform Cook they were going to go see Harold's girlfriend, in an effort to get Cook to leave. (*Id.* at p. 239, ln. 16 – p. 240, ln. 11.) Whitten also monitored the parking lot of the motel to see if Sean had, in fact, left before her and the Dillons. (*Id.* at p. 241, ln. 2 – p. 242, ln. 21.) Lastly, she went to the Exxon gas station located on Appleway and Government to get cigarettes. (*Id.* at p. 242, ln. 22 – p. 243, ln. 2.) The fact that Whitten assisted in making the bed of the motel room, hatched a plan with the Dillon brothers to get Cook to leave; monitored Cook's departure and then went to buy cigarettes, indicates that Whitten's later statement that Cook had raped her was not a spontaneous statement.

Whitten's statement was also not voluntarily made, but given only after constant questioning from Hoss Dillon. Hoss Dillon testified at trial that he had asked Whitten what was wrong during his telephone call with her, to which there was no response. (*Id.* at p. 291, ln. 7-11.) He further asked her what was wrong after he arrived at her motel room, to which Whitten responded that she "wanted to get out of there". (*Id.* at p. 299, ln. 14-17.) He asked again what was wrong while the two sat in the car at the gas station or on the way to the gas station. (*Id.* at p. 303, ln. 7 – p. 304, ln. 1.) It wasn't until Whitten and the Hoss brother had returned to the motel room that Whitten made her statement to Hoss Dillon that Cook had raped her, and again the

statement was only made after Dillon again asked her what was wrong. (*Id.* at p. 304, ln. 24 – 305, ln. 8.)

Admittedly, in Idaho the excited utterance exception often receives broader application in sex crime cases. *See, e.g., State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986). However, most, if not all Idaho cases applying this broader approach for application of the excited utterance rule involve child victims or adults whose statements were declared “excited utterances” made those statements spontaneously and not in response to direct questioning. *See, e.g. State v. Parker, supra, compare, State v. State v. Peite*, 122 Idaho 809 (Idaho App. 1992).

In this matter, Whitten’s was an adult woman of 23 years of age who did not make her statements to the Dillon brothers except upon constant questioning over approximately 35-45 minutes. Also, in the time between the event of her alleged rape, Whitten assisted Cook in making the motel bed, devised a plan to get Cook to leave the motel room, monitored Cook’s departure, and traveled to the gas station to get cigarettes. Owing to these facts, Whitten’s subsequent statement that Cook had raped her was not an excited utterance as she clearing was in charge of her normal powers of thought and reflection.

2. Defense attorney Hull was ineffective for failing to object to the admission of alleged threats by Cook against Mr. Nelson, his family and Whitten.

During the trial, the court held a conference on the admission of 404(b) evidence. During the conference, the state sought to introduce testimony from Mr. Nelson that while they were cellmates Cook allegedly confessed to raping Whitten. In addition, the state sought to introduce testimony from Mr. Nelson that Cook threatened him, his wife and daughter while the two were in custody. The state also sought to introduce testimony from Mr. Nelson that Cook allegedly

had stated he needed to get out of jail to keep Whitten from testifying and that he (Cook) had intentions of killing Whitten. The state sought to introduce this evidence pursuant to Idaho Rule of Evidence 404(b).

In response to the state's request to introduce this evidence, Cook's attorney, Mr. Hull stipulated to the introduction of the alleged threats to Mr. Nelson and his family stating that he believed Mr. Nelson's testimony that Cook threatened hard to Mr. Nelson was "part and parcel" of Cook's confession. (Exhibit A, p. 108, ln. 4-16.) Mr. Hull's stipulation included that this information would be admitted without a limiting instruction. (*Id.*) Hull also informed the court that he believed Cook's alleged statement to Mr. Nelson that he (Cook) needed to get out of jail to keep Whitten from testifying was admissible because it was part of a confession. (*Id.* at p. 114, ls. 13-18.)

At trial, Mr. Nelson testified as to Cook's alleged confession to the rape of Whitten. Mr. Nelson further testified, without objection from the defense, that prior to being transported to Cook's preliminary hearing, Cook threatened to have Nelson's wife and daughter followed and raped or that "they would be taken care of" if Nelson testified against him. (*Id.* at p. 381, ln. 14 – p. 389, ln. 7.) Mr. Nelson further testified, without objection from the defense, that Cook had expressed a desire to escape from jail so that nobody would be left to testify against him and that he would kill Whitten so that she would not be able to testify. (*Id.* at p. 387, ln. 10 – 388, ln. 16.) Defense counsel Hull was deficient in stipulating that this "threat evidence" should be permitted to go before the jury.

The "threat evidence" testified to by Nelson was not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination

more probable or less probable than it would be without the evidence. I.R.E. 401. At trial, the only issue of consequence for the jury's determination was whether the intercourse between Cook and Whitten was consensual or forced. Evidence that Cook threatened Mr. Nelson, his wife and daughter had no tendency to make it more likely that the intercourse between Cook and Whitten was forced by Cook. Furthermore, evidence that Cook expressed a desire to escape jail and kill Whitten so that she could not testify also did not make it more likely that Cook had engaged in rape. Instead, this evidence was relevant only to the question of whether Cook had intimidated witnesses which was not at issue in the rape case. The evidence that Cook had allegedly engaged in threats, on the other hand, made Cook appear to the jury to be a dangerous and violent person. However, the state is not allowed to prove that Cook committed rape by showing that he is a violent person.

I.R.E., Rule 404(b) provides that evidence of a character trait and evidence of other crimes, wrongs or acts is not admissible to prove that the individual acted in conformity therewith. *State v. Wood*, 126 Idaho 241, 244, 880 P.2d 771 (Ct. App. 1994). In *State v. Woods*, the Court of Appeals set forth the policy inherent in Rule 404:

"The policy expressed in Rule 404, precluding use of character evidence or other misconduct evidence to suggest that the defendant must have acted consistently with those past acts or traits, is a long-standing element of American law. It is part of our jurisprudential tradition that an accused may be convicted based only upon proof that he committed the crime with which he is charged--not based upon poor character or uncharged sins of the past. The rule against use of other misconduct evidence to suggest that the defendant had a propensity to commit crimes of the type charged recognizes that such evidence may have a too-powerful influence on the jurors, and may lead them to determine guilt based upon either a surmise that if the defendant did it before, he must have done it this time, or a belief that it matters little whether the defendant committed the charged crime because he deserves to be punished in any event for other transgressions."

Id. at 244-245, 880 P.2d 771.

While I.R.E. 404(b) does not permit other crimes, wrongs or acts evidence to be admitted to prove the propensity of the defendant to commit the crime charged, the rule does permit such evidence to be admitted when relevant for other purposes. These exceptions include admitting the evidence to show proof of knowledge, identity, plan, preparation, opportunity, motive, intent and the absence of mistake or accident. I.R.E. 404(b); *State v. Johnson*, 148 Idaho 664, 668, 227 P.3d 918 (2010). At Cook's rape trial, however, there were no issues for the jury's determination which would invoke one of these stated exceptions. The only relevant question for the jury at Cook's trial for rape was whether the intercourse between Cook and Whitten was consensual or forced and evidence that Cook was a dangerous and violent individual by allegedly threatening Nelson, his family and Whitten was not relevant to that issue.

Even if a court could find that the "threat evidence" testified to by Mr. Nelson was marginally relevant, because it showed consciousness of guilt, it would have been excluded, upon a proper objection, on the basis that the evidence was unfairly prejudicial. I.R.E., Rule 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." While this rule does not require the exclusion of all prejudicial evidence, the rule does require exclusion of evidence which is unfairly prejudicial such that it tends to suggest a decision on an improper basis. *State v. Pokorney*, 149 Idaho 459, 465, 235 P.3d 409 (Ct. App. 2010); *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

In Cook's case, the admitted evidence that Cook allegedly threatened Mr. Nelson, his family and Whitten was unfairly prejudicial. Again, Mr. Nelson's testimony of the threats against his family was that Cook allegedly stated that should Mr. Nelson testify at the preliminary

hearing, Cook would have his wife and daughter followed and raped or that they would be taken care of. (*Exhibit A, p. 381, ln. 14 – p. 389, ln. 7.*) Although, Mr. Nelson further testified that Cook had stated that Cook would have his girlfriend do the following, (*Id.* at p. 382, ln. 7-11.), Mr. Nelson provided no similar testimony as to who would engage in the alleged rape of his wife and daughter. As a consequence of the introduction of this testimony, along with Mr. Nelson's further testimony of Cook desiring to escape jail so that nobody would be left to testify against him, raised a specter that Cook himself would rape Mr. Nelson's wife and daughter to keep Nelson from testifying. That is the only rational inference to be taken from the testimony.

Mr. Nelson's further testimony that Cook had expressed a desire to escape from jail so that nobody would be left to testify against him and that he would kill Whitten so that she would not be able to testify, was also unfairly prejudicial. This testimony from Mr. Nelson raised the similar specter that Cook would have murdered Whitten prior to trial had he been released from jail. Thus, Mr. Nelson's "threat testimony" suggested to the jury that Cook would freely rape and murder others for his benefit. The testimony painted him as a prospective rapist with murderous intentions that were only being held back by jail walls. The introduction of the "threat evidence" was so overly prejudicial to Cook's case as to deny him his constitutional right to a fair trial. Had Cook's attorney, Mr. Hull objected to the introduction of this evidence, the district court would have excluded under I.R.E. 403. Accordingly, Mr. Hull was deficient in not objecting to the introduction of this evidence; and rather stipulating that it was admissible as "part and parcel" of a confession.

3. Cook suffered prejudice by Mr. Hull's failure to object to the Dillon brothers' hearsay statements and the testimony of Mr. Nelson regarding Cook's alleged threats of the rape and murder of Mr. Nelson's family and Miss Whitten.

Mr. Hull's deficiencies in failing to object to the Dillon brothers' hearsay statements and Mr. Nelson's testimony regarding Cook's alleged threats because introduction of that evidence because introduction of this evidence the evidence radically altered Cook's trial.

At Cook's rape trial the only material issue for the jury to decide was whether the sexual intercourse between Cook and Whitten was consensual or forced. Under the facts adduced at trial, the only persons with personal knowledge that could testify to that issue were Whitten and Cook. Introduction of the Dillon brothers' hearsay statements was prejudicial because it provided constant repetition or a constant banging-of-the-drum of the state's claim that Cook had raped Whitten through incompetent sources (i.e. persons with no first-hand knowledge of the events that had transpired). In addition, neither of the Dillon brothers' could be effectively cross-examined as to any alternative motive Whitten may have had in making her statements because the statements were not the Dillon brothers' statements. Admission of Whitten's hearsay statements through the Dillon brothers' testimony effectively made those statements unimpeachable -- as coming from the Dillons.

Introduction of Mr. Nelson's testimony of Cook's alleged threats to rape and murder Mr. Nelson's wife, daughter and Whitten also prejudiced Cook because it distracted the jury from the ultimate issue in controversy. The improper introduction of Mr. Nelson's irrelevant and highly prejudicial testimony changed the overall issue of the trial from whether a presumed innocent defendant committed rape to whether a potentially serial rapist with murderous intentions committed rape. In both cases, defense counsel's Hull's failure to object to this hearsay and threat evidence caused extreme prejudice to Cook such that a Court cannot conclude that, even

without counsel's errors, the result would have been the same. As a result, Cook is entitled to a new trial.

4. Defense attorney Hull was ineffective for failing to object to the prosecutor's closing argument which abrogated the reasonable doubt standard.

At the conclusion of the evidence at trial, defense counsel Hull and the prosecuting attorney each gave their closing arguments. In her closing argument the prosecutor argued:

Defense talks about reasonable doubt. When you're playing golf and you hit the golf ball and it falls into a pond, you know where that golf ball has gone. You know where that golf ball is. You watched it fall in there. And you go to the pond and you try to fish it out with your golf club. And it gets murky, and it gets confusing. And you can't see where the ball is anymore, but you know it's there. You know beyond a reasonable doubt where that golf ball is. Exactly what you have here. There is no reasonable doubt Sean Cook committed rape.

Exhibit A, p. 543, ln. 17 – p. 544, ln. 2.

Defense counsel Hull failed to object to this argument.

Defense attorney Hull was ineffective for failing to object to the prosecutor's closing argument because the prosecutor's illustration of reasonable doubt through the golf ball analogy impermissibly reduced the state's burden of proof and thereby deprived Cook of his due process rights.

The requirement that the State prove every element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of due process. *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S.Ct. 2781, 2783, 61 L.Ed.2d 560, 567 (1979); *State v. Mubita*, 145 Idaho 925, 942, 188 P.3d 867, 884 (2008); *State v. Crowe*, 135 Idaho 43, 47, 13 P.3d 1256, 1260 (Ct.App.2000). This standard of proof " plays a vital role in the American scheme of criminal procedure" because it " provides concrete substance for the presumption of innocence-that bedrock "

axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481, 491 (1895)). It follows that a misstatement to a jury of the State's burden rises to the level of fundamental error because it goes to the foundation of the case and would take away from a defendant a right essential to his or her defense. *Raudebaugh*, 124 Idaho at 769, 864 P.2d at 607.

At Cook's trial, the prosecutor's illustration of the reasonable doubt standard of proof through the golf ball analogy was a misstatement of the reasonable doubt standard. Moreover, the golf ball illustration described the "reasonable doubt" standard as a no doubt standard and diminished the state's burden of proof by arguing a higher degree of doubt than is required for an acquittal. See, *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct 1239 (1994) (citing, *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam)).

In analyzing this argument, the Court should consider that the prosecutor's argument was made in response to defense counsel's closing argument wherein Mr. Hull argued that reasonable doubt existed to the rape charge. In her response, the prosecutor likened the reasonable doubt standard to a no doubt standard; thereby implying that Cook had the burden of proving the intercourse he had with Whitten was consensual without any doubt. Overall, the prosecutor's golf ball analogy shifted the burden of proof to Cook to prove his defense of consent by a no doubt standard.

Cook was prejudiced by defense counsel's failure to object to the prosecutor's golf ball analogy because, had counsel objected, the trial court would have sustained the objection and

reaffirmed the correct standard for reasonable doubt. More importantly, Cook was further prejudiced by counsel's failure to object because the jury was permitted to convict Cook of rape on a lesser burden of proof than that of "beyond a reasonable doubt" which violated his due process rights. As a consequence of his attorney's deficiency in failing to object to the prosecutor's golf ball analogy Cook was convicted by a standard less than beyond a reasonable doubt. Cook is entitled to a new trial even without a proper objection to the prosecutor's argument because the prosecutor's conduct constituted fundamental error. *See, State v. Erickson*, 148 Idaho 679, 227 P.3d 933 (Ct. App. 2010).

5. Defense attorney Hull was ineffective for failing to object to the prosecutor's closing argument where the prosecutor improperly vouched for the state's witnesses.

In his verified Petition for Post-Conviction Relief, Cook claims that his defense counsel was ineffective for failing to object to the prosecutor's vouching for the state's witness in closing argument. *See, Verified Petition for Post Conviction Relief*, pp. 6-8. Cook further claims that was prejudiced by that deficiency because, had counsel objected to the improper vouching, the district court would have sustained the objection and there is a reasonable probability that without the improper vouching, the jury would not have returned a guilty verdict. *Id.*

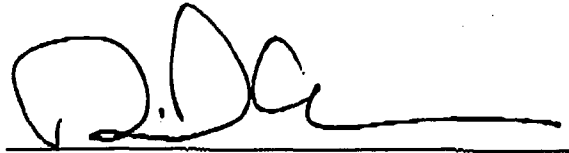
Cook reiterates those claims and incorporates those herein by this reference. However, in candor to the Court, it should be noted that the Court of Appeals held that the prosecutor's closing argument did not impermissibly vouch for the state's witnesses on direct appeal in *State of Idaho v. Sean M. Cook*, Docket No. 36145 (November 22, 2010) (Unpublished Decision). Owing to the Court of Appeals' decision, Cook merely reiterates this argument to exhaust the claim for purposes of federal habeas review.

IV.

CONCLUSION

Based upon the foregoing arguments and those arguments to be presented at hearing, Cook respectfully requests the Court deny the state's motion for summary disposition or summary judgment.

Respectfully submitted this 10th day of May, 2012.



DANIEL G. COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 10th day of May, 2012, addressed to:

Kootenai County Prosecuting Attorney's Office

Attention: Donna Gardner

By Fax: (208) 446-1833 *dc*



A handwritten signature in black ink, appearing to read 'D. Cooper', is written over a horizontal line.

ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

ED #429

2012 MAY 16 PM 12:59

CLERK DISTRICT COURT

Sherry Huffman
DEPUTY

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	STATE'S RESPONSE TO PETITIONER'S
	)	MEMORANDUM ON
	)	SUMMARY JUDGMENT
)	
vs.)	
)	
STATE OF IDAHO)	
Respondent.)	

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Donna Gardner, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby files this the State's Response to Petitioner's Memorandum on Summary Judgment. In so doing, Respondent specifically responds to Section III of Petitioner's Memorandum, "Arguments" 1 through 4 as follows:

- 1. The statements made to Hoss Dillon by the victim were not impermissible hearsay.

Petitioner asserts that defense counsel should have objected to these statements simply because they were hearsay. A statement made by another is not necessarily "hearsay" if it is not intended to prove the truth of the matter asserted. IRE 801. In his testimony, Hoss Dillon was

describing the unusual actions of his friend upon his arrival at the scene of the rape and explaining how those actions prompted his questioning. The statements made by Whitten to him were further explanation and evidence of her unusual state of mind and behaviors at the time. Additionally, Dillon's testimony as to Whitten's statements were permissible because the victim's credibility had been challenged by the defense.

If the court, however, determines that these statements were in fact "hearsay," only then should it decide whether an exception applies. Regarding the excited utterance exception, the Petitioner admits that "there was not a great deal of time that passed between the alleged incident of rape and when Whitten made her statements to [Hoss] Dillon." (Pages 7-8 of Petitioner's Memorandum), but then proceeds to speculate that there was "approximately 35-45 minutes" that "may have elapsed." (Page 8 of Petitioner's Memorandum). The testimony revealed that Hoss Dillon was nearby when he received the phone call from Whitten. The resultant actions in the motel room took place while Dillon was en route to the motel. A matter of a few minutes. The law does not put a stopwatch on the appropriate time that a person can recover from a traumatic event in order to exclude statements from the excited utterance exception. We can certainly infer that Ms. Whitten was still under the emotional upset of the incident given the repeated questioning by her friend.

Petitioner assumes that Whitten's statement to Dillon was involuntary because she would not respond to his questions until the perpetrator was gone from the scene. Just like Petitioner's calculation of time, this claim is unsupported by any evidence. Nevertheless, assuming defense counsel's failure to lodge an objection fell below the standard of reasonableness, Petitioner has still not presented any evidence of how an objection from defense counsel, if sustained, would have changed the jury's decision. The statements made by Whitten to Hoss about what had just

occurred were also made through her own testimony at trial. In fact, as explained in Respondents Motion for Summary Judgment, defense counsel used the Whitten-Hoss statements to his advantage in arguing that Whitten made up the story in order to cover up her indiscretions while her boyfriend was out of town.

- 2 and 3. Defense counsel's opinion that the "threat evidence" was "part and parcel" of a confession was correct.

We must look at the "threat evidence" together with the defendant's initial jail house confession to Nelson. All of the statements that the Petitioner now challenges all took place after that confession and are further evidence of both defendant's guilty mind and knowledge that he committed the crime and that he was going to be convicted if he didn't take certain actions to prevent that from occurring. These statements made by defendant were therefore all admissible as statements against interest. Petitioner speculates that the jury (assuming it believed Nelson), after hearing of the statements believed defendant to have a propensity for violence. This is pure speculation. Even if the evidence had some impact on the jury's opinion of defendant, the rules of evidence do not prohibit evidence just because it might have *some* prejudice against a defendant, but rather its probative value must be substantially outweighed by the danger of unfair prejudice. IRE 403.

4. The state did not reduce its burden of proof in the "golf ball scenario" presented in rebuttal argument.


Petitioner fails to provide any reasoning in support of its claim that the state "reduced the state's burden of proof" (Page 15 of Petitioner's Memorandum), therefore the Respondent is unable to understand and respond sufficiently to this claim. How the state's burden of proof was diminished when, if anything, the state increased its burden in its argument to the jury that 'by seeing a ball go into a pond, you know it is there,' is incomprehensible. Further, Petitioner's

claim that the state somehow shifted the burden to the defense in this rebuttal is unsupported by any evidence.

CONCLUSION

Petitioner has failed to provide a sufficient affidavit or evidence in support of his Petition. Instead, he provides a transcript of the jury trial and asks this court to review the lower court proceeding and come to its own conclusion, just as the Court of Appeals has already done. This post-conviction proceeding is not the proper forum in which to have a second appeal. It is for these reasons that the Respondent respectfully requests that this Court GRANT Respondent's requested relief and SUMMARILY DISMISS this cause.

DATED this 16th day of May, 2012.

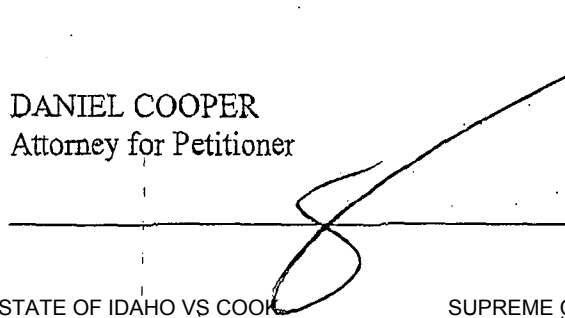


DONNA GARDNER
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 16 day of May 2012, a true and correct copy of the foregoing RESPONSE TO PETITIONER'S MEMORANDUM ON SUMMARY JUDGMENT was caused to be faxed/hand delivered to:

DANIEL COOPER
Attorney for Petitioner



DANIEL G. COOPER
Attorney at Law
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

FD #807

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CLERK DISTRICT COURT

DEPUTY

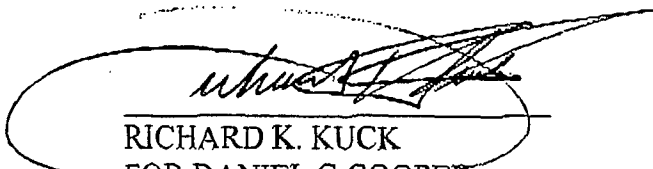
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
)	
Petitioner,	)	CASE NUMBER CV-2011-10315
)	
V.)	
	)	MOTION TO APPEAR
STATE OF IDAHO,	)	TELEPHONICALLY
)	
)	
Respondent.)	
)	

COMES NOW, Sean Cook, Petitioner in the above-entitled matter, by and through his Attorney, Daniel G. Cooper, and hereby moves the Court pursuant to Rule 7(b) of the Idaho Civil Rules of Procedure and Idaho Code § 19-4907, for an Order of the Court requiring applicant's participation in the Motion for Summary Judgment hearing scheduled in this matter for May 18, 2012 at 10:00 a.m. by telephonic means.

This motion is made for the reason that the hearing involves Petitioner's case and short of being transported to Kootenai County to participate personally at the hearing, Petitioner's telephonic appearance is the only manner in which Petitioner can participate.

DATED this 17 day of May, 2012.

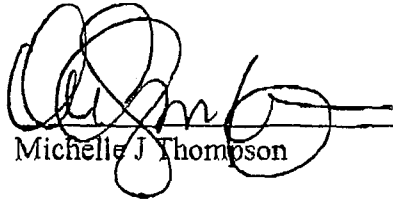

 RICHARD K. KUCK
 FOR DANIEL G. COOPER
 ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox or as otherwise provided below on the 17 day of May, 2012, addressed to:

Kootenai County Prosecuting Attorney:

Fax: 208-446-1833


Michelle J Thomson

DANIEL G. COOPER
Attorney at Law
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 5/17/12
AT 3:12 O'CLOCK P.M.
CLERK, DISTRICT COURT

Guerrero Hoffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
)	
Petitioner,	)	CASE NUMBER CV-2011-10315
)	
V.)	
	)	ORDER FOR PETITIONER TO
STATE OF IDAHO,	)	PARTICIPATE TELEPHONICALLY
)	
)	
Respondent.)	
)	

The Court having before it Petitioner's Motion to Participate Telephonically; the Court having reviewed the Motion; and the Court finding this an appropriate case in which to grant the motion, now, therefore:

IT IS HEREBY ORDERED that Petitioner, Sean Cook shall be permitted to appear and participate in the Motion for Summary Judgment hearing scheduled for May 18, 2012 at 10:00 a.m.

IT IS FURTHER ORDERED that counsel for Petitioner shall arrange Petitioner's telephonic appearance with the Idaho Department of Corrections.

ENTERED this 17th day of May, 2012.

John R. Stegner
JOHN R. STEGNER
District Judge

CLERK'S CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox or as otherwise provided below on the 17 day of May, 2012, addressed to:

Kootenai County Prosecuting Attorney;
Attention: Donna Gardner

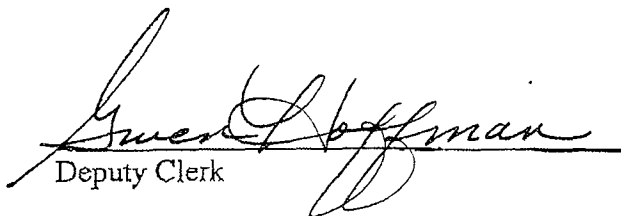
Fax: (208)-446-1833

Daniel G. Cooper
Attorney for Petitioner

Fax: (208) 765-5249

Idaho Correctional Center
Paralegal's Office

Fax: (208) 331-2766


Deputy Clerk

Description		CV 2011-10315 Cook vs State of Idaho 20120518 Motion for Summary Judgment Judge John Stegner Clerk Kathy Booth Court Reporter Julie Foland PA Daniel Cooper DA Donna Gardner
Date	5/18/2012	Location 1K-COURTROOM1
Time	Speaker	Note
09:43:05 AM		
10:06:42 AM	J	Calls case - PA Cooper, DA Gardner present - Mr. Cook is appearing via phone. This is the time set for a motion for summary judgment
10:09:36 AM	DA	I'll submit mostly on the briefing that the state has provided. We have a petition for Post Conviction Relief that is not supported by any evidence. We have an affidavit of Robin ___ who appears to be an attorney who represented him in this PCR and the affidavit says that she assisted in drafting the petition. What Mr. Cook is asking the court to do is to look at certain points of the transcript where he believes objections should have been made and find that since the objections were not made the outcome would have been different. He's provided no evidence that an objection - had it been made- the court would have granted or sustained the objection and if the court had done so what effect it would have had. There was overwhelming evidence otherwise for the jury to find guilt. There were photos taken of the crime scene with a shoe print on the middle of the bed and it is clear that it was consistent with the victim's version of how the rape occurred. He's shown nothing as far as to the out coming being different had the objections been made. I'm not conceding that objections should have been made. I believe the statement of the victim to the Dillon brother should have been allowed in - excited utterance. Did the court receive the May 16 response of the state?
10:13:57 AM	J	I don't think I have the May 16 response. Reviews file - I do have it in the Kootenai County file but didn't have it in the materials submitted to me in Latah county.
10:14:32 AM	DA	That is a response to petitioners response to our memorandum.
10:15:00 AM	J	I didn't understand that the victim's state of mind was at issue in this case. I'm reading your submission.
10:15:55 AM	DA	It was relevant because at the time Hoss Dillon responded to the telephone call where she panicked and wanted him to come to the scene where the rape occurred and he asked her questions.

<u>10:16:37 AM</u>	J	I understand your argument - I'm not sure I'm buying it. What about the statements that Cook made to Nelson?
<u>10:16:55 AM</u>	DA	When defense counsel said it was all part and parcel of the profession it was a correct assessment. We have a confession of Cook to Nelson in the jail cell and then the follow up of threats further verifying that he's going to do something if this confession is made - is brought out to light. It's his confirming that he admitted this otherwise why would he make a threat?
<u>10:18:08 AM</u>	J	Isn't the thread prohibited under 404(b)?
<u>10:18:20 AM</u>	DA	I see that petitioner's argument is that it's assumed he's violent because he made a threat but the reason it got in is because he's following up with the statement against his interests he made - the jailhouse confession and following up with confirming the threats. It further supports his original statement.
<u>10:19:17 AM</u>	J	Couldn't it have been sanitized to allow Nelson to say what the confession was without delving into the additional information of threatening his wife and daughter with similar offense.
<u>10:19:53 AM</u>	DA	I don't think he ever testified that he was going to do the same thing that he did to the victim. (reviews transcript) Page 381/382 The interpretation of the statement is that defendant would not commit a violent act but that "someone".
<u>10:22:29 AM</u>	J	But it would have been done at Mr. Cook's behest.
<u>10:22:45 AM</u>	DA	I'd have to agree with that Judge.
<u>10:22:51 AM</u>	PA	To the extent that there has not been a proper motion for judicial notice of EX A - the transcript - I'll make the motion.
<u>10:23:45 AM</u>	DA	I have no objection and understood that it was already part of the amended petition
<u>10:23:59 AM</u>	J	Granted
<u>10:24:06 AM</u>	PA	<p>The verified petition and trial transcript provide the insight with respect to the prima facie claim of ineffective counsel. I'll limit my comments to the issues re: admission of the hearsay evidence and also to the threat evidence from Mr. Nelson and rely on my brief on the other issues. The court of appeals dealt with the issue of prosecutorial misconduct. The claim had not been preserved and the claim of ineffective assistance of counsel is that the claim was not preserved. Petitioner doesn't have to show fundamental error re: evidence before the jury. He has to show evidence was admitted and should probably have been objected to and failure to object was ineffective assistance of counsel.</p> <p>2 fundamental issues re: ineffective assistance of counsel - failure to object to the hearsay statements of Hoss and Harold Dillon. In our brief we have indicated that those statements are hearsay unless they fit within a specific exception of the hearsay rule - the</p>

		state indicated excited utterance and we say they are not as the statements were made after a period of time when she had engaged in a telephone call, Cook left the hotel. They were statements made over express questioning over a period of 45 minutes.
<u>10:28:15 AM</u>	J	Are they anything other than cumulative as to what Whitten testified to?
<u>10:28:31 AM</u>	PA	They were admittedly the same statements Whitten testified to - the statements came in and the ability to cross examine Hoss Dillon - trial counsel was not in a position to XE the Dillons as to the veracity of the statements. He was able to and did XE Whitten. When a statement is made and can be impeached but over the course of a trial and you have a number of other witnesses coming back and saying this is what was said and counsel not having the opportunity to impeach them it sets this aside and bolsters it. The more times an untrue statement is made the more people are likely to believe it.
<u>10:31:08 AM</u>	J	Isn't that what a jury gets to do? I don't think they concluded that it was a false statement did they?
<u>10:31:27 AM</u>	PA	<p>Because the jury came back they way they did doesn't necessarily mean the conviction should stand.</p> <p>It's clear that trial counsel, by stipulating that the threat evidence Nelson testified to, re: his wife and daughter tainted this trial and we suggest that the court could find that absent that evidence that there is no reasonable probability that there would be a different result. We stipulate that a statement re: confession, had it occurred, by making the statement trial counsel forewent any testing as to when the statements were made.</p> <p>The treat evidence in this matter was of the nature that Cook told Nelson that should he testify at the PH that he would have someone follow Nelson's wife and she would be done the same way Danelle was done - obviously a rape. That he would have someone follow her -it went on - that Nelson's wife and daughter would be taken care of. Even if you could find that they were marginally relevant they were so highly prejudicial that Mr. Cook was a person that was in fact thinking about doing the offense for which he was on trial, to other people, namely Nelson's wife and daughter and the state relied on that evidence in closing - arguing that Cook was guilty of the rape against Whitten. This was identified in our petition. Nelson testified at the trial. She was permitted to testify as to her concerns as to what her husband told her that Cook told him. I don't know why trial counsel didn't object to all of her testimony. She was not the recipient of the threat and it was all hearsay to her and her testimony was not relevant to the trial. That's part and parcel of the claims of deficiency of counsel. In the prosecutor's closing the state argued that Nelson's -</p>

		discussed the threat and concern and that this was his only request - Nelson's wife and daughter had been victim of rape and she could sympathize with her. The threats were argued in closing to obtain the conviction. There is case law out there re: overly prejudicial statements to constitute reversible error.
<u>10:40:06 AM</u>	DA	I'd like to address the cumulative effect of the witnesses - his assertion that it was repeated many times over. It was basically her statement of what she told Hoss Dillon. It was not a matter of witness after witness repeating it.
<u>10:41:14 AM</u>	J	What's the relevance of Mrs. Nelson's testimony?
<u>10:41:24 AM</u>	DA	I am not finding Ms. Nelson's testimony
<u>10:42:12 AM</u>	PA	It was Karen Freeland testimony starts on page 395
<u>10:42:29 AM</u>	DA	I could not find Ms. Nelson's testimony.
<u>10:43:21 AM</u>	J	What's the relevance of Ms. Freeland's testimony?
<u>10:43:42 AM</u>	DA	It was to support the testimony of her husband that he was extremely upset about something that happened.
<u>10:44:03 AM</u>	J	What is the relevance of him being upset?
<u>10:44:12 AM</u>	DA	It supports the testimony re: Cook. I just don't have a memory of this particular testimony. It doesn't look like she was allowed to testify fully as to the content - by her husband. I don't think that her testimony had any real assistance. She did testify as to ___ and the remainder of her testimony was excluded. Nothing additional.
<u>10:48:05 AM</u>	PA	The testimony of Ms. Freeland is part and parcel with counsel's deficiencies in this case wherein she was permitted to testify as to her own rape. I don't find any of her testimony is relevant. To testify that she had a daughter and her daughter is 20 - counsel's response to the relevance of her testimony because it demonstrated Nelson's state of mind re: threats made to him - absolutely not relevant to the trial and in fact - I'll leave that alone. The testimony painted Mr. Cook as a perspective rapist in the future, carrying murderous intentions and that evidence would not have been permitted in as being overly prejudicial has the objection been made. We ask that the court, in review of the transcripts and brief, deny the motion.
<u>10:50:46 AM</u>	DA	Her testimony was not about the threats but that there was something that her husband was "freaked out about" and that he talked to her about it and she said he should talk to someone about it. That she had been a victim of rape herself. The statements he made to her never came out. It looks like that was the purpose of her testimony to verify that her husband received this confession from Cook and that he was reporting it to her. The content was objected to and not allowed in. It's a reasonable conclusion for the jury to make - that there was a confession - he

		was freaked out and no statement that he was frightened for her safety.
<u>10:52:52 AM</u>	PA	Nothing additional.
<u>10:52:57 AM</u>	J	I'm here because the 2nd district doesn't have the case load that the first district does and the first district has chosen to give us the Post Conviction Relief issues - that's both good and bad. I have to get up to speed on the case and I'm not fully up to speed. A written decision will be prepared.
<u>10:54:19 AM</u>		
<u>10:54:37 AM</u>	End	

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STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: 6/15/12 p
 AT 5:49 O'CLOCK P
 CLERK, DISTRICT COURT
Alan Mitchell
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	ORDER SETTING HEARING
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

It is **ORDERED** that a planning and scheduling conference be conducted by telephone conference call, to be initiated by the Court, at 9:30 A.M. on July 9, 2012, at which time all counsel for the respective parties shall be available to participate in the conference call.

In the event that counsel for any party is unable to participate in such planning and scheduling conference because of prior court commitments on the date above scheduled, it is the duty of such counsel to contact the Court and opposing counsel and arrange a mutually satisfactory date to which the matter will be continued.

DATED this 15th day of June 2012.

John R. Stegner
 John R. Stegner
 District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full,
true and correct copy of the foregoing
ORDER SETTING HEARING was transmitted
by facsimile to:

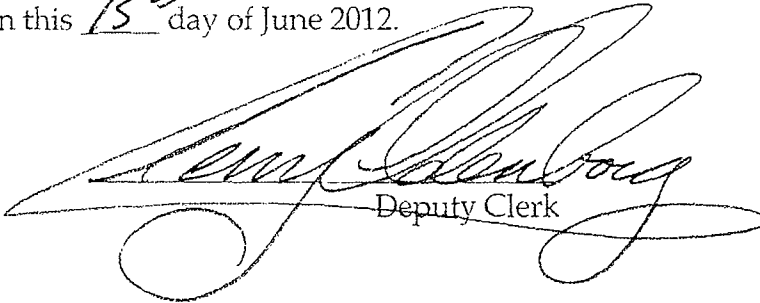
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 15th day of June 2012.



Deputy Clerk

STATE OF IDAHO)
 COUNTY OF KOOTENAI)
 FILED: 10/15/12)
 AT 3:46 O'CLOCK P.M.)
 CLERK, DISTRICT COURT)
 Sean Mitchell)
 DEPUTY)

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
)	
vs.	)	ORDER GRANTING PARTIAL
	)	SUMMARY DISMISSAL AND
	)	ORDER DENYING SUMMARY
STATE OF IDAHO,	)	DISMISSAL ON THE
	)	REMAINDER OF THE
Respondent.	)	PETITIONER'S CLAIMS
_____)	

INTRODUCTION

The Respondent, State of Idaho (“the State”), has moved for summary judgment¹ on the claims for post-conviction relief asserted by the Petitioner, Sean Cook (“Cook”). A hearing on the State’s motion was held on May 18, 2012. The following individuals participated in the hearing: the State’s attorney, Donna Gardner; Daniel G. Cooper, court-appointed counsel for Cook; and Cook (who

¹ While counsel for the State moved for summary judgment, the statute refers to “summary dismissal.” See I.C. § 19-4906. As a result, this Court will consider the pending motion to be one for summary dismissal and will refer to it as such.

participated from prison by telephone). Following the hearing, this Court took the State's motion under consideration. This Order addresses and resolves the pending motion.

BACKGROUND

Cook's Petition for Post-Conviction Relief stems from his conviction of the crime of Rape, a violation of I.C. § 18-6101, in Kootenai County Case No. CR-2008-13006. *See Pet.* at 1. Cook was convicted of that charge following a jury trial. *See id.; Judgment* (Jan. 30, 2009). Following being charged with Rape, Cook was charged with Intimidating a Witness in a related Kootenai County case, CR-2008-20200. *Id.* at 2. Upon conviction for the crime of Rape, in Kootenai County Case CR-2008-13006, Cook was sentenced to not less than ten and not more than thirty years imprisonment. *Id.* at 2. The court later entered an order reducing that sentence to not less than ten and not more than twenty years imprisonment. *Order Reducing Sentence* (Feb. 4, 2009).

Cook appealed his conviction in CR-2008-13006 alleging prosecutorial misconduct and an excessive sentence. *See State of Idaho v. Sean M. Cook*, Unpublished Opinion, Docket No. 36145 (Ct. App. Nov. 22, 2010). The Idaho Court of Appeals upheld Cook's conviction finding that the prosecutor did not impermissibly vouch for the State's witnesses in her closing argument. *Id.* at 5. Cook's counsel did not object to the prosecutor's closing argument. *Id.* at 2. The

Court of Appeals also held that the district court did not abuse its discretion in sentencing Cook. *Id.* at 5.

Cook now asserts the following grounds for post-conviction relief: (1) prosecutorial misconduct, which deprived him of his right to a fair trial; and (2) ineffective assistance of counsel. *Pet.* at 8-9. He requests that his conviction be vacated. *Id.* at 9.

STANDARD OF REVIEW

A post-conviction relief petition initiates a civil proceeding. *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). The petitioner must prove the allegations upon which the request for relief is based by a preponderance of the evidence. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1994). The court may take judicial notice of the records in a petitioner's underlying criminal case. *Anderson v. State*, 2007 WL 3227294 (Ct. App. 2007). The petition must "present or be accompanied by admissible evidence." *Ridgley v. State*, 148 Idaho 671, 227 P.3d 925 (2010) quoting *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 128, 136 (2008) citing I.C. § 19-4903.

An application for post-conviction relief is subject to summary dismissal pursuant to a party's motion or the court's own initiative. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) citing I. C. § 19-4906. Summary dismissal of an application for post-conviction relief is equivalent to summary judgment under Rule 56, I.R.C.P. *Id.* Summary dismissal based upon review of the "pleadings,

depositions and admissions together with any affidavits on file” is “permissible only when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the relief requested.”

Id. (citation omitted).

ANALYSIS

A. Cook has failed to allege a genuine issue of fact that, if resolved in his favor, would entitle him to relief on his claim that his right to a fair trial was violated by the prosecutor’s statements in her closing argument.

A defendant's right to a fair trial is violated when a prosecutor seeks to “have a jury reach its decision on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence.” *State v. Adamcik*, 152 Idaho 445, 452, 272 P.3d 417 (2012) quoting *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). During closing argument both sides have “traditionally been afforded considerable latitude” and are “entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn” from the evidence. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) quoting *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003). That latitude has its limit however, and closing argument “should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused” or “misrepresent the law or the reasonable doubt burden.” *Id.* (citations omitted).

Prosecutorial misconduct constitutes fundamental error if the prosecutor’s

statements “are so egregious or inflammatory that any ensuing prejudice cannot be remedied by a curative jury instruction.” *State v. Lovelass*, 133 Idaho 160, 167, 983 P.2d 233, 240 (Ct. App. 1999) (citation omitted).

A prosecutor’s unobjected-to statements in closing argument are reviewed under a fundamental error analysis. *State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). The Defendant must show that the alleged error:

- (1) violates one or more of the defendant's unwaived constitutional rights;
- (2) plainly exists; and
- (3) was not harmless.

Id. Error will be deemed “harmless” if the court can conclude beyond a reasonable doubt “that the result of the trial would have been the same absent the error.” *State v. Erickson*, 148 Idaho 679, 686, 227 P.3d 933, 940 (Ct. App. 2010).

a. The prosecutor’s statements did not amount to impermissible witness vouching.

A criminal defendant may assert error on appeal and pursue post-conviction relief; however, once a defendant has elected a remedy, the defendant must bear the burden of that choice and may not raise the same issue in both proceedings. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008).

On appeal to the Idaho Court of Appeals, Cook alleged that the prosecutor’s statements in closing argument regarding the motivation of the State’s witnesses and the evidence that supported the witnesses’ testimony amounted to impermissible witness vouching. *State of Idaho v. Sean M. Cook*, Unpublished Opinion, Docket No. 36145 (Ct. App. Nov. 22, 2010) at 2-5. The Court of Appeals

determined that the prosecutor's statements were not improper. *Id.* at 5. Cook challenges those same statements in this action, again on the ground that the statements amounted to impermissible witness vouching. *Id.* at 4-5; *Pet.* at 6-8.

Because Cook elected to raise this issue on appeal, he is precluded from asserting it in this post-conviction action. *See Yakovac*, 145 Idaho at 443, 180 P.3d at 482. Accordingly, Cook has alleged no genuine issue of material fact that, if resolved in his favor, would entitle him to relief on this claim.

b. The prosecutor's statements did not abrogate the reasonable doubt standard.

Idaho Code § 19-4901(b) states the following:

Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.

The Idaho Supreme Court has interpreted this provision to mean that "in actions between the same parties upon the same claim, the former adjudication . . . concludes parties not only as to every matter offered, *'but also as to every matter which might or should have been litigated in the first suit.'*" *Aragon v. State*, 114 Idaho 758, 766, 760 P.2d 1174, 1182 (1988) quoting *Kraft v. State*, 100 Idaho 671, 673, 673 P.2d 1005, 1007 (1979) (italics in original). The Court then announced, in a footnote, that not all issues are barred by the doctrine of *res judicata* in post-conviction proceedings. *Id.* at footnote 12. These exceptions include: (1) where

ineffective assistance of counsel is claimed; (2) where new evidence has been discovered; and (3) where subsequent case law suggests that a conviction is unlawful. *Id. citing Kraft*, 100 Idaho at 673, 673 P.2d at 1007; and I.C. § 19-4901.

Requiring the State to prove each element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of due process. *Erickson*, 148 Idaho at 685, 227 P.3d at 939 (citations omitted). Thus, “a misstatement to a jury of the State's burden rises to the level of fundamental error because it goes to the foundation of the case and would take away from a defendant a right essential to his or her defense.” *Id.* (citations omitted).

Cook seeks to allege a new basis for prosecutorial misconduct other than the one he presented on direct appeal. Cook challenges the following argument of the prosecutor,

[d]efense talks about reasonable doubt. When you are playing golf and you hit the golf ball and it falls into a pond, you know where the golf ball has gone. You know where that golf ball is. You watched in fall in there. And you go to the pond and you try to fish it out with your golf club. And it gets murky, and it gets confusing. And you can't see where the ball is anymore, but you know it's there. You know beyond a reasonable doubt where the ball is. Exactly what you have here. There is no reasonable doubt Sean Cook committed rape.

Tr. on Appeal at 543, line 17-25; 544, line 1- 2. Cook claims that the prosecutor's golf ball hypothetical likened the reasonable doubt standard to a lesser standard and therefore, reduced the level of doubt required of the prosecution. *Pet.* at 6; *Pet.'s Mem. on Summ. J.* at 16-17.

Cook brought a claim for prosecutorial misconduct against the State, the same party to this action, on direct appeal. He therefore “could have” raised this issue on direct appeal and is, as a result, barred from asserting it in this post-conviction action by I.C. § 19-4901(b).

Even reaching the merits of Cook’s argument, he has not alleged a genuine issue of material fact that, if resolved in his favor, would entitle him to relief. The statements were not so egregious that any confusion they caused regarding the reasonable doubt standard or the State’s burden of proof could not be fixed by a jury instruction. In fact, the jury was instructed that the attorney’s closing arguments were not to be considered as evidence. *Jury Instructions Given* (Nov. 7, 2008) at No. 1, No. 3, No. 15. The jury was also specifically instructed as to the meaning of reasonable doubt, and that it was the State’s burden to prove that Cook committed the crime beyond a reasonable doubt. *Id.* at No. 2. The prosecutor properly used the hypothetical to argue that there was “no reasonable doubt Sean Cook committed rape.” *See Tr. on Appeal* at 544, lines 1-2. The prosecutor’s statements did not improperly inform the jury of the State’s burden of proof. The statements therefore, did not constitute fundamental error nor did they violate Cook’s right to a fair trial. As such, Cook has failed to allege a genuine issue of fact that, if construed in a light most favorable to him, would entitle him to relief on this basis.

B. Cook has alleged a genuine issue of fact that, if resolved in his favor, would entitle him to relief on his claim that his right to effective assistance of counsel was violated.

The accused in a criminal trial is guaranteed effective assistance of counsel based upon the Sixth Amendment to the United States Constitution, and Article 1, § 13 of the Idaho Constitution. *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989) (citation omitted). A claim of ineffective assistance of counsel may be alleged in a post-conviction application. *Kuehl v. State*, 145 Idaho 607, 610-11, 181 P.3d 533, 536-37 (Ct. App. 2008). To prevail on an ineffective assistance of counsel claim, the petitioner must show that: (1) his attorney's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for his attorney's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

In challenging an attorney's failure to pursue a motion or objection, the district court may consider the probability of success of the motion or objection to determine "whether the attorney's inactivity constituted incompetent performance." *State v. Piro*, 146 Idaho 86, 89, 190 P.3d 905, 908 (Ct. App. 2008) (citation omitted). A conclusion that the motion or objection would not have been granted by the trial court if it had been pursued, is generally determinative of both prongs of the *Strickland* test for ineffective assistance of counsel. *Id.* (citation omitted).

a. Counsel's failure to object to the prosecutor's closing arguments did not fall below the objective standard of reasonable representation.

As explained above, the prosecutor's statements regarding the credibility of the State's witnesses and the reasonable doubt standard did not constitute prosecutorial misconduct. As such, even if Cook's attorney had objected, an objection would not have been sustained. Accordingly, Cook has failed to allege a genuine issue of fact that, if resolved in his favor, shows his attorney's performance in failing to object to the State's closing argument fell below the objective standard of reasonable representation.

b. Counsel's failure to object to the admissibility of certain testimony fell below the objective standard of reasonable representation.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Hearsay is inadmissible unless "it falls within one of the exceptions in the Idaho Rules of Evidence or another rule formulated by the Idaho Supreme Court." *State v. Meister*, 148 Idaho 236, 241-42, 220 P.3d 1055, 1060-61 (2009) *citing* I.R.E. 802.

(i) Counsel unreasonably conceded the admissibility of testimony that Cook threatened to harm certain individuals.

An out-of-court statement made by a party, offered against that party, is considered an admission by a party-opponent and is not hearsay. I.R.E. 801(d)(2)(A). The availability of the declarant to testify at trial is immaterial. *Id.* Accordingly, the statement need not fit within one of the exceptions to the hearsay

rule to be admissible. D. Craig Lewis, 2 *Idaho Trial Handbook*, § 20.1 (Oct. 2011) (citation omitted). Also, an out-of-court statement, which tends to subject the declarant to criminal liability when made, is admissible under the “statement against interest” exception to the hearsay rule if the declarant is unavailable to testify at trial. I.R.E. 801(b)(3). While not banned by the hearsay rule, an admission of a party opponent or an out-of-court statement that fits within a hearsay exception may nonetheless, be inadmissible on other grounds. For example, pursuant to Rule 404(b), I.R.E., “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that a person acted in conformity therewith.” Such evidence may however, be relevant and admissible for other purposes, such as: “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” I.R.E. 404(b).

Trial courts are required to undergo a two-tiered analysis to determine whether other acts evidence is “inadmissible propensity evidence under 404(b) or whether the evidence could be admitted for some other purpose.” *State v. Sheldon*, 145 Idaho 225, 229, 178 P. 3d 28, 32 (2008) (citation omitted). The first tier requires a court to determine “whether the evidence is relevant to a material disputed issue concerning the crime charged.” *Id.* The second tier requires a court to determine “whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant.” *Id.*; see I.R.E. 403.

Rule 404(b) has been held to prohibit the introduction of other acts evidence where its probative value is “entirely dependent on its tendency to demonstrate the defendant’s propensity to engage in such behavior.” *State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2009). Evidence is only subject to Rule 404(b) if it bears on the defendant’s character. *State v. Norton*, 151 Idaho 176, 254 P.3d 77, 91 (Ct. App. 2011).

Cook alleges his attorney’s failure to object to testimony given by Paul Nelson (“Nelson”) fell below the objective standard of reasonable representation. *Pet.* at 2. The testimony regarded statements Cook allegedly made to Nelson while the two were incarcerated. Cook purportedly told Nelson that if he testified at Cook’s preliminary hearing about what Cook told him regarding Cook’s rape of the victim, Cook would have Nelson’s wife followed, that something would happen to Nelson’s daughter and that Nelson’s wife “would be done just the same as [the victim] was done.” *See Tr. on Appeal* at 381, lines 21-25; 382, lines 3-4. Nelson also testified about statements Cook made to him expressing a desire to escape from jail to hurt the victim and make sure that “nobody was left to testify against him.” *Id.* at 387, lines 18-22. In addition, Nelson testified that he limited his testimony at Cook’s preliminary hearing because he was concerned for his family’s welfare due to Cook’s threats. *Id.* at 382, lines 16-21. Cook was charged with the crime of Intimidating a Witness for the threats he allegedly made to Nelson in a separate action, Kootenai County Case CR-2008-20200. *See Pet.* at 2.

Prior to trial, the State filed a Notice of Intent to Use I.R.E. 404(b) Evidence, which included the statements Cook made to Nelson threatening Nelson's family and Cook's desire to prevent the victim from testifying. At a preliminary hearing, Cook's counsel conceded the admissibility of those statements. As to the threats Cook made to Nelson to harm his wife and daughter, Cook's counsel stated, "I believe it is part and parcel of Mr. Nelson's testimony or contention. It's not true, but I don't see that it's a part of an alleged confession." *Tr. on Appeal* at 108, lines 4-16. Trial counsel conceded the admissibility of that testimony without a limiting instruction. *Id.* Regarding the admissibility of Cook's statement to Nelson that he wanted to escape to prevent the victim from testifying, Cook's counsel stated, "the statement attributed to Mr. Nelson [made by Cook] that he [Cook] needed to get out to prevent the alleged victim from testifying, I believe, is an admission against interest or a part of a confession type statement. So I feel it would be admissible evidence." *Id.* at 114, lines 14-18.

The State maintains the threats were admissible as statements against interest. *State's Mot. for Summ. J.* at 9. Cook's alleged threats to harm Nelson's family and the victim were within the statement against interest exception to the hearsay rule because they would tend to subject Cook to criminal liability. *See* I.R.E. 804(b)(3). In addition, Cook was unavailable to testify regarding the statements due to his privilege against self-incrimination. *See* I.R.E. 804 (a)(1). Furthermore, because they were statements made by a party, offered against that

party, they were admissible as statements of a party-opponent. *See* I.R.E. 801(d)(2)(A).

Nonetheless, the threats were covered by Rule 404(b) and 403, I.R.E. The threats constituted a crime, wrong, or act, other than the crime, wrong, or act with which Cook was charged. *See* I.R.E. 404(b). Testimony regarding the threats was not admissible for one of the enumerated purposes of Rule 404(b), I.R.E., or any other permissible purpose. The threats were irrelevant to any disputed material issue concerning the Rape charge. The crucial issue was whether the sexual intercourse between Cook and the victim was consensual. Nelson's testimony regarding Cook's statements of how he raped the victim was obviously relevant to that issue. However, there was no reason for Nelson to refer to the threats Cook made to harm Nelson's family or the victim in order to explain Cook's statements regarding how he raped the victim.

Lastly, the testimony tended to make Cook appear like a bad person who freely threatened to harm others. The probative value of the testimony was minimal on the issue of whether Cook committed the crime with which he was charged. Consequently, the evidence should have been excluded under both Rule 404(b) and 403, I.R.E. The probative value of this evidence was "entirely dependent" on its tendency to cause the jury to believe that Cook had a propensity to engage in violent, criminal behavior and therefore, must have committed the crime with which he was charged. There was no strategic reason not to object to Nelson's

testimony. Thus, Cook's attorney's failure to object to that testimony fell below the objective standard of reasonable representation.

(ii) Counsel unreasonably conceded the admissibility of testimony regarding the victim's out-of-court statements concerning the alleged rape.

An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." I.R.E. 803(2). The exception has two requirements: "(1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." *State v. Thorngren*, 149 Idaho 729, 732, 240 P.3d 575, 578 (2010) quoting *State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007). To determine whether a hearsay statement falls within the excited utterance exception, "a court considers the totality of the circumstances, including: [1] the amount of time that elapsed between the startling event and the statement, [2] the nature of the condition or event, [3] the age and condition of the declarant, [4] the presence or absence of self-interest, and [5] whether the statement was volunteered or made in response to a question." *Id.* quoting *Field*, 144 Idaho at 568, 165 P.3d at 282.

Cook claims his attorney erred by failing to object to testimony given by Hoss and Harold Dillon, (friends of the victim's boyfriend) regarding what the victim told them about the alleged rape. *Pet.* at 5. The victim's statements were made about

thirty minutes after the alleged rape. *See Tr. on Appeal* at 291, line 24; 299, line 10; 299, line 4-7; 300, line 12-13; line 301; 10-12. The victim allegedly called the Dillon brothers and asked them to come to her hotel room after the purported rape took place at that location. *Tr. on Appeal* at 306, ln. 21-22. Upon arriving at the hotel room, the Dillon brothers spoke with the victim and Cook for about ten minutes, Cook then left the hotel room for about five minutes to walk the victim's dog. *Id.* at 299, line 4-7, 10; 300, lines 12-13. Cook then returned to the hotel room and left in his car shortly thereafter. *Id.* at 300, lines 18-25; 301, lines 1-24. The victim and the Dillon brothers left the hotel room about a minute or two later and traveled to the store and back before the victim stated that Cook had raped her. *Id.* at 300, lines 10-12; 304, lines 24-25; 305, lines 1-25, 306, lines 1-9. The first few times Hoss Dillon asked the victim "what was wrong," she refused to say anything. *Id.* at 303, lines 5-25; 304, 305, 306. Hoss Dillon testified that the victim was upset and crying when she made the statements regarding the rape. *Id.* at 306, lines 13-18.

The statements made by the victim to the Dillon brothers were hearsay. They were the victim's out-of-court oral assertions that she had been raped by Cook. *See* I.R.E. 801. And they were offered for the truth of the matter asserted—that Cook had raped the victim. *See id.* Thus, to be admissible, the statements must fall within some exception to the hearsay rule set forth in the Idaho Rules of Evidence.

Cook has alleged a genuine issue of fact as to whether the victim's statements to the Dillon brothers were hearsay not within the excited utterance exception

based on the following: First, as to the time, about thirty minutes elapsed from the time of the alleged rape before the victim made the statements. *See Tr. on Appeal* at 291, line 24; 299, line 10; 299, line 4-7; 300, line 12-13; line 301; 10-12. Second, neither the victim's age nor condition supports the contention that she was still under the stress or excitement of the alleged rape at the time she made the statements. The victim was a twenty-three year old adult at the time of the alleged rape; thus, unlike other Idaho cases where the excited utterance exception was broadly applied because of the "unique stresses" associated with sex offenses for a child victim, the victim's age was not a factor that justified broad application of the excited utterance exception. *See State v. Hansen*, 133 Idaho 323, 327, 986 P.2d 346, 350, footnote 2 (Ct. App. 1999). Also, the victim in this case was composed enough to engage in conversation with the Dillon brothers and Cook and travel to the store and back to the hotel room before she made the statements.

Lastly, the statements in this case were not volunteered. The victim did not tell Hoss Dillon that she had been raped by Cook immediately upon speaking with him. Rather, Hoss Dillon pressed the victim several times to tell him what was wrong before she said that she had been raped. Even while Cook was outside of the hotel room walking the victim's dog for about five minutes, the victim refused to say what was wrong. *Tr. on Appeal* at 299, ln. 4-17. These circumstances indicate that the victim's statements were a product of reflective thought and were not spontaneous statements made while the victim was under the stress or excitement

of the alleged rape. Cook has therefore, alleged a genuine issue of material fact showing that the statements were hearsay not within the excited utterance exception and that his counsel's performance in failing to object to the admissibility of those statements, fell below the objective standard of reasonable representation.

c. Cook was prejudiced by his counsel's failure to object to the admissibility of the threat and hearsay testimony.

To meet the second prong of the *Strickland* test for ineffective assistance of counsel, the petitioner must show that there is a reasonable probability that, but for his attorney's errors, the outcome of the proceeding would have been different.

Strickland, 466 U.S. at 687-88, 694.

Cook claims that his attorney's failure to object to the inadmissible testimony caused him extreme prejudice such that there is a reasonable probability that without the admission of this evidence, the result of the trial would not have been the same.

See Pet.'s Mem. on Summ. J. at 15. The State argues that Cook has failed to show that objecting to these statements would have made a difference in the jury's decision.

Mot. for Summ. J. at 4.

Cook has alleged sufficient facts to show that but for his attorney's failure to object to the testimony of Nelson and the Dillon brothers, there is a reasonable probability that the jury would not have convicted him of Rape. While there was other evidence of Cook's guilt, such as Cook's statements to Nelson about how the crime was committed and the victim's testimony; the unobjected-to evidence both corroborated the victim's testimony and could have caused the jury to convict Cook

based on his criminal propensity. As such, Cook has alleged a genuine issue of fact that, if resolved in his favor, would entitle him to relief on his claim that he received ineffective assistance of counsel based on his counsel's failure to object to this testimony.

CONCLUSION

Cook's has failed to raise a genuine issue of material fact as to his claim that his right to a fair trial was violated by the prosecutor's statements in closing argument. He has also failed to raise a genuine issue of material fact as to his claim that his right to effective assistance of counsel was violated by his attorney's failure to object to the prosecutor's closing argument. Cook has however, alleged a genuine issue of material fact that, if construed in his favor, would entitle him to relief on his claim of ineffective assistance of counsel based on his attorney's failure to object to inadmissible testimony.

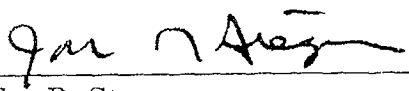
Based on the reasons set forth above and good cause appearing,

It is ORDERED, that the State's Motion for Summary Dismissal of the Petitioner's claims that his due process rights were deprived by virtue of the prosecutor's statements in closing argument is GRANTED.

It is FURTHER ORDERED, that the State's Motion for Summary Dismissal of the Petitioner's claim that his right to effective assistance of counsel was violated by his attorney's failure to object to the prosecutor's statements in closing argument is GRANTED.

It is FURTHER ORDERED, that the State's Motion for Summary Dismissal of the Petitioner's claim that his right to effective assistance of counsel was violated by his counsel's failure to object to testimony given by Paul Nelson, Hoss Dillon, and Hank Dillon is DENIED. This Court will conduct a planning and scheduling conference to set this case for an evidentiary hearing.

Dated this 15th day of June 2012.



John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true and correct copy of the foregoing Order was delivered in the following fashion to:

Donna Gardner	[] U.S. Mail
Kootenai County Prosecuting Attorney	[] Overnight Mail
P.O. Box 9000	[] Fax
Coeur d'Alene, ID 83816	[] Hand Delivery
Daniel G. Cooper	[] U.S. Mail
Attorney at Law	[] Overnight Mail
P.O. Box 387	[] Fax
Coeur d'Alene, ID 83816	[] Hand Delivery

On this day _____ of June 2012.

Deputy Clerk

ORDER GRANTING PARTIAL
SUMMARY DISMISSAL AND
ORDER DENYING SUMMARY
DISMISSAL ON THE REMAINDER
OF THE PETITIONER'S CLAIMS

Page 20

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2012 JUL -2 PM 4:01

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI
CLERK DISTRICT COURT
DEPUTY *Sherry Huff*

SEAN COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

**ORDER VACATING AND
RESETTING SCHEDULING
CONFERENCE**

Due to a conflict in the Court's calendar,

It is **ORDERED** that the scheduling conference currently set for July 9, 2012, is **VACATED** and **RESET** to be conducted by telephone conference call, to be initiated by the Court, at 11:00 A.M. on July 30, 2012, at which time all counsel for the respective parties shall be available to participate in the conference call.

In the event that counsel for any party is unable to participate in such planning and scheduling conference because of prior court commitments on the date above scheduled, it is the duty of such counsel to contact the Court and opposing counsel and arrange a mutually satisfactory date to which the matter will be continued.

DATED this 1st day of July 2012. *9th*

John R. Stegner

John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER VACATING AND RESETTING SCHEDULING CONFERENCE was transmitted by facsimile to:

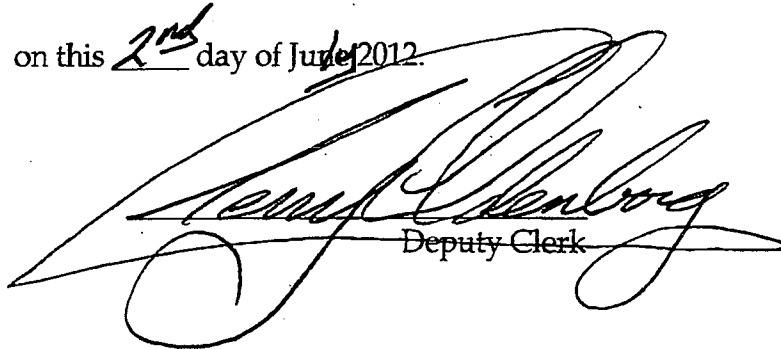
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 2nd day of June 2012.



Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2012 AUG -9 PM 3:13

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CLERK DISTRICT COURT
C. M. May

SEAN COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315
ORDER SETTING HEARING
ON PETITION

As a result of an informal scheduling conference conducted by telephone conference on July 30, 2012, with counsel for each of the respective parties participating,

It is **ORDERED** that the hearing of the Petition for Post Conviction Relief shall be conducted at 9:30 A.M. on December 6, 2012, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

DATED this 9th day of August 2012.

John R. Stegner
John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER SETTING HEARING ON PETITION was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 9 day of August 2012.



Deputy Clerk

BARRY McHUGH
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
Fax: (208) 446-1833

2012 AUG 27 PM 4:19
CLERK OF DISTRICT COURT
Barb Crumpache
CLERK

ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	WITNESS LIST
vs.)	
)	
STATE OF IDAHO)	
)	
Respondent.)	
)	

The Respondent may call the following witnesses:

- 1. Jonathan Hull, 508 E. Garden, Coeur d'Alene;

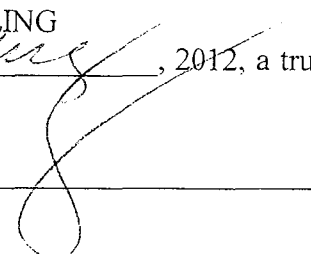
DATED this 27th day of Aug, 2012.

DONNA GARDNER
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 27 day of Aug, 2012, a true and correct copy of the foregoing was caused to be FAXED to:

DAN COOPER



DANIEL G. COOPER
Conflict Public Defender
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
BD #367
2012 NOV 20 PM 4:23
CLERK DISTRICT COURT
(Signature)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
)	
Petitioner,	)	CASE NUMBER CV-11-0010315
)	
V.)	
	)	MOTION TO TRANSPORT
STATE OF IDAHO,)	
)	
Respondent.)	

COMES NOW, the Petitioner, SEAN COOK, in the above-entitled matter, by and through his attorney, Daniel G. Cooper, Conflict Public Defender, hereby respectfully requests the Court for an Order directing the Idaho Department of Corrections to transport Petitioner, SEAN COOK, to the Kootenai County Public Safety Building no later than December 3, 2012, so that Petitioner may prepare for and personally participate in the Post Conviction Relief proceedings scheduled for December 6, 2012, at 9:00 a.m. before the Honorable John R. Stegner. This motion is made for the reason that Defendant's presence for this hearing is mandatory.

DATED this 20th day of November, 2012.

(Signature)
DANIEL G. COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox or as otherwise provided below on the 20th day of November, 2012, addressed to:

Kootenai County Deputy Prosecuting Attorney: FAX: (208) 446-1833
Donna Gardner

Idaho Department of Corrections (Transport) FAX: (208) 327-7480
Nest Cox

DANIEL G. COOPER
Conflict Public Defender
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
BD#457
2012 NOV 21 PM 4:01
GLENK DISTRICT COURT
Suzanna M. Keon
DPP, IV
Bm

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
Petitioner,)
)
V.)
)
STATE OF IDAHO,)
)
)
Respondent.)
)
_____)

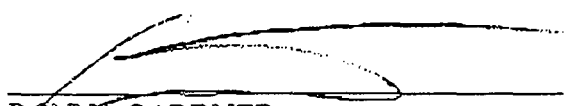
CASE NUMBER CV-11-0010315

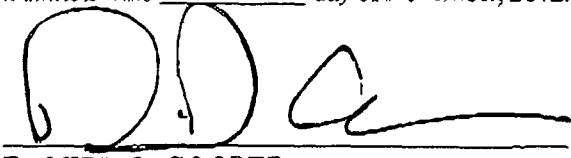
STIPULATION TO TRANSPORT

COMES NOW, the Petitioner, SEAN COOK, in the above-entitled matter, by and through his attorney, Daniel G. Cooper, Conflict Public Defender, and Donna Gardner, Attorney for the State, and hereby stipulates to an Order directing the Idaho Department of Corrections to transport Petitioner, SEAN COOK, to the Kootenai County Public Safety Building no later than December 3, 2012, so that Petitioner may prepare for and personally participate in the Post Conviction Relief proceedings scheduled for December 6, 2012, at 9:00 a.m. before Judge Stegner. This Stipulation is made for the reason that Defendant's presence for this hearing is necessary.

DATED this 21 day of November, 2012.

DATED this 21st day of November, 2012.


DONNA GARDNER
DEPUTY PROSECUTING ATTORNEY


DANIEL G. COOPER
ATTORNEY FOR PETITIONER

DANIEL G. COOPER
Conflict Public Defender
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILE

NOV 27 PM 2:12

CLERK DISTRICT COURT
DEPT. 1
[Handwritten Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
) Petitioner,)
)
) V.)
)
) STATE OF IDAHO,)
)
) Respondent.)
)

CASE NUMBER CV-11-10315

MOTION TO CONTINUE & MOTION TO
SHORTEN TIME FOR HEARING

The Petitioner, Sean Cook, by and through his attorney, Daniel G. Cooper,
Conflict Public Defender, hereby moves the Court for an Order continuing the scheduled *trial*
in this matter for December 6, 2012 at 9:30AM before the Honorable Judge Stegner to a
later date.

Further, Petitioner moves for an Order of the Court shortening the time for notice
of this Motion to Continue such that the Motion may be timely heard on Wednesday,
November 28, 2012.

These Motions are made for the following reasons and are based upon the
following grounds:

1. Undersigned counsel is a sole practitioner who works as a Conflict Public
Defender for Kootenai County. On October 1, 2012 Kootenai County restructured its
conflict public defender system to include additional on-call attorneys who would assist

with indigent defense in Kootenai County. Included in the restructured system, conflict attorneys are required to document their time in all cases for purposes of compensation from the County. Previously, the County paid its conflict attorneys a flat monthly fee which did not require the documenting of time on conflict public defender matters.

2. Prior to implementing the newly restructured system, the undersigned attorney was provided numerous new client appointments as it was uncertain how the new system would work. As such, since approximately mid-September, 2012 undersigned counsel has carried approximately 70 public defender cases, many of which were are cases involving timely discovery review and client appointments. During that time, undersigned counsel was also engaged in substantial briefing in matters before the Idaho Supreme Court and the U.S. District Court for Idaho.

3. Based upon counsel's workload, counsel believes that he has been unable to devote sufficient time to Petitioner's case and a continuance is necessary in order to further prepare Petitioner's case for trial, such that the trial occurs in an efficient manner.

4. Undersigned counsel has spoken to Petitioner, Sean Cook regarding this request for a continuance and Petitioner has indicated that he would favor the continuance so long as the matter was not set out for many months.

5. Undersigned counsel also has spoken to Deputy Prosecuting Attorney, Donna Gardner regarding this request for a continuance of the trial and Ms. Gardner by her signature hereto has "no objection" to a continuance of the trial being granted, but rather would join in the request for a continuance. Ms. Gardner also has "no objection" to this motion being heard on short notice.

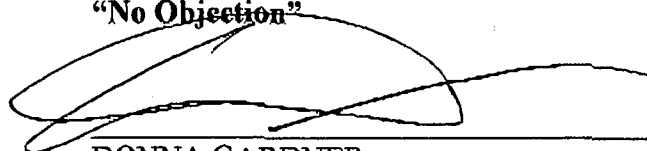
Based upon the forgoing, Petitioner Sean Cook respectfully requests the Court grant this Motion to Continue and reset this matter for a time after January 1, 2012.

Dated this 27th day of November, 2012.



DANIEL G. COOPER
ATTORNEY FOR PETITIONER

"No Objection"



DONNA GARDNER
DEPUTY PROSECUTING ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 27th day of November, 2012, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833

BY:  _____

DANIEL G. COOPER
Attorney At Law
408 Sherman Ave., Suite 203
P.O. Box 387
Coeur d'Alene, ID 38316
(208) 664-5155; Fax: (208) 765-5249
ISB No. 6041

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
2012 NOV 27 PM 2:12 }
CLERK DISTRICT COURT }
[Handwritten signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER: CV 11-10316
)	
Petitioner,	)	NOTICE OF HEARING
)	
v.	)	DATE: November 28, 2012
	)	TIME: 10:00AM
STATE OF IDAHO,)	
)	
Respondent.)	

NOTICE IS HEREBY GIVEN the above-named Petitioner, SEAN COOK, by and through his attorney, Daniel G. Cooper, Conflict Public Defender will call on for a telephonic hearing of Petitioner's Motion to Continue on **Wednesday, the 28th day of November 2012 at 10:00AM**, before the Honorable Judge Stegner.

The Parties are designated to call into a commercial audio conference telephone number for this hearing on **November 28, 2012 at 10:00AM**, The number to dial into is **(888) 296-1938**. Then, when prompted, dial the Participant Number: **947340**

DATED this 27th day of November 2012.

[Handwritten signature]

DANIEL G. COOPER
Conflict Public Defender

CERTIFICATE OF DELIVERY

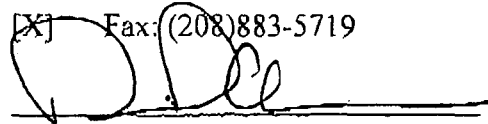
I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same via facsimile on the 27th day of November, 2012, addressed to:

Kootenai County Prosecuting Attorney
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

U.S. Mail (postage prepaid)
 Fax: (208) 446-1833
 Interoffice Mail

Honorable Judge Stegner

Fax: (208) 883-5719



Office of the Kootenai County
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, Idaho 83816-1971
Telephone: (208) 446-1800
Assigned Deputy Prosecutors: DG

RECEIVED

12 AUG 28 AM 10:59

SHERIFF'S DEPARTMENT
KOOTENAI COUNTY

STATE OF IDAHO)
COUNTY OF KOOTENAI)
FILED:

NOV 29 AM 10:31

CLERK DISTRICT COURT

Patty Bradley
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
)
Respondent.)
)

SUBPOENA

CASE NO. CV11-10315

POST CONVICTION TRIAL

**TO: ATTORNEY JONATHAN HULL, 508 E. GARDEN, COEUR D'ALENE, ID, 83814,
// 667-6467**

You are hereby commanded that, laying aside all excuses, you appear at the Kootenai County Courthouse of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, at Coeur d'Alene on the 6th day of December, 2012, at **9:30** o'clock a.m. of said day, as Witness in the above entitled action on the part of the Plaintiff for 1 day.

Given under my hand this 28 day of August, 2012.

By: _____, Deputy Prosecuting Attorney

OFFICE OF SHERIFF OF KOOTENAI COUNTY

I hereby certify that I served the within subpoena by showing the said within original to the following person named therein, and delivered a true copy thereof to the said person on the 27th day of November, 2012.

ROCKY WATSON,
Sheriff of Kootenai County By: #2328 Mark Skindler Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

- COURT MINUTES -

John R. Stegner
District Judge

Sheryl L. Engler
Court Reporter
Recording: Z: 3/2012-11-28
Time: 10:00 A.M.

Date: November 28, 2012

SEAN COOK,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

)
)
) Case No. CV-2011-10315

) APPEARANCES:

) Petitioner represented by counsel,
) Daniel Cooper, Coeur d'Alene, ID

) Defendant present with counsel,
) Donna Gardner, Deputy Prosecutor

Subject of Proceedings: MOTION TO CONTINUE and MOTION TO
SHORTEN TIME FOR HEARING by telephone
conference pursuant to Rule 7(b)(4), I.R.C.P.

This being the time fixed pursuant to written notice for hearing of the petitioner's Motion to Continue the hearing on the Petition for Post Conviction Relief and Motion to Shorten Time for Hearing in this case, Court noted the participation of counsel in this conference call.

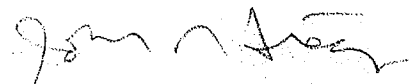
There being no objection from the respondent, Court granted both motions.

Colloquy was had between Court and counsel regarding scheduling. Counsel estimated the hearing would last approximately four hours.

Court vacated the December 6, 2012, hearing and rescheduled hearing on the Petition for Post Conviction Relief for 10:00 A.M. on February 8, 2013.

Court recessed at 10:04 A.M.

APPROVED BY:



JOHN R. STEGNER
DISTRICT JUDGE

Terry Odenborg
Deputy Clerk

SUPREME COURT DOCKET 41449

300 of 428

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER SETTING HEARING ON PETITION was transmitted by facsimile to:

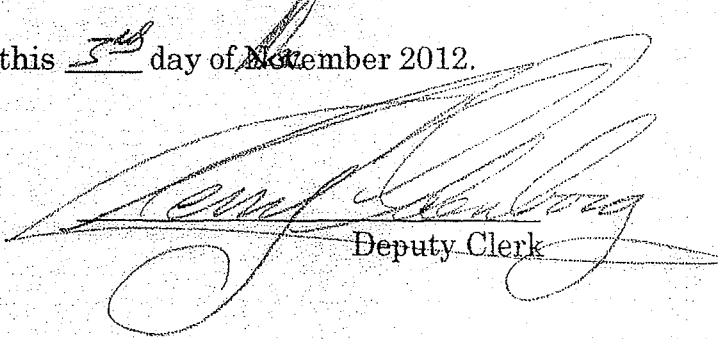
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 5th day of ~~Nov~~ November 2012.



Deputy Clerk

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: 12/3/12
 AT 11:06 O'CLOCK A.M.
 CLERK, DISTRICT COURT
 DEPUTY

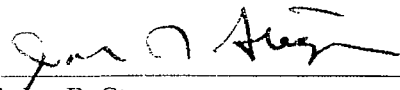
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	ORDER TO TRANSPORT
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

The Court having before it Petitioner's Motion to Transport, the record and files herein, and good cause appearing;

It is **ORDERED** that the Idaho Department of Correction transport Petitioner, Sean Cook, to the Kootenai County Jail no later than February 5, 2013, so that Petitioner may prepare for and personally participate in the hearing of his petition for post conviction relief scheduled to be conducted at 10:00 A.M. on February 8, 2013, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

DATED this 30th day of November 2012.



 John R. Stegner
 District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing **ORDER TO TRANSPORT** was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

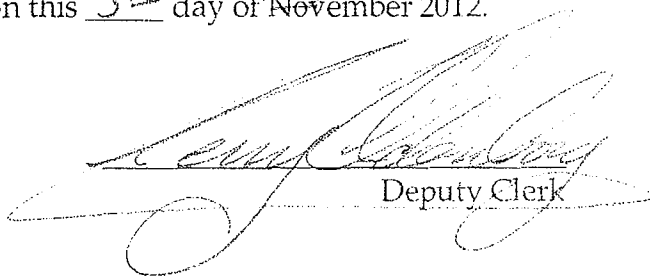
Idaho Department of Corrections (Transport)
(208) 327-7480

Kootenai County Jail
(208) 446-1407

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 3rd day of Nov November 2012.



Deputy Clerk

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: 12/3/12
 AT 11:00 O'CLOCK A.M.
 CLERK, DISTRICT COURT
 Blair Mitchell
 DEPUTY

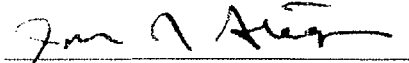
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	ORDER VACATING AND
vs.	)	RESCHEDULING HEARING ON
	)	PETITION FOR POST CONVICTION
STATE OF IDAHO,	)	RELIEF
)	
Respondent.)	
_____)	

As a result of a hearing conducted by telephone conference on November 28, 2012, with counsel for each of the respective parties participating,

It is **ORDERED** that the hearing of the Petition for Post Conviction Relief which is currently scheduled for December 6, 2012, is VACATED and RESCHEDULED to be conducted at 10:00 A.M. on February 8, 2013, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

DATED this 30th day of November 2012.



 John R. Stegner
 District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing **ORDER VACATING AND RESCHEDULING HEARING ON PETITION FOR POST CONVICTION RELIEF** was transmitted by facsimile to:

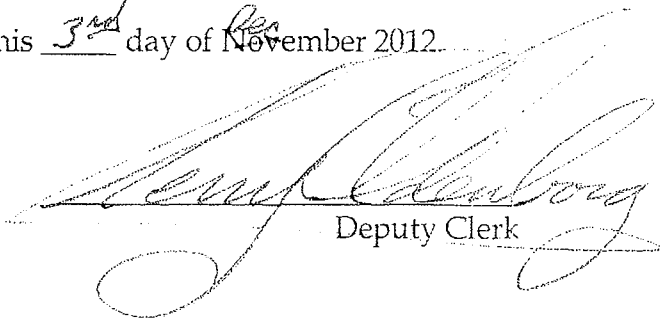
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 3rd day of November 2012.



Deputy Clerk

BARRY McHUGH
Prosecuting Attorney
501 N. Government Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
Fax: (208) 446-1840

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2012 DEC -3 PM 3: 58

CLERK DISTRICT COURT

[Signature]
DEPUTY
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ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BARRY McHUGH, Prosecuting	)	Case No. CV-11-10315
Attorney for Kootenai County,)	
Idaho,	)	NOTICE OF SERVICE
)	
Respondent,)	
)	
vs.)	
)	
SEAN COOK,)	
)	
Petitioner.)	
_____)	

DONNA GARDNER, Deputy Prosecuting Attorney, hereby notifies the Court that on the 3 day of December, 2012, Plaintiff's First set of Interrogatories and Requests for Production was completed and sent out for service by way of facsimile, along with a copy of this Notice, upon the following:

DAN COOPER
FAX: 765-5249

DATED this 3 day of December, 2012.

[Signature]
KELLI KITTILSTVED
Sr. Legal Assistant

Office of the Kootenai County
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, Idaho 83816-1971
Telephone: (208) 446-1800
Assigned Deputy Prosecutors: DG

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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 JAN 23 AM 9:44

CLERK DISTRICT COURT
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DEPUTY
02

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
)
Respondent.)
)
_____)

SUBPOENA

CASE NO. CV11-10315

POST CONVICTION TRIAL

**TO: ATTORNEY JONATHAN HULL, 508 E. GARDEN, COEUR D'ALENE, ID, 83814,
// 667-6467**

You are hereby commanded that, laying aside all excuses, you appear at the Kootenai County Courthouse of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, at Coeur d'Alene on the 8th day of February, 2013, at **10:00** o'clock a.m. of said day, as Witness in the above entitled action on the part of the Plaintiff for 1 day.

Given under my hand this 23 day of DEC, 2012.

By: _____, Deputy Prosecuting Attorney

OFFICE OF SHERIFF OF KOOTENAI COUNTY

I hereby certify that I served the within subpoena by showing the said within original to the following person named therein, and delivered a true copy thereof to the said person on the 18th day of January, 2013.

~~Ben Wolfinger~~
~~ROCKY WATSON~~

Sheriff of Kootenai County By: #2328 Mark Stindler Deputy

01-16-'13 13:17 FROM-Kootenai Dist Court

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DANIEL G COOPER OF IDAHO COUNTY OF KOOTENAI FILED

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DANIEL G. COOPER
Attorney At Law
408 Sherman Ave., Suite 203
P.O. Box 387
Coeur d'Alene, ID 83816
(208) 664-5155; Fax: (208) 765-5249
JSB No. 6041

CLERK DISTRICT COURT

CLERK DISTRICT COURT

[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

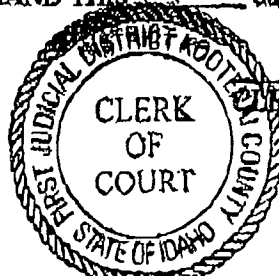
SEAN COOK,	)	CASE NUMBER CV-11-0010315
)	
Petitioner,	)	SUBPOENA
)	
v.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

TO: JONATHAN HULL
508 E. GARDEN
COEUR D'ALENE, ID 83814

YOU ARE HEREBY COMMANDED that laying aside all excuses, you appear in the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, in Coeur d'Alene, Idaho, on Friday, February 8, 2013 at 10:00 a.m., until excused, as a witness in the above-entitled matter on the part of the Petitioner, SEAN COOK.

YOU ARE FURTHER NOTIFIED THAT IF YOU FAIL TO APPEAR AT THE PLACE AND TIME SPECIFIED ABOVE, THAT YOU MAY BE HELD IN CONTEMPT OF COURT AND THAT THE AGGRIEVED PARTY MAY RECOVER FROM YOU THE SUM OF \$100.00 AND ALL DAMAGES WHICH HE MAY SUSTAIN BY YOUR FAILURE TO ATTEND AS A WITNESS.

GIVEN UNDER MY HAND THIS 16 day of Jan, 2013.



[Signature]
CLIFFORD T. HAYES
CLERK OF THE COURT

SUBPOENA - 1

CERTIFICATE OF SERVICE

I hereby certify that I served this subpoena to the following persons named therein, and delivered a true copy thereof to each of the said persons on the 24th day of January, 2013.

#2328 Deputy Mark Dindler

SUBPOENA - 2

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2013 FEB -7 AM 10:08

CLERK DISTRICT COURT
Rebecca McKeon
DEPUTY
TMB

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,	)	RESPONDENT'S TRIAL BRIEF
)	
)	
)	
vs.)	
)	
STATE OF IDAHO)	
Respondent.)	
_____)	

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Donna Gardner, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby files this the Respondent's Trial Brief.

It is anticipated that the bulk of Petitioner's case will rest on the jury trial transcript. As such, the Respondent submits the following argument on each of the evidence issues this court will consider. Those evidence issues are two statements provided by witness Nelson, purportedly made by Cook to Nelson while the two were incarcerated; and statements made by the victim to Hoss Dillon, effectively reporting the rape that had recently occurred.

I.R.E. 404(b) HEARING

Before any testimony was provided in this case, the State filed a Notice of Intent to Introduce IRE 404(b) evidence. The proffer of evidence was discussed in chambers and heard by the trial court on the record. See Tr. 107, lines 9-25 through 120, lines 1-14. The State sought and received the court's rulings on anticipated testimony from both Nelson and another proposed witness, Sawley. The Court at that time made its rulings on the admissibility of this testimony.

STATEMENTS MADE BY COOK TO WITNESS NELSON

Petitioner contests the following statements made by Cook to witness Nelson:

1. A statement by Cook to Nelson "that (if he testified against Cook) somebody would follow her (Nelson's wife). And she would be done just the same that Danielle (the victim) was done." Tr. At 382, lines 3-4; and
2. A statement by Cook to Nelson that "he (Cook) wanted out (of jail) so he could make sure that nobody was left to testify against him." Tr 387, 20-22.

I. Nelson's testimony was made in anticipation of credibility attack by the defense on cross-examination.

At this point in the trial when this evidence was submitted, Nelson had already testified about his relationship with Cook and how it had developed while they were "cell partners." Cook gradually confessed to Nelson over a span of time, including his claim that he had seen the victim days prior to the rape, stalked the victim for those days, discovered where she was staying, and the eventual forcible rape of the victim. Tr pgs 370, lines 17-25 through 379, lines 1-3. The specifics provided by this witness of the details given him by Cook of the forcible rape and circumstances leading up to that act were such that only Cook or the victim could have known. For example, Nelson testified that Cook described the rape occurring on the bed of a

motel room and that he had “her pinned down on the bed with his elbow in her neck.” Tr. 376, lines 3-4 and 375, lines 8-10. This testimony matched the victim’s testimony about the actions of Cook during a portion of the rape—Tr pgs 221-222, lines 15-25 and 1-20. This testimony was further verified through the physical evidence of victim’s injuries through nurse Leslie Rogers—“redness on the right side of the neck, a pinkened skin area to the left, and a bruise on the right knee.” Tr pg 353, lines 19-22.

However, this testimony was subject to attack by the defense as being inconsistent with Nelson’s previous testimony provided at the preliminary hearing. The State’s tactical move here was to allow the witness to explain this inconsistency before the defense had their opportunity to challenge the witness on cross-examination. Thus, Nelson explained why he had not given these specific details of Cook’s confession in previously sworn testimony. Tr. Pg 379, lines 12-25 to 385, lines 1-5. Specifically, Nelson testified that his testimony differed at preliminary hearing in that he did not testify then that Cook had admitted to forcibly raping the victim, just that Cook admitted to having consensual sex. Tr. 383, lines 13-23.

II. Defense strategic decision to not object.

The defense in not objecting to the statements of Nelson, also made a strategic decision. The defense saw this witness as not appearing credible and did not want to call attention to anything he had to say by objecting. As defense counsel noted in the 404(b) hearing, he “believe[d] it is part and parcel of Mr. Nelson’s testimony or contention. It’s not true . . . “ Tr. Pg 108, lines 4-16. In other words, a strategy to making the jury disbelieve any of Nelson’s testimony would be to not call attention to his unbelievable claims of the threats that Cook had conveyed to him.

III. Statements portrayed Cook's "Consciousness of Guilt"

The testimony by Nelson of Cook's threats were relevant in that they portrayed a "consciousness of guilt" on Cook's part. Evidence of a defendant's efforts to influence or affect evidence, such as intimidating a witness, offering to compensate a witness, and fabrication, destruction or concealment of evidence may be relevant to demonstrate consciousness of guilt. In *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003), where officers had handcuffed the defendant and placed bags over his hands to preserve evidence of a shooting, Sheahan's attempts to remove the bags and thus destroy evidence, according to the Idaho Supreme Court, implicated "consciousness of guilt." *Id* at 279, 77 P.3d at 968.

A case with facts closer to ours is *State v. Rolfe*, 92 Idaho 467, 470, 444 P.2d 428, 431 (1968), where evidence of the defendant's offer to pay a witness for false testimony was held admissible. Furthermore, the Ninth Circuit has even recognized that intimidating witnesses shows a consciousness of guilt. *United States v. Begay*, 567 F.3d 540, 552 (9th Cir., 2009).

Similarly, in *State v. Pokorney*, 149 Idaho 459, 235 P.3d 409 (Idaho App., 2010), the contents of a letter that defendant had written to his older son while in prison was relevant as demonstrating consciousness of guilt in his prosecution for lewd conduct with a minor under sixteen. The letter was odd and clearly not the type of letter most parents would have written to a child; the purpose behind telling his son about how other families were destroyed by lewd conduct prosecutions was apparently to convince his son that charging him with lewd conduct would hurt his family; and the defendant was attempting to persuade his son to provide helpful testimony and arguably for him to convince the younger sons not to testify.

THE REPORT OF RAPE MADE BY THE VICTIM TO HOSS DILLON

The victim testified that as soon as they (her and the Dillon brothers) returned to the hotel room she told Hoss Dillon about the rape. In her testimony, she stated that she did not elaborate, but simply answered “yes” to Hoss’ questions of “did he touch you?” and “did he rape you?” Tr pg 247, lines 1-25, 248, lines 1-10.

Before Hoss Dillon testified, the victim was subjected to cross-examination by the defense. Tr. 263-285. That cross examination challenged the victim’s credibility and inconsistency of prior statements made by this witness. The defense focused on inconsistency of statements the victim made regarding details of that night as a challenge to both her truthfulness and ability to recall details (assuming victim was intoxicated). The defense challenged her prior statements at the preliminary hearing: Tr. 271, lines 1-17; Tr. 275, lines 5-14; Tr. 276, lines 24-25, 277, lines 1-12; Tr. 284, lines 7-13; To the police officer: Tr. 274, lines 9-17; Tr. 283, lines 23-25, 284, lines 1-6; and to hospital staff: Tr. 274, lines 18-23. Further, the defense challenged the victim’s testimony regarding her report to Hoss Dillon as “being reluctant” and being “pretty much committed to maintaining that description of the event.” Tr. 275, lines 15-25, 276, lines 1-2. Questions were posed to the victim about Hoss “pressing [her] about what had gone on between [her] and Mr. Cook” and that “when he started pressing you about what had gone on between you and Mr. Cook you were worried about what your boyfriend might think.” Tr.276, lines 7-19.

It was after this cross examination of the victim, that Hoss Dillon testified about his observations and communications with the victim that evening. He testified about her demeanor: that the victim called him at around 11:00 that night, and that “she seemed like she was talking really quiet. She seemed pretty urgent . . . she asked me to come to the motel . . . She said that

Sean was there and that . . . she couldn't get him out of there. I mean, she sounded pretty upset.” Tr. Pg 290, lines 1-10. His reaction to this call was one of urgency to get to the victim's aid. “I told my brother that we needed to go up to the motel . . . that something was wrong with Danielle or something was going on. I didn't know exactly what . . . and we locked up the house. And we jumped in his car. And we went up there.” Tr 291, lines 2-6. When Hoss asked the victim during their phone conversation what was wrong, her demeanor was “kind of reluctant, . . . like, she didn't have a whole lot of time.” Tr. 291, lines 7-11. Hoss testified that they showed at the hotel about 10-15 minutes after the call (Tr. 291, lines 22-24) and that upon arrival the victim appeared “upset” and that “her eyes were a little red...like she had been crying.” (Tr. 294, lines 14-20). During this initial contact, Cook was present, lending one to a reasonable conclusion as to why the victim would not have immediately reported the rape.

Hoss testified that Cook had a brief absence from the room. It was during this time that Hoss inquired to the victim again as to what was wrong. Her response was a statement that she just “wanted to get out of there.” Upon Cook's return, an excuse was fabricated for the Dillon brothers to leave with the victim. Tr. 299, lines 14-23. Hoss testified that even when leaving the hotel, Cook remained on the scene. Tr. 301, lines 20-25; 302, lines 1-25; 303, lines 1-4. It could be inferred by the jury that this added to Hoss' suspicions and was further reason for all to depart the hotel area for some period of time until Cook left.

Further questioning by Hoss of the victim led to statements from her beginning with nothing being wrong and just “want[ing] to get out of there” (Tr. Pg 299, lines 16-17) to Cook “trying to kiss her or something like that” (Tr.304, lines 7-8) to “he was on top of her and stuff like that” (Tr. 307, lines 6-7) and ultimately to “Sean had raped her, basically” and “he forced sex on her,” and “he grabbed her neck,” leading to the victim showing Hoss where Cook had

grabbed her, and Hoss' testimony that he saw a couple of fingerprint-type marks there. Tr. 306, line 3, 6-7, 9; pg 308, lines 1-14.

I. The "Fresh Complaint" of the victim provided to other witnesses, not just Hoss Dillon, supported the credibility of her testimony.

Harold Dillon testified that after Cook left the hotel room to walk the dog, the victim stated that "Sean wouldn't leave. And that she wanted to get out of the hotel room." As a result, they contrived a plan to tell Cook they were going to leave and visit Harold's girlfriend. Tr. 343, lines 5-13. Upon returning from the store, to the hotel room, Harold observed the victim "break[ing] down" and "crying . . . shaking . . . totally a wreck." Tr. 342, lines 22-25; 343, lines 1-2. Harold's testimony was limited to observations of the victim's demeanor. No statements of the victim were admitted through his testimony.

KMC nurse, Leslie Rogers, testified also as to statements made by the victim to her at the hospital. Tr. 348, lines 22-25 to 360, line 20. This witness testified from her intake notes as to specifically what the victim had told her when she sought medical care shortly after the rape. See page 355, lines 2-16. This witness also testified about the victim's demeanor (Page 355, lines 22-25 to 356, lines 1-5) and injuries she observed (353, lines 17-21).

The report of the victim to witnesses, including Hoss Dillon, was an expected, normal reaction. The jury would expect to hear that the victim reported a major event. For instance, a person who had just been robbed would be less likely to be believed if they went home after the robbery and didn't tell their spouse, significant other, or close family. As here, witness testimony of the victim's "fresh complaint" is permissible and relevant evidence. "When witnesses testify to the victim's complaint of the act, the testimony is not hearsay. The fact of the complaint is admissible as corroboration of the complainant's testimony. *State v. Stevens*, 289

N.W.2d 592, 595 (Iowa 1980). This is, of course, true whether or not an effort has been made to impeach the complainant.” *State v. Ogilvie*, 310 N.W.2d 192, 195 (Iowa, 1981).

There is no absolute rule of law as to the time within which a sexual assault victim must make her first complaint for that complaint to be admissible in evidence. *Commonwealth v. Smith*, 59 Mass.App.Ct. 181, 794 N.E.2nd 1241 (2003). The test is whether the victims’ actions were reasonable under the particular circumstances. *Commonwealth v. Lavoie*, 47Mass.App.Ct 1, 710 N.E.2d 1011 (1999). The fact that the victim in our case reported being raped by Cook to witnesses, including Hoss Dillon, assists the trier of fact in determining whether they believed her testimony and was therefore relevant. In our case, the credibility of the victim was central to the success of the State’s case. To not allow evidence of fresh complaints made by her shortly after the rape would have been an improper exclusion of permissible evidence.

II. Admissible prior consistent statements of the victim.

Petitioner asserts that defense counsel should have objected to the statements made to Hoss Dillon simply because they were hearsay. However, as a general rule of law, prior consistent statements are admissible. Prior out of court statements by a witness that would normally be considered hearsay can be admissible at trial under various circumstances. For instance, witness "x" may, following direct examination, be impeached on cross examination through prior statements witness "x" made that could be considered inconsistent. Witness "y" could then be called and on direct examination testify to prior consistent statements made by witness "x" to witness "y" for the purpose of rehabilitating witness "x." *State v. Martinez*, 128 Idaho 104 (Ct.App.1995). These statements from witness "x" to witness "y", if not offered for the truth of the matter asserted but for the purpose of rehabilitation, are not hearsay. *Id* at 109.

The reasoning for this particular rule is as follows: "The effect of the evidence of consistent statements is that the supposed fact of not speaking formally, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. . ." *State v. McKinney*, 107 Idaho 180, 184 (1984) quoting J. Wigmore on Evidence (Chadbourn ed.), § 1129 at 271 (1972).

Obviously, the form of the prior consistent statement need not be one of an oral statement from witness "x" to witness "y", common sense dictates it need only be a statement of some sort that precedes the alleged inconsistent statement. However, statements admitted under this general rule are not admitted as substantive evidence. *Id.*

Furthermore, prior consistent statements are admissible under I.R.E. 801(d)(1)(B). In order for prior consistent statements to come in at trial as substantive evidence they must conform to I.R.E. 801(d)(1)(B). *Id.* Under this rule of evidence, a statement is not hearsay if it meets the following guidelines:

- (1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive. I.R.E. 801(d)(1)(B).

The criteria imposed by the rule are quite broad and allow for statements to be admissible as substantive evidence under a variety of circumstances. The cross-examination of a witness need only imply a charge of recent fabrication, improper influence or motive in order for the prior consistent statements of the witness to become admissible.

The issue of whether or not the prior consistent statements must have occurred before the motive to fabricate appears to be unsettled. *State v. Howell*, 137 Idaho 817, 820 (Ct.App. 2002). Yet, this question and its interpretation by a trial court does not determine general admissibility,

it only determines whether or not the prior consistent statements come in solely for rehabilitation or as substantive evidence.

Furthermore, prior consistent statements are admissible under I.R.E. 106. A third approach for admitting prior consistent statements may materialize following the introduction, in part, of a statement:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. I.R.E. 106

There are basic limits under this rule. The remainder of the statement must be relevant to the part of the statement that was previously introduced. *State v. Bingham*, 124 Idaho 698, 700 (1993). In addition, the remainder of the statement must not be "patently prejudicial. . ." *Id.*

Prior consistent statements, if not offered for the truth of the matter asserted but only for rehabilitation, are generally admissible. Prior consistent statements that fall under I.R.E. 801(d)(1)(B) are admissible as substantive evidence. Finally, the remainder of a writing or recorded statement that has in part been admitted may also be admitted provided it is relevant and not overly prejudicial.

As stated in *U.S. v. Pierre*, 781 F.2d 329, 333 (C.A. 2, 1986):

[A] prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition. When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement.

In this case, the victim's truthfulness came into question under cross-examination and over the course of the trial. Her reluctance in telling Hoss Dillon, her contradictory statements to

Dillon, the police, and medical staff were all covered by the defense. Additionally, contradictions in her own prior testimony at preliminary hearing was brought out by the defense. In the defense's closing argument we can see the where these attacks on the victim's testimony connects in their claim that the victim fabricated this incident because she was in fear of her boyfriend learning of her and Cook having intercourse from his friends the Dillon brothers. The fact that she reported the rape to Hoss Dillon soon after the crime, and thus made a consistent statement to him, was permissible rehabilitation of the witness.

THE DECISION OF DEFENSE COUNSEL TO NOT MAKE OBJECTIONS TO CERTAIN TESTIMONY WAS TACTICAL, AND NOT PROOF OF INEFFECTIVENESS

In *State v. Frederick*, 126 Idaho 286, 882 P.2d 453 (Ct.App., 1994), the appellate court found that testimony similar to ours here was admissible, despite it being inadmissible hearsay, and that the defense counsel was not ineffective for failing to object to said testimony . In *Frederick*, defendant had been convicted of lewd conduct with a minor under 16. During the trial, the mother of the victim testified and relayed the contents of what the victim had told her about the incident. In the *Frederick* case, the victim's statements to her mother were detailed, much more so in our case where the victim relayed only the claim that she had been raped, without providing any real specific information to Hoss Dillon.

Another example of the proof required to establish ineffective counsel is seen in *Malone v. Clarke*, 536 F.3d 54 (C.A. 1, 2008), where the court held that defense counsel's failure to call a police officer to impeach the victim's testimony as to defendant's sexual abuse did not prejudice defendant. That Court determined several factors present in defense counsel's decision: the impeachment value of the police officer's testimony would not have significantly undermined the victim's credibility; the defense counsel did not fail to impeach the victim altogether. since the

jury was repeatedly presented with victim's inconsistent statements; and calling the officer to testify would have come with a price, as the officer may have testified to everything else that was told.

When evaluating an ineffective assistance of counsel claim, “effective legal representation does not require that an attorney object to admissible evidence.” *State v. Aspeytia*, 130 Idaho 12, 15, 936 P.2d 210, 213 (Ct.App.1997). [emphasis added] The testimony of Nelson regarding Cook’s threatening statements towards himself and the victim, as well as the victim’s report to Hoss Dillon were admissible for several reasons, as already stated.

The defense counsel’s decisions to not object to the testimony from Nelson and Dillon were strategic. **When evaluating an ineffective assistance of counsel claim, the court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.** *Pratt v. State*, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000). [emphasis added]. The decision to impeach a witness is a tactical decision. *State v. McKenney*, 101 Idaho 149, 152, 609 P.2d 1140, 1143 (1980); see also *State v. Fee*, 124 Idaho 170, 174, 857 P.2d 649, 653 (Ct.App.1993). Likewise, the decision of what evidence should be introduced at trial is also tactical. *Bagshaw v. State*, 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct.App.2005). When faced with a tactical decision, this Court utilizes the “strong presumption” that the decision fell within the acceptable range of choices available to trial counsel. *State v. Hairston*, 133 Idaho 496, at 511, 988 P.2d 1170, at 1185 (1999). See also the Idaho Supreme Court decision in *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008). See also *Downing v. State*, 136 Idaho 367, 33 P.3d 841 (Ct.App., 2001).

**THERE HAS BEEN AN INSUFFICIENT SHOWING OF PREJUDICE, AS COOK
CANNOT SHOW A REASONABLE PROBABILITY THAT, BUT FOR
COUNSEL’S ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE
BEEN DIFFERENT.**

Even if there was error, the error was harmless. Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct.App., 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.*

Demonstration of a deficiency in counsel's performance does not entitle petitioner to post-conviction relief. He must also show that he suffered prejudice as a result. To establish prejudice, a petitioner must show “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, at 694, 104 S.Ct. 2052, at 2068, 80 L.Ed.2d 674, at 698 (1984). See also *Sheahan v. State*, 146 Idaho 101, 190 P.3d 920 (Ct.App., 2008), where the court found that failure of defense counsel to object to an erroneous jury instruction was deficient performance, but not to the point of establishing that prejudice occurred.

Cook’s claim fails on this prong of the *Strickland* test because the jury had before it significant compelling evidence, by which these limited portions of the testimony of Nelson and Dillon paled in comparison. Reviewing the State’s summation of the evidence reveals many significant pieces of evidence heard over the course of this trial, many of which were revealed in Cook’s own testimony. This evidence, when cumulated, led to the reasonable decision by this jury to find Cook guilty. That evidence included:

1. Undisputed testimony that Cook and the victim had no prior intimate relationship;
2. Cook was drinking heavily the night of the offense while the victim was not;
3. The victim’s panties were found hidden underneath towels, under the bathroom sink;

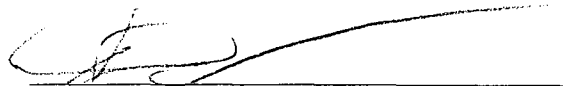
4. Forensics tests revealed the presence of semen on the panties;
5. The victim's demeanor after the rape was not simply strange, it was completely contrary to the usual way she behaved. Whereas she was normally social and talkative, she avoided going into a public location, even with the Dillon brothers' escort. Additionally, the victim was visually very worried and upset;
6. The victim had injuries that matched her account of the physical contact by defendant during the rape;
7. Cook was established to be left-handed. This fact matched with the location of the injuries on the victim's body;
8. Nelson's testimony of Cook's statement about having his elbow in the back of the victim's neck during the rape matched both the injuries on the victim and the victim's own testimony;
9. Cook was wearing tennis shoes during the rape and the rape occurred on the bed. A photograph entered into evidence, taken by police at the scene, revealed a shoeprint in the middle of the bed. This photo also contradicted Cook's testimony that both parties were completely undressed during the "consensual sex."
10. Cook admitted to being so intoxicated when he left the scene that he drove at risk of being pulled over by police for driving under the influence. It could easily have been inferred from the evidence that Cook wanted to remove himself from the scene as it was likely the victim was going to report the rape to the Dillons—friends of the victim and the victim's boyfriend.

11. The victim called the Dillons (friends of victim's boyfriend) to the hotel room immediately after the rape. This contradicted Cook's testimony that they wanted to keep their consensual sexual encounter from the victim's boyfriend.
12. The fact that there was sperm on victim's panties and jeans contradicted Cook's testimony that the sex had occurred while both parties were unclothed.
13. Nelson's testimony of Cook's gradual confession and knowledge of the details of the rape was compelling and believable.

CONCLUSION

A defendant has the right to a fair trial, but not the right to a perfect trial. A review of the entire jury trial in this matter should reveal that the Petitioner's claim lacks merit and should be dismissed.

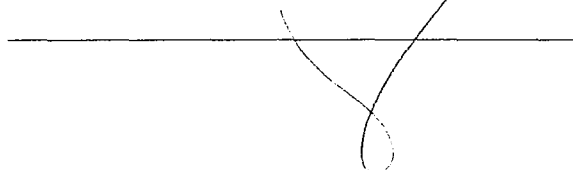
DATED this 6 day of February, 2013.


DONNA GARDNER
Deputy Prosecuting Attorney
Kootenai County

CERTIFICATE OF MAILING

I hereby certify that on the 6 day of Feb, 2013, a true and correct copy of the foregoing RESPONDENT'S TRIAL BRIEF was caused to be faxed/hand delivered to:

DANIEL COOPER
Attorney for Petitioner



STATE OF IDAHO
COUNTY OF KOOTENAI
FILED
JMS #319
2013 FEB -7 PM 1:07

DANIEL G. COOPER
Attorney at Law
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

CLERK DISTRICT COURT
Rebecca M. Keon
OFFICE
TMB

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)		
)		
Petitioner,	)	CASE NUMBER	CV-11-0010315
)		
V.)		
	)	WITNESS LIST	
STATE OF IDAHO,)		
)		
)		
Respondent.)		
)		

COMES NOW, the Petitioner, SEAN COOK, by and through his attorney, Daniel

G. Cooper, and hereby submits the following Witness List:

1. Jonathan Hull
508 E. Garden
Coeur d'Alene, ID 83814
(208) 667-6467
2. Dennis Reuter
500 N. Government Way, Ste 100
Coeur d'Alene, ID 83814
(208) 665-5658
3. Sean Cook, Petitioner

The Petitioner reserves the right to supplement this witness list if more witnesses become available. Further, the Petitioner reserves the right to cross-examine any witnesses called on behalf of the Respondent in this matter.

DATED this 7th day of February 2013.



DANIEL G. COOPER
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same on the 7th day of February, 2013, addressed to:

Kootenai County Prosecutor
ATTENTION: DONNA
GARNER

- By Fax: (208) 446-1833
- Hand Delivered
- U.S. Mail, postage prepaid



Description	CV 2011-10315 Cook vs State Of Idaho 20130208 Post Conviction Relief Judge Stegner Court Reporter Sheryl Engler Clerk TaLisa Burrington	
Date	2/8/2013	Location 1K-COURTROOM3
Time	Speaker	Note
09:01:21 AM	Judge Stegner	Mr. Cook in custody with his attorney Mr. Cooper. Ms. Gardner for the state.. Sheryl Engler court reporter.
10:10:58 AM	Judge Stegner	All parties present.
10:11:22 AM	Mr. Cooper	Proceed. We have a witness Dennis Reuter. Disclosed to PA yesterday, discovery was requested and I could not follow up. We will proceed if Dennis Reuter is dennied testimony.
10:12:54 AM	Donna Gardner	Complete surprise to me about Dennis Reuter testimony. Sent yesterday. Yes I did request discovery back in Nov 2012. Spoke to him at that time 11/28/12 and he said only Jonathan Hull would testify. Interogotories were requested. Written documents were requested. Recieved NO PRESPONSE what so ever. They have failed to comply with discovery, written or orally they have not compllied. Asking to DISMISS this case for discovery violation. If not dismissed then I am asking Mr. Reuter to be denied.
10:15:30 AM	Mr. Cooper	Issues are fairly defined for the purpose of this hearing. It involves trial attorneys professional conduct which lead to prejudice to Mr. Cook. With regards to discovery list, it was faxed yesterday. They made no supplemental request. 404B evidence was prejudical.
10:18:14 AM	Judge Stegner	I am not going to dismiss. Will decide on its merits. Having said that, discovery was not provided.
10:19:03 AM	Mr. Cooper	Mr. Reuter is experienced trial attorney, 36 years in this community. He will testify that councils conduct was below standards. Not professional conduct. Comments made were not professional, reptive hear say and was not admissable. Reviewing of the transcript he will testify that there was reasonable probability of a different outcome.
10:22:26 AM	Judge	A couple of options here. Proceed today with Mr. Hull and exclude Mr. Reuter or take testimony of Cook and Mr. Hull and if needed cont. until Mr. Reuter can testify and state can be prepared to CX, or we can simply do a Cont. Inclined to take testimony of Hull and Cook today and then see where we are.
10:24:04 AM	Mr. Cooper	I can put on limited testimony. Mr. Hull is here. Conduct of the trial is such that I didnt necessarily expect to call him. Wants court to take judicial notice of the trial transcript in the criminal case.
10:25:54 AM		I was just at a conference in Boise and was WARNED to be very

	Judge Stegner	cautious of taking judicial notice of the transcript in the criminal case in the post conviction case, this came from board of appeals. Sounds like Mr. Cooper want to cont.
10:27:26 AM	Mr. Cooper	Asking to cont.
10:27:35 AM	Ms. Gardner	Asking to cont
10:27:43 AM	Judge Stegner	Grants cont. I dont have my calendar. Will go to Moscow and I will call you both for hearing date.
10:28:15 AM	PA	Motion to compel to respond to discovery
10:28:28 AM	Judge	Granted respond by the end of next week.
10:28:51 AM	End	

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 2/8/13
AT 4:59 O'CLOCK P.M.
CLERK, DISTRICT COURT

Juan P. Hoffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

ORDER RESCHEDULING HEARING
ON PETITION FOR POST
CONVICTION RELIEF

As a result of a hearing conducted by telephone conference on February 8, 2013,
with counsel for each of the respective parties participating,

It is **ORDERED** that hearing of the Petition for Post Conviction Relief is
rescheduled to be conducted at 1:30 P.M. on April 12, 2013, at the Kootenai County
Courthouse in Coeur d'Alene, Idaho.

DATED this 8th day of February 2013.

John R. Stegner
John R. Stegner
District Judge

ORDER RESCHEDULING HEARING ON
PETITION FOR POST CONVICTION RELIEF - 1

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing **ORDER RESCHEDULING HEARING ON PETITION FOR POST CONVICTION RELIEF** was transmitted by facsimile to:

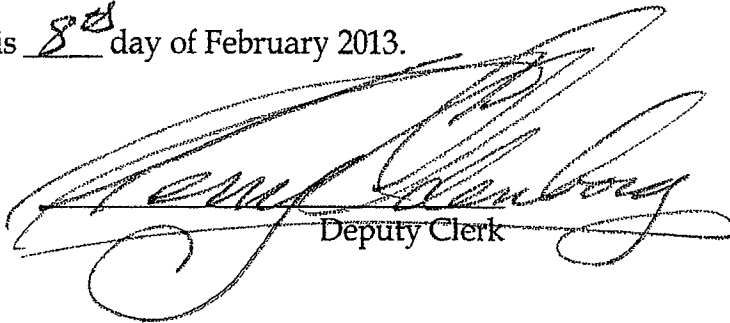
Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and by PDF email to:

Dawn Mitchell
Kootenai County District Court
dmitchell@kcgov.us

on this 8th day of February 2013.



Deputy Clerk

DANIEL G. COOPER
 Attorney at Law
 408 Sherman Ave, Suite 203
 PO Box 387
 Coeur d'Alene, ID 83816
 Phone: (208) 664-5155; Fax: (208) 765-5249
 Bar Number: 6041

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED:

2013 FEB 15 PM 4:53 875m

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-11-0010315
)		
Petitioner,)		
)		
v.	)	NOTICE OF SERVICE	
)		
STATE OF IDAHO,)		
)		
Respondent.)		

Daniel G. Cooper, Attorney for Petitioner, SEAN COOK, hereby gives Notice to the Court that on this 15th of February 15, 2013, the Petitioner's Response to the Respondent's First Set of Interrogatories, Request for Production of Documents was served to:

Donna Gardner/Attorney for the State/Respondent
 501 N. Government Way/Box 9000
 Coeur d'Alene, ID 83816
 VIA: U.S. Mail

DATED this 15th day of February, 2013.



DANIEL G. COOPER
 Attorney for Petitioner

Office of the Kootenai County
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, Idaho 83816-1971
Telephone: (208) 446-1800
Assigned Deputy Prosecutors: DG

RECEIVED

13 MAR 15 AM 10:48

SHERIFF'S DEPARTMENT
KOOTENAI COUNTY

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 MAR 28 AM 10:07

CLERK DISTRICT COURT

Rebecca McKeon
DEPUTY *R.M.*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
)
) Petitioner,)
)
)
)
)
) vs.)
)
)
)
) STATE OF IDAHO,)
)
)
)
) Respondent.)
)
_____)

SUBPOENA

CASE NO. CV11-10315

POST CONVICTION TRIAL

TO: ATTORNEY JONATHAN HULL, 508 E. GARDEN, COEUR D'ALENE, ID, 83814,
// 667-6467

You are hereby commanded that, laying aside all excuses, you appear at the Kootenai County Courthouse of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, at Coeur d'Alene on the 12th day of April, 2013, at 1:30 o'clock p.m. of said day, as Witness in the above entitled action on the part of the Plaintiff for 1 day.

Given under my hand this 13 day of March, 2013.

By: _____, Deputy Prosecuting Attorney

OFFICE OF SHERIFF OF KOOTENAI COUNTY

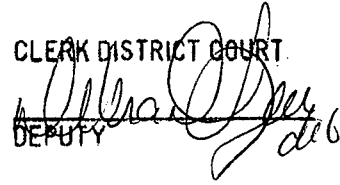
I hereby certify that I served the within subpoena by showing the said within original to the following person named therein, and delivered a true copy thereof to the said person on the 26th day of March, 2013.

BENJAMIN WOLFINGER,
Sheriff of Kootenai County By: #2328 Mark Hindler Deputy

2013 APR 18 AM 7:47

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-2011-10315

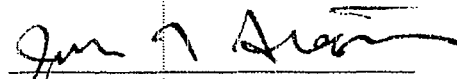
SCHEDULING ORDER

As a result of a hearing on the Petition for Post-Conviction Relief conducted in Coeur d'Alene, Idaho, on April 12, 2013, with counsel for each of the respective parties participating,

It is **ORDERED** that:

- (1) Petitioner's brief must be filed and served no later than April 30, 2013;
- (2) The State's response brief shall be served and filed no later than May 21, 2013; and
- (3) The reply brief, if any, shall be served and filed no later than May 28, 2013.

DATED this 16th day of April 2013.



John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing SCHEDULING ORDER was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188

374

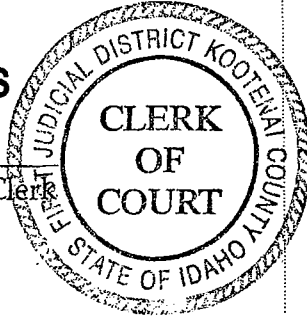
Daniel G. Cooper
Attorney at Law
(208) 765-5249

376

on this 18th day of April 2013.

CLIFFORD T. HAYES

Clifford T. Hayes
Deputy Clerk



Description	CV 2011-10315 Cook vs State of Idaho 20130412 Post Conviction Judge Stegner Clerk Emily Hamilton Court Reporter Sheryl Engler		
Date	4/12/2013	Location	1K-COURTROOM10
Time	Speaker	Note	
<u>02:48:01 PM</u>	Judge Stegner	Post Conviction Case, Defendant is present, In Custody	
<u>03:03:01 PM</u>	Daniel Cooper	Ms. Gardner is stipulating to exhibit 1 --transcript	
<u>03:03:43 PM</u>	Donna Gardner	This is correct	
<u>03:03:51 PM</u>	Judge Stegner	Exhibit I will be admitted	
<u>03:04:16 PM</u>	Daniel Cooper	Call Dennis Reuter	
<u>03:04:25 PM</u>	Dennis Reuter	Sworn for testimony, attorney since 1976, reviews education, training, experience	
<u>03:07:11 PM</u>		Have worked on felony criminal matters--hundreds	
<u>03:08:06 PM</u>		I was involved in trial for Sean Cook	
<u>03:08:36 PM</u>		I was asked to evaluate the trial attorney's work, objections, evidence	
<u>03:09:13 PM</u>		I have had classes about evidence for both civil and criminal	
<u>03:10:01 PM</u>		I am proficient in Idaho rules of evidence	
<u>03:10:29 PM</u>		I have reviewed the transcript from the jury trial in this case. Exhibit 1 is the transcript I reviewed	
<u>03:11:40 PM</u>		Mr. Cook was represented by Jonathan Hull--charge was forcible rape with Danielle Whitton	
<u>03:12:22 PM</u>		Mr. Cook was denying that is was forced.	
<u>03:12:54 PM</u>		I have found errors in Mr. Hulls, representation	
<u>03:13:07 PM</u>		Begin with opening statement--one witness Mr. Nelson wife was victim of rape and wanted this to come out	
<u>03:13:34 PM</u>	Donna Gardner	Object	
<u>03:13:59 PM</u>	Daniel Cooper	Argument	
<u>03:14:52 PM</u>	Donna Gardner	Object	

<u>03:19:30 PM</u>	Judge Stegner	Looking at file, I don't see where the issue of opening statement has been preserved as an issue for my review
<u>03:20:26 PM</u>		Objection is Sustained
<u>03:20:42 PM</u>	Dennis Reuter	
<u>03:20:54 PM</u>	Donna Gardner	Object--we only have two main issues for the purpose of this trial
<u>03:21:27 PM</u>	Judge Stegner	Sustained
<u>03:21:34 PM</u>	Dennis Reuter	One of the errors is for escape and threat
<u>03:21:55 PM</u>		Prior to trial state gave notice of 404b--other actions of defendant. One was threatening of Mr. Nelson's family. Nelson was witness for the state
<u>03:22:39 PM</u>		Mr. Nelson testified that defendant threatened his wife and daughter
<u>03:22:49 PM</u>		It was error for Mr. Hull to not object to that. Such a threat is not admissible. More prejudicial than probative
<u>03:24:04 PM</u>		Mr. Cooks was charged separately but it was not part of this trial. It was not joined. It should not have been admitted. Mr. Hull did not object at all to it and declined a limiting instruction
<u>03:24:52 PM</u>		There was separate issue about testimony from Mr. Nelson that defendant wanted to escape and prevent Danielle from testifying by killing her. Mr Hull said this a confession statement and said it is admissible evidence. This should have been objected to. It is not admissible under 403.
<u>03:26:17 PM</u>	Bryant Bushling	Object
<u>03:26:26 PM</u>	Judge Stegner	Only one prosecutor can be heard
<u>03:26:41 PM</u>	Donna Gardner	Same objection
<u>03:26:57 PM</u>	Judge Stegner	Sustain, and I will only let one of you cross examine Mr. Reuter
<u>03:27:14 PM</u>	Dennis Reuter	Major issue at trial was consensual sex or not
<u>03:28:14 PM</u>		There was no statement by Mr. Cook about escaping
<u>03:28:26 PM</u>		Mr. Nelson testified that everyone in yard was talking about it. He said defendant made no statement about escaping. The testimony at trial was that he wanted to get out. Nothing about escape

<u>03:29:16 PM</u>	No personal knowledge by Mr. Nelson as to any escape plans
<u>03:31:28 PM</u>	Testimony about escaping to prevent testimony--it is unfair--Mr. Hull did object and Judge did exclude that testimony about killing Danielle
<u>03:33:18 PM</u>	There were specific statements Mr. Nelson testified to that should have been objected to by Mr. Hull
<u>03:34:43 PM</u>	on page 379 of transcript lines 7-11--this was objectionable testimony, it calls for hearsay and speculation
<u>03:36:23 PM</u>	Threat evidence--it was unclear who was to be raped his daughter or wife, but they would be messed up
<u>03:36:59 PM</u>	Page 387 line 20-22--page 388 lines 8-16
<u>03:38:11 PM</u>	Found other evidentiary issues from Mr. Hull, the Dillon bothers testimony
<u>03:38:31 PM</u>	Hoses repeatedly said Danielle said yes she had been raped. pages 302-306--this should have been objected, no personal knowledge of the rape
<u>03:40:06 PM</u>	He repeated Danielle statements to the jury
<u>03:40:28 PM</u>	Harold testified similarly pages 342-343--same problem as Hoss testimony--repeated statements of Danielle's testimony
<u>03:41:43 PM</u>	Mr. Hull not making the objections was fatal to the case
<u>03:41:56 PM</u>	In a rape charge--if jury hears defendant threatened to harm wife or daughter and raped. It is just devastating to having the jury keeping an open mind as to rape or being consensual
<u>03:42:53 PM</u>	The statements of Dillon brothers--it is error to have people to repeat the allegation. This with the escape evidence, significantly changed what could be argued.
<u>03:43:56 PM</u>	Failures to object by Mr. Hull, Mr. Hull provided inassistance of counsel
<u>03:44:21 PM</u>	Opinion he did not act
<u>03:45:03 PM</u>	Defendant suffered prejudice
<u>03:45:35 PM</u>	Without the evidence, then the arguments could have been made, jury may have been persuaded otherwise
<u>03:46:21 PM</u>	Attacking Mr. Nelson--credibility--jail house snitch--argument was made by Mr. Hull
<u>03:46:54 PM</u>	The motive--the victim had a boyfriend
<u>03:47:26 PM</u>	Victim didn't say anything to the Dillon brothers when they got there
<u>03:47:46 PM</u>	She didn't say anything on phone to them
<u>03:47:53 PM</u>	She was free to leave and she did not

<u>03:48:17 PM</u>		No bruising on victim. Danielle had known him since high school She did live in same house for some time
<u>03:48:50 PM</u>		They met at the liquor store the day of the event. She invited him over and gave him her room number. They went to bar together, they drank together.
<u>03:49:46 PM</u>		Her testimony about how she was held down--
<u>03:50:10 PM</u>		She let defendant take her dog and go for a walk
<u>03:50:21 PM</u>		The dog never attacked or barked while this was going on
<u>03:50:39 PM</u>		Marks on her neck were very minor
<u>03:50:46 PM</u>		She could have left when he was in the bathroom. She admitted she helped make the bed they had the sex in
<u>03:51:11 PM</u>		Mr. Cook was at ease when the Dillon brothers arrived.
<u>03:51:27 PM</u>		Defendant was cooperative with police. Gave an explanation and testified
<u>03:52:06 PM</u>		He did testify at trial
<u>03:52:14 PM</u>		Victim didn't remember where her underwear ended up
<u>03:52:36 PM</u>		She had consumed alcohol before going to bar
<u>03:52:49 PM</u>		All the covers and sheets were taken off the bed--shows more consensual than forced
<u>03:53:37 PM</u>		When you look at all the facts of what happened, nothing unusual, she told Hoss nothing was wrong, underwear in the bathroom. lack of testimony about choking to the police--these factors would benefit defendant in closing
<u>03:54:52 PM</u>		All this could have been very effective in this case
<u>03:55:58 PM</u>		The case was a defensible case. The compounded hearsay from the Dillon brothers affected the case
<u>03:56:22 PM</u>		It was error. Evidence that came in of escape and threats
<u>03:56:48 PM</u>		He did not receive a fair trial. Errors are too large. Ineffectiveness assistance of counsel
<u>03:57:16 PM</u>	Daniel Cooper	Nothing more
<u>03:57:23 PM</u>	Bryant Bushling	Cross exam
<u>03:57:33 PM</u>	Dennis Reuter	I am saying--those factors could have been pointed out by Mr. Hull in a much more effective way
<u>03:58:32 PM</u>		Effective closing argument is a standard for lawyer
<u>03:59:13 PM</u>		Physical evidence found
<u>04:00:47 PM</u>		Dillon's brothers testimony was not exact

<u>04:01:27 PM</u>		Harold said she said yes, she was raped
<u>04:01:43 PM</u>		Victims statements to the brothers are inadmissible
<u>04:02:05 PM</u>	Daniel Cooper	Object
<u>04:02:11 PM</u>	Judge Stegner	Overruled
<u>04:02:47 PM</u>	Dennis Reuter	Statements to brothers not admissible
<u>04:03:15 PM</u>		There was time for reflections, she called them, she didn't tell them she was raped. They came up with story to tell Cook where they were going in hopes he would leave
<u>04:03:55 PM</u>		Shows reflections, willing to tell a story to Cook
<u>04:04:57 PM</u>		Error to admit the statements of the brothers
<u>04:05:37 PM</u>		She was not acting stressed for the application of the rule of evidence. It would not be admissible
<u>04:07:10 PM</u>		The statements of the brothers not as fatal as the escape and threats evidence
<u>04:07:50 PM</u>		It was inadmissible in this case
<u>04:08:47 PM</u>		The statements are not admissible
<u>04:09:44 PM</u>		Statements should have been objected to
<u>04:11:54 PM</u>		His confession to Mr. Nelson was admitted
<u>04:12:12 PM</u>		Mr. Nelson testified there was a threat to him and his family if testified
<u>04:12:45 PM</u>		I do know he was charged with Witness Intimidation
<u>04:13:10 PM</u>		Mr. Nelson testified there was a threat to him and family
<u>04:13:56 PM</u>	Bryant Bushling	No further questions
<u>04:14:01 PM</u>	Daniel Cooper	Re direct
<u>04:14:07 PM</u>	Dennis Reuter	The brothers testimony were not admissible under the excited utterance
<u>04:15:14 PM</u>		Page 239 and 240 of transcript was conference between brothers and victim. It happened even before they left for the store
<u>04:18:02 PM</u>		To the degree that Mr. Hull was to get affective answers or cross is an additional reason it should not be admissible in first place
<u>04:18:38 PM</u>		Threats are not always admissible
<u>04:19:04 PM</u>	Daniel	Nothing more

	Cooper	
<u>04:21:06 PM</u>	Bryant Bushling	Re cross
<u>04:21:12 PM</u>	Dennis Reuter	
<u>04:21:23 PM</u>	Bryant Bushling	Nothing more
<u>04:21:43 PM</u>	Judge Stegner	5 minute recess
<u>04:21:55 PM</u>		Back on record, all present
<u>04:32:38 PM</u>	Daniel Cooper	We rest
<u>04:32:48 PM</u>	Donna Gardner	Call Jonathan Hull
<u>04:33:22 PM</u>	Jonathan Hull	Sworn for testimony--attorney since 1985, reviews education, training, experience
<u>04:33:59 PM</u>		Primary area is criminal defense
<u>04:34:09 PM</u>		Was employed at Kootenai County PD Office 1989-1995
<u>04:34:48 PM</u>		1996 opened private practice
<u>04:34:58 PM</u>		Still licensed in state of Idaho
<u>04:35:32 PM</u>		10 rape trials prior
<u>04:35:38 PM</u>		Sex crimes probably over 100
<u>04:36:34 PM</u>		Hundreds of trials
<u>04:37:33 PM</u>		I represented defendant in this trial for rape charge. I prepared for the trial
<u>04:38:13 PM</u>		We had difficulty locating witnesses, I recall
<u>04:38:26 PM</u>		I think we had preliminary hearing
<u>04:38:37 PM</u>		I can't remember the names of the witnesses
<u>04:39:09 PM</u>		There was a young man I attempted to cross exam about testimony at the preliminary hearing
<u>04:40:09 PM</u>		Court didn't allow the questions I wanted to ask. Don't recall much of a cross exam
<u>04:40:32 PM</u>		I remember cross examining of the victim. Don't recall the specifics
<u>04:41:04 PM</u>		I recall her testimony of not much drinking. I found that incredible and I was going after that I recall
<u>04:42:00 PM</u>		An issue for me, I don't recall the victim reporting this right away. There was a delay. That is my memory at this time

<u>04:42:38 PM</u>		I remember the jail house snitch--don't recall him being called Mr. Nelson.
<u>04:43:14 PM</u>	Daniel Cooper	Object
<u>04:43:31 PM</u>	Judge Stegner	Overrule
<u>04:43:46 PM</u>	Jonathan Hull	I don't recall if Mr. Nelson was in custody
<u>04:45:05 PM</u>		Don't recall testimony of threats
<u>04:45:21 PM</u>		I didn't not read a transcript of the file
<u>04:45:36 PM</u>		I did meet with you prior to this and we talked briefly. You did not provide me with any transcript
<u>04:46:01 PM</u>		I recall the strategy with Mr. Nelson, he purgered himself at preliminary hearing. He was incredible witness.
<u>04:46:37 PM</u>		He was cooking his own goose as far as I was concerned
<u>04:46:48 PM</u>		His statements about what Mr. Cooks said to him didn't relate to the case
<u>04:47:01 PM</u>		His testimony was an unreliable witness
<u>04:47:21 PM</u>		I thought it went well. His story changed a lot
<u>04:47:57 PM</u>		He testified he had no felonies. It was not true. It would be my intention to bring it out
<u>04:48:35 PM</u>		He had impeached himself. What he said defendant had told him didn't make any sense, didn't related to the case
<u>04:49:51 PM</u>		I don't recall the testimony of threats
<u>04:50:01 PM</u>		I don't recall a charge of intimidating a witness
<u>04:52:17 PM</u>		The trial Judge was recently the Chief PA for county, we had always been adversaries. My strategy was to not make objections that were not necessary. I let Mr. Nelson say what he had to say, It was obvious he was lying. the strategy was not to object a lot
<u>04:54:18 PM</u>	Donna Gardner	Nothing more
<u>04:54:27 PM</u>	Daniel Cooper	Cross exam
<u>04:54:33 PM</u>	Jonathan Hull	I have made many mistakes and may have in this case. Certain things I remember very well, I don't recall the threats to the snitch and his wife
<u>04:55:29 PM</u>	Daniel Cooper	Nothing more

<u>04:55:38 PM</u>	Donna Gardner	Nothing
<u>04:55:44 PM</u>	Judge Stegner	Why wouldn't you ask for limited instruction
<u>04:55:55 PM</u>	Jonathan Hull	I don't recall. I don't have an answer.
<u>04:56:24 PM</u>		I haven't often used limited instruction in my career
<u>04:56:59 PM</u>		In this case could have been counter productive. I don't recall
<u>04:57:23 PM</u>		My strategy was to dismiss his testimony
<u>04:57:31 PM</u>		I recall going into chambers a lot
<u>04:57:40 PM</u>		I don't recall my thought process then
<u>04:58:12 PM</u>		I would exclude testimony if I could get rid of it entirely
<u>04:58:25 PM</u>	Judge Stegner	Noting more, you are excused
<u>04:58:36 PM</u>	Daniel Cooper	Submit written argument would like until the 30th
<u>04:59:23 PM</u>	Judge Stegner	You have till the 30th
<u>04:59:32 PM</u>	Donna Gardner	A couple weeks after, ask for a month
<u>04:59:45 PM</u>	Judge Stegner	Petitioners Post brief due the 30th, States brief due May 21st
<u>05:00:14 PM</u>		Response due May 28th
<u>05:00:23 PM</u>		I will issue written opinion
<u>05:00:30 PM</u>	end	

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 813

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Bar Number: 6041

2013 MAY -1 AM 8:06

CLERK DISTRICT COURT
Debra J. Day
DEPUTY *dtb*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	PETITIONER'S TRIAL BRIEF	
)		
V.)		
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record, Daniel G. Cooper, Conflict Public Defender, hereby submits the following Petitioner's Trial Brief and the arguments contained therein for the Court's Consideration in determining the Petition for Post Conviction Relief filed herein on December 28, 2011:

I.

STATEMENT OF FACTS

On December 28, 2011, Petitioner, Sean Cook filed a verified Petition for Post Conviction Relief alleging, amongst other things, claims of ineffective assistance of counsel by his appointed counsel, Jonathan Hull in Cook's representation at trial for rape in the matter of *State of Idaho v. Sean M. Cook*, CR-2008-13006. In the underlying criminal matter, Cook was charged with forcible rape against one, Miss Danielle Whitten based upon an encounter where

the two engaged in sexual intercourse at Whitten's motel room late one evening on or about April 8, 2011.

Cook alleged in his Petition for Post Conviction Relief that Mr. Hull provided him ineffective assistance of counsel at trial for the rape charge by failing to object to the admission of evidence of threats Cook allegedly made toward the State's witness, Mr. Paul Nelson; his wife, Karen Freeland; their daughter; and Whitten. Cook further alleged ineffective assistance of counsel from Mr. Hull in failing to object to testimony from Mr. Nelson regarding Cook's intent to escape from custody to harm Whitten and prevent her from testifying and by failing to object to hearsay testimony from State's witnesses, Hoss and Harold Dillon.

The trial on the underlying rape charge occurred between November 3 and November 6, 2008. During the trial, the trial court held a conference on the admission of 404(b) evidence. During the conference, the state sought to introduce testimony from Mr. Nelson that while they were cellmates Cook allegedly confessed to raping Whitten. In addition, the state sought to introduce testimony from Mr. Nelson that Cook threatened him, his wife and daughter while the two were in custody. The state also sought to introduce testimony from Mr. Nelson that Cook allegedly had stated he needed to get out of jail to keep Whitten from testifying and that he (Cook) had intentions of killing Whitten. The state sought to introduce this evidence pursuant to Idaho Rule of Evidence 404(b).

In response to the state's request to introduce this evidence, Cook's attorney, Mr. Hull stipulated to the introduction of the alleged threats to Mr. Nelson and his family stating that he believed Mr. Nelson's testimony that Cook threatened Mr. Nelson and his family was "part and parcel" of Cook's confession. (Plaintiff's Exhibit 1, p. 108, ln. 4-16.) Mr. Hull further stipulated

that this testimony would be admitted without a limiting instruction. (*Id.*) Hull also informed the court that he believed Cook's alleged statement to Mr. Nelson that he (Cook) needed to get out of jail to keep Whitten from testifying was admissible because it was part of a confession. (*Id.* at p. 114, ls. 13-18.)

At trial, Mr. Nelson testified as to Cook's alleged confession to the rape of Whitten. Mr. Nelson further testified, without objection from the defense, that prior to being transported to Cook's preliminary hearing, Cook threatened to have Nelson's wife and daughter followed and raped or that "they would be taken care of" if Nelson testified against him. (*Id.* at p. 381, ln. 14 – p. 389, ln. 7.) Mr. Nelson further testified, without objection from the defense, that Cook had expressed a desire to escape from jail so that nobody would be left to testify against him and that he would kill Whitten so that she would not be able to testify. (*Id.* at p. 387, ln. 10 – 388, ln. 16.)

In addition to the threat and escape evidence being admitted in Cook's underlying trial, hearsay testimony was also admitted without objection by Mr. Hull. During trial, the state called Hoss Dillon and Harold Dillon to testify. At trial, the Dillon brothers testified that were called by Whitten to come to the motel room where she had been staying. (Plaintiff's Exhibit 1, p. 290, ln. 4-18; p. 338, ln. 18-21.) Upon their arrival at the room, Hoss and Harold hung out with Whitten and Cook for awhile before Whitten left with them in one vehicle, while Cook left in another. (*Id.* at p. 301, ln. 20 – p. 302, ln. 24.) According to the brothers' testimony at trial, Whitten appeared upset and not her usual self that evening. (*Id.* at p. 290, ln. 8-15; p. 2954, ln. 14-24; p. 339, ln. 24 – p. 340, ln. 7.)

At trial, Hoss Dillon further testified, without defense objection, to the following statements attributed to Whitten:

“She just said that he was trying to get on her or whatever. And she kept trying to push him off or whatever.” (*Id.* at p. 303, ln. 11-13.)

“She said that he was on top of her and stuff like that... Well, I mean she said he was trying to hit on her and kiss her and just, like, trying to lay on her and stuff.” (*Id.* at 305, ln. 6-18.)

“She said that Sean raped her basically... She said that he forced sex on her... [She said it had happened] right before she called me...” (*Id.* at 306, ln. 3-7.) Harold Dillon provided further testimony indicating that Whitten told the brother that she had been raped by Cook. (*Id.* at 342, ln. 18 – p. 343, ln. 24.)

On April 12, 2013 trial was held on Cook’s claims of ineffective assistance of counsel by Mr. Hull. At trial, Cook called Mr. Dennis Reuter as an expert witness. Mr. Reuter is an attorney who has practiced mostly in the area of criminal law since 1976. Mr. Reuter also served as a deputy public defender employed by the Kootenai County Public Defender’s Office from 2000 until 2009. During his career, Mr. Reuter engaged in more than 200 jury trials and, approximately, 60-65 felony criminal trials. In that experience, Mr. Reuter represented criminal defendants in six (6) criminal rape trials.

Mr. Reuter testified that, in his opinion, Mr. Hull provided Cook ineffective assistance of counsel in Cook’s defense in the underlying rape trial. Specifically, Reuter testified that Mr. Hull engaged in an objectively deficient performance in his defense of Cook in the rape trial (1) by failing to object to the testimony offered by Mr. Nelson that Cook had allegedly threatened Cook, his wife and daughter, and Whitten; (2) by failing to object to testimony offered by Mr. Nelson that Cook intended to escape from jail in order to prevent Whitten from testifying against him; and (3) by failing to object to the hearsay testimony from Hoss and Harold Dillon. Mr. Reuter

further testified that, in his opinion, Mr. Hull's errors resulted in prejudice to Cook in that, absent the errors, the outcome of the case would likely have been different.

II.

APPLICABLE LEGAL STANDARD

Claims for ineffective assistance of counsel are reviewed utilizing the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See, *McKeeth v. State*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004). To prevail on such a claim the Petitioner must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors the result would have been different. *Id.* In evaluating whether prejudice is proved, the court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068; *Milburn v. State*, 130 Idaho 649, 653, 946 P.2d 71, 75 (Ct. App. 1997).

When evaluating an ineffective assistance of counsel claim, the court does not second guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate representation, ignorance of relevant law or other shortcomings capable of objective review. There is a strong presumption that counsel's performance fell within a wide range of professional assistance. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2007).

III.

ARGUMENT

- 1. Counsel, Jonathan Hull's performance fell below an objective standard of reasonable representation by conceding the admissibility of testimony that Cook threatened harm to Mr. Nelson, his wife and daughter, and Whitten and in failing to**

object to inadmissible hearsay testimony from Hoss and Harold Dillon regarding Whitten's statements concerning the alleged rape.

a.

Defense attorney Hull was ineffective for failing to object to the admission of alleged threats by Cook against Mr. Nelson, his family and Whitten.

The "threat evidence" testified to by Nelson was not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence. I.R.E. 401. At trial, the only issue of consequence for the jury's determination was whether the intercourse between Cook and Whitten was consensual or forced. Evidence that Cook threatened Mr. Nelson, his wife and daughter had no tendency to make it more likely that the intercourse between Cook and Whitten was forced by Cook. Furthermore, evidence that Cook expressed a desire to escape jail and kill Whitten so that she could not testify also did not make it more likely that Cook had engaged in rape. Instead, this evidence was relevant only to the question of whether Cook had intimidated witnesses which was not at issue in the rape case. The evidence that Cook had allegedly engaged in threats, on the other hand, made Cook appear to the jury to be a dangerous and violent person. However, the state is not allowed to prove that Cook committed rape by showing that he is a violent person.

I.R.E., Rule 404(b) provides that evidence of a character trait and evidence of other crimes, wrongs or acts is not admissible to prove that the individual acted in conformity therewith. *State v. Wood*, 126 Idaho 241, 244, 880 P.2d 771 (Ct. App. 1994). In *State v. Woods*, the Court of Appeals set forth the policy inherent in Rule 404:

“The policy expressed in Rule 404, precluding use of character evidence or other misconduct evidence to suggest that the defendant must have acted consistently with those past acts or traits, is a long-standing element of American law. It is part of our jurisprudential tradition that an accused may be convicted based only upon proof that he committed the crime with which he is charged--not based upon poor character or uncharged sins of the past. The rule against use of other misconduct evidence to suggest that the defendant had a propensity to commit crimes of the type charged recognizes that such evidence may have a too-powerful influence on the jurors, and may lead them to determine guilt based upon either a surmise that if the defendant did it before, he must have done it this time, or a belief that it matters little whether the defendant committed the charged crime because he deserves to be punished in any event for other transgressions.”

Id. at 244-245, 880 P.2d 771.

While I.R.E. 404(b) does not permit other crimes, wrongs or acts evidence to be admitted to prove the propensity of the defendant to commit the crime charged, the rule does permit such evidence to be admitted when relevant for other purposes. These exceptions include admitting the evidence to show proof of knowledge, identity, plan, preparation, opportunity, motive, intent and the absence of mistake or accident. I.R.E. 404(b); *State v. Johnson*, 148 Idaho 664, 668, 227 P.3d 918 (2010). At Cook’s rape trial, however, there were no issues for the jury’s determination which would invoke one of these stated exceptions. The only relevant question for the jury at Cook’s trial for rape was whether the intercourse between Cook and Whitten was consensual or forced and evidence that Cook was a dangerous and violent individual by allegedly threatening Nelson, his family and Whitten was not relevant to that issue.

Even if a court could find that the “threat evidence” testified to by Mr. Nelson was marginally relevant, because it showed consciousness of guilt, it would have been excluded, upon a proper objection, on the basis that the evidence was unfairly prejudicial. I.R.E., Rule 403 provides: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” While this rule does not require the exclusion of

PETITIONER’S TRIAL BRIEF - Page 7

all prejudicial evidence, the rule does require exclusion of evidence which is unfairly prejudicial such that it tends to suggest a decision on an improper basis. *State v. Pokorney*, 149 Idaho 459, 465, 235 P.3d 409 (Ct. App. 2010); *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

In Cook's case, the admitted evidence that Cook allegedly threatened Mr. Nelson, his family and Whitten was unfairly prejudicial. Again, Mr. Nelson's testimony of the threats against his family was that Cook allegedly stated that should Mr. Nelson testify at the preliminary hearing, Cook would have his wife and daughter followed and raped or that they would be taken care of. (Plaintiff's Exhibit 1, p. 381, ln. 14 – p. 389, ln. 7.) Although, Mr. Nelson further testified that Cook had stated that Cook would have his girlfriend do the following, (*Id.* at p. 382, ln. 7-11.), Mr. Nelson provided no similar testimony as to who would engage in the alleged rape of his wife and daughter. As a consequence of the introduction of this testimony, along with Mr. Nelson's further testimony of Cook desiring to escape jail so that nobody would be left to testify against him, raised a specter that Cook himself would rape Mr. Nelson's wife and daughter to keep Nelson from testifying. That is the only rational inference to be taken from the testimony.

Mr. Nelson's further testimony that Cook had expressed a desire to escape from jail so that nobody would be left to testify against him and that he would kill Whitten so that she would not be able to testify, was also unfairly prejudicial. This testimony from Mr. Nelson raised the similar specter that Cook would have murdered Whitten prior to trial had he been released from jail. Thus, Mr. Nelson's "threat testimony" suggested to the jury that Cook would freely rape and murder others for his benefit. The testimony painted him as a prospective rapist with murderous intentions that were only being held back by jail walls. The introduction of the "threat evidence" was so overly prejudicial to Cook's case as to deny him his constitutional right to a fair trial.

Had Cook's attorney, Mr. Hull objected to the introduction of this evidence, the district court would have excluded under I.R.E. 403. Accordingly, Mr. Hull was deficient in not objecting to the introduction of this evidence; rather than stipulating that it was admissible as "part and parcel" of a confession.

In this matter, the State may argue that Hull's conduct in stipulating to the admission of Mr. Nelson's testimony regarding Cook's alleged threats toward Nelson, his wife and daughter, and Whitten was a strategic decision and therefore this claim of ineffective assistance of counsel should be dismissed. In support of this argument, the state may argue that Hull did not want to draw any attention to any of Mr. Nelson's testimony because, in his [Mr. Hull's] mind, Mr. Nelson was an obviously incredible witness. However, Mr. Hull stated that he believed that the threat and escape evidence was admissible as part and parcel of a confession. (See, Plaintiff's Exhibit 1, p. 108, Ls. 4-16; p. 114, Ls. 13-18.) Accordingly, the appearance is that Mr. Hull's failure to object to the threat and escape evidence was not occasioned by any reasoned strategy he may have possessed, but rather by ignorance of the applicable legal standards related to such evidence.

Moreover, Hull's concession to the introduction of the threat and escape evidence occurred during a "conference" during which the jury was not present. (See, Plaintiff's Exhibit 1, pp. 107 - 129.) Because the jury was not present during the "conference", none of Hull's objections to the threat and escape evidence would have been heard by the jury and he would not have drawn any attention to Mr., Nelson's threat and escape testimony had he properly objected to it.

Based upon these facts, it is apparent that Mr. Hull's failure to properly object to the

threat and escape evidence was not based upon a strategic decision he possessed but, but merely his negligence.

To support this argument the Court need only look to Mr. Hull's other deficiencies during Cook's rape trial. For instance, Mr. Hull did not object to any of the testimony from Nelson's wife, Karen Freeland. Freeland was permitted to testify, without objection from Hull, that she herself had been a victim of rape and that she possessed strong opinions about reporting those types of things. (Plaintiff's Exhibit 1, p. 399, Ls. 5-12.) This evidence was completely irrelevant to Cook's trial, yet Hull let it be proffered. Mr. Hull also permitted Nelson to testify that his and Freeland's daughter had been raped. (Id, at p. 380, Ls. 10-15). This evidence was also completely irrelevant to Cook's trial. Yet, Hull let that evidence be proffered as well. Moreover, the state used the testimony of Freeland's rape and the daughter's rape in closing to bolster Nelson's credibility and curry emotional favor with the jury. (Id, p. 517, L. 20 – P. 518, L. 10.)

Looking at the trial transcript, the Court cannot find that Hull's failure to object to the threat and escape evidence was based upon a strategic decision.

b.

Defense attorney Hull was ineffective for failing to object to the Dillon brothers' hearsay testimony concerning Whitten's statements.

Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Idaho R. Evid. 801(c). Hearsay is inadmissible except in those circumstances provided by the Idaho Rules of Evidence. I. R. E. 802; *State v. Thorngren*, 149 Idaho 729, 731, 240 P.3d 575 (Idaho 2010). One of the established exceptions to the hearsay rule is that of an excited utterance. The excited

utterance exception authorizes the admission of hearsay if the testimony recounts “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” I.R. E. 803(2); *state v. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 349 (Ct. App. 1999). To fall within the excited utterance exception, an out-of-court statement must meet two requirements. First, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and second, the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Hansen, supra* (citing, *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986); *State v. Burton*, 115 Idaho 1154, 1156, 772 P.2d 1248, 1250 (Ct.App.1989)).

In determining whether a statement constitutes an excited utterance, courts apply a totality of the circumstances test, which includes consideration of (1) the amount of time that elapsed between the startling event and the statement, (2) the nature of the condition or event, (3) the age and condition of the declarant, (4) the presence or absence of self-interest, and (5) whether the statement was volunteered or made in response to a question. *See, State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007).

At Cook's trial, defense counsel, Mr. Hull was deficient for not objecting to this testimony from the Dillon brothers because the Dillon brother's statements attributed to Whitten were not excited utterances. Rape certainly can be considered a startling event startling event that renders inoperative the normal reflective thought process of a person experiencing that event. However, Whitten's statements to the Dillon brothers identified above were not spontaneous statements concerning that event.

Pursuant to the testimony admitted at trial, there was not a great deal of time that passed

between the alleged incident of rape and when Whitten made her statements to the Dillon. Based upon the trial testimony, approximately 35 to 45 minutes may have elapsed. However, during that intervening time, Whitten assisted Cook in making the bed in her motel room. (*Id.* at p. 234, ln. 3-21.) In addition, during this time, Whitten and the Dillon brothers had a conversation with the Dillon brothers that she wanted Sean to leave the motel room and she and the Dillon brothers formulated a plan whereby she and the Dillon brothers were going to inform Cook they were going to go see Harold's girlfriend, in an effort to get Cook to leave. (*Id.* at p. 239, ln. 16 – p. 240, ln. 11.) Whitten also monitored the parking lot of the motel to see if Sean had, in fact, left before her and the Dillons. (*Id.* at p. 241, ln. 2 – p. 242, ln. 21.) Lastly, she went to the Exxon gas station located on Appleway and Government to get cigarettes. (*Id.* at p. 242, ln. 22 – p. 243, ln. 2.) The fact that Whitten assisted in making the bed of the motel room, hatched a plan with the Dillon brothers to get Cook to leave; monitored Cook's departure and then went to buy cigarettes, indicates that Whitten's later statement that Cook had raped her was not a spontaneous statement.

Whitten's statement was also not voluntarily made, but given only after constant questioning from Hoss Dillon. Hoss Dillon testified at trial that he had asked Whitten what was wrong during his telephone call with her, to which there was no response. (*Id.* at p. 291, ln. 7-11.) He further asked her what was wrong after he arrived at her motel room, to which Whitten responded that she "wanted to get out of there". (*Id.* at p. 299, ln. 14-17.) He asked again what was wrong while the two sat in the car at the gas station or on the way to the gas station. (*Id.* at p. 303, ln. 7 – p. 304, ln. 1.) It wasn't until Whitten and the Hoss brother had returned to the motel room that Whitten made her statement to Hoss Dillon that Cook had raped her, and again the

statement was only made after Dillon again asked her what was wrong. (*Id.* at p. 304, ln. 24 – 305, ln. 8.)

Admittedly, in Idaho the excited utterance exception often receives broader application in sex crime cases. *See, e.g., State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986). However, most, if not all Idaho cases applying this broader approach for application of the excited utterance rule involve child victims or adults whose statements were declared “excited utterances” made those statements spontaneously and not in response to direct questioning. *See, e.g., State v. Parker, supra, compare, State v. State v. Peite*, 122 Idaho 809 (Idaho App. 1992).

In this matter, Whitten’s was an adult woman of 23 years of age who did not make her statements to the Dillon brothers except upon constant questioning over approximately 35-45 minutes. Also, in the time between the event of her alleged rape, Whitten assisted Cook in making the motel bed, devised a plan to get Cook to leave the motel room, monitored Cook’s departure, and traveled to the gas station to get cigarettes. Owing to these facts, Whitten’s subsequent statement that Cook had raped her was not an excited utterance as she clearing was in charge of her normal powers of thought and reflection.

2. Cook suffered prejudice by Mr. Hull’s failure to object to the Dillon brothers’ hearsay statements and the testimony of Mr. Nelson regarding Cook’s alleged threats of the rape and murder of Mr. Nelson’s family and Miss Whitten.

Mr. Hull’s deficiencies in failing to object to the Dillon brothers’ hearsay statements and Mr. Nelson’s testimony regarding Cook’s alleged threats because introduction of that evidence because introduction of this evidence the evidence radically altered Cook’s trial.

At Cook’s rape trial the only material issue for the jury to decide was whether the sexual intercourse between Cook and Whitten was consensual or forced. Under the facts adduced at

Cook's rape trial the only persons with personal knowledge that could testify to the issue of a consensual sexual encounter were Whitten and Cook.

In this matter, Cook need only show that there was a reasonable probability that but for counsel's errors the result would have been different and there was significant evidence adduced in the underlying rape trial upon which a jury could have acquitted Cook of rape, absent the improperly admitted evidence. Mr. Reuter testified that, in his opinion, absent the admission of the inadmissible threat and escape evidence from Nelson and the compound hearsay from the Dillon brothers, a jury would not have been able to find beyond a reasonable doubt that Cook was guilty of forcible rape. Cook and Whitten had known each other for a considerable period of time and they had previously lived together. In addition, Whitten invited Cook to her motel room and went out to a bar and had drinks with him. Whitten relayed to Cook that she was having problems with her relationship with her boyfriend.

Also, Whitten didn't run from her motel room after their sexual encounter, but remained while Cook was in another room for several minutes. Whitten helped Cook make the bed. Thereafter, Whitten also trusted Cook with her own pet dog while she met with Hoss and Harold. Lastly, Whitten did not report the sexual encounter freely, but only related the event, in the form of a rape accusation, after consistent prodding by Hoss Dillon.

Introduction of the Dillon brothers' hearsay statements was prejudicial because it provided constant repetition or a constant banging-of-the-drum of the state's claim that Cook had raped Whitten through incompetent sources (i.e. persons with no first-hand knowledge of the events that had transpired). In addition, neither of the Dillon brothers' could be effectively cross-examined as to any alternative motive Whitten may have had in making her statements because

the statements were not the Dillon brothers' statements. Admission of Whitten's hearsay statements through the Dillon brothers' testimony effectively made those statements unimpeachable – as coming from the Dillons.

Introduction of Mr. Nelson's testimony of Cook's alleged threats to rape and murder Mr. Nelson's wife, daughter and Whitten also prejudiced Cook because it distracted the jury from the ultimate issue in controversy. The improper introduction of Mr. Nelson's irrelevant and highly prejudicial testimony changed the overall issue of the trial from whether a presumed innocent defendant committed rape to whether a potentially serial rapist with murderous intentions committed rape. In both cases, defense counsel's Hull's failure to object to this hearsay and threat evidence caused extreme prejudice to Cook such that a Court cannot conclude that, even without counsel's errors, the result would have been the same. As a result, Cook is entitled to a new trial.

IV.

CONCLUSION

Based upon the foregoing arguments, Cook respectfully requests the Court grant his Petition for Post Conviction Relief and order that he be provided a new trial.

Respectfully submitted this 30th day of April, 2013.



DANIEL G. COOPER
ATTORNEY FOR PETITIONER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 30th day of April, 2013, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833



A handwritten signature in black ink, appearing to read 'D. G. Cooper', is written over a horizontal line.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 MAY 16 AM 10: 26

CLERK DISTRICT COURT
[Signature]
DEPUTY

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	MOTION TO REVIEW TRIAL
	)	COURT DOCUMENT OR TO
	)	REOPEN TO CONSIDER
	)	ADMISSIBILITY.
vs.)	
)	
STATE OF IDAHO)	
Respondent.)	
_____)	

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Donna Gardner, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby files this Respondent's Motion to Review Trial Court Document or to Reopen to Consider Admissibility. Specifically, the Respondent requests consideration of admissibility of the Preliminary Hearing Transcript entered in the underlying trial court proceeding, Case No. CR08-13006. A copy of that transcript is attached and filed under seal. Copy has been provided to Counsel for Petitioner. Request has been made of Counsel for Petitioner as to whether he would have objection to the review of this document by this Court when making its decision. However, to date, no response has been provided.

ADMISSION OF THIS DOCUMENT WILL ASSIST THE TRIER OF FACT

The Respondent believes that admission of this document is essential for this Court to have a complete understanding of the testimony provided by Hoss Dillon and Paul Nelson leading up to the trial testimony provided by these persons. This would assist this Court in understanding the tactical decisions referenced by Mr. Hull in his testimony with regard to his cross-examination of these witnesses.

Respondent submits that this transcript is not hearsay as it is not presented for the truth of the matter asserted (I.R.E. 801 (c)); and the transcript contains the prior statements of the trial witnesses. I.R.E. 801 (d)(1). Furthermore, the transcript is a self-authenticated public record provided by the Court Clerk. I.R.E. 803 (8).

The tendering of this transcript is intended to assist the Court in understanding the tactical decisions made by Mr. Hull, as well as to provide a better understanding as to both why the State questioned Mr. Nelson regarding the threats made by Cook at the trial and why Mr. Hull did not pose an objection to those questions.

THIS COURT HAS DISCRETION TO REOPEN THE CASE FOR THE LIMITED PURPOSES OF DETERMINING ADMISSION OF THE TRANSCRIPT

The Petitioner might argue that there exists no rule allowing the Respondent to ask for reopening or reconsideration, and thus this court has no authority to allow such. However, at least one appellate court decision has disagreed. The court in *State v. Montague*, 114 Idaho 319, 756.P.2d 1083 (Ct.App., 1988) found:

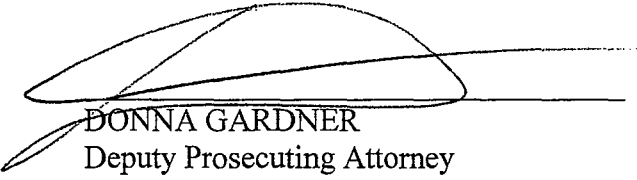
Apparently, Montague would have us hold that because such a request is not specifically mentioned in the rules of criminal procedure, a trial court is without power to act upon it. This position is without merit. The Federal Rules of Criminal Procedure, upon which the Idaho Criminal Rules are based, similarly omit mention of motions or requests for reconsideration. However, the federal courts have held that a trial court is free to

entertain such a motion when made. *E.g., United States v. Scott, 524 F.2d 465 (5th Cir.1975)*. On appeal, the federal standard for reviewing a trial court's decision to reconsider is whether there has been an abuse of discretion. *United States v. Rabb, 752 F.2d 1320 (9th Cir.1984)*, *cert. denied*, 471 U.S. 1019, 105 S.Ct. 2027, 85 L.Ed.2d 308 (1985). We believe the federal approach is sound.

Montague at 1084.

In *Montague*, the state had presented a brief in support of its motion for reconsideration, as well as an affidavit of facts which had not previously been provided in opposition to the suppression motion. That Court found that while the judge was not bound to consider this new information, it had discretion to reexamine his prior ruling and to consider all information pertinent to the subject.

DATED this 15 day of May, 2013.


DONNA GARDNER
Deputy Prosecuting Attorney
Kootenai County

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of May, 2013, a true and correct copy of the foregoing MOTION TO REVIEW TRIAL COURT DOCUMENT OR TO REOPEN TO CONSIDER ADMISSIBILITY was caused to be faxed/hand delivered to:

DANIEL COOPER
Attorney for Petitioner



BARRY McHUGH
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ASSIGNED ATTORNEY:
DONNA GARDNER

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 MAY 16 AM 10:26

CLERK DISTRICT COURT

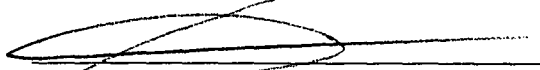
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	Case No. CV11-10315
Petitioner,)	
	)	NOTICE OF FILING UNDER SEAL
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

PLEASE TAKE NOTICE that the State, by and through the attorney of record, Donna Gardner, Deputy Prosecuting Attorney, files the accompanying document under seal to protect the confidentiality of said document. The document being submitted is a preliminary hearing transcript in support of the Respondent's Motion to Review Trial Court Documents or to Re-Open to Consider Admissibility and the Respondent's 2nd Trial Brief and Response to Petitioner's Trial Brief, both filed herein.

DATED this 15 day of May, 2013.


DONNA GARDNER,
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of May, 2013, a true and correct copy of the foregoing NOTICE OF FILING UNDER SEAL was faxed to:

DAN COOPER

NOTICE OF FILING UNDER SEAL

2013 MAY 16 AM 10: 26

CLERK DISTRICT COURT
[Signature]
DEPUTY

BARRY MCHUGH
Prosecuting Attorney
501 Govt Way/Box 9000
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Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	CASE NO. CV11-10315
Petitioner,)	
	)	RESPONDENT'S 2 ND TRIAL BRIEF
	)	AND RESPONSE TO PETITIONER'S
	)	TRIAL BRIEF
)	
vs.)	
)	
STATE OF IDAHO)	
Respondent.)	

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Donna Gardner, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby files this the Respondent's 2nd Trial Brief and Response to Petitioner's Trial Brief. Respondent incorporates by reference its initial Trial Brief filed with this court on February 6, 2013, and makes the additional following responses to Petitioner's Trial Brief:

1. The "threat evidence" was properly admitted.

The Petitioner claims that the threats to Mr. Nelson or his family and to the victim were not admissible. Petitioner further seems to argue that if Mr. Hull had merely made an objection, the Court would have not allowed any of this testimony to be heard. Mr. Reuter testified during direct examination that the threats were inadmissible because guilt could not be inferred from the

threat. Respondent adamantly disagrees with this point, as does the case law. The Petitioner also claims that the “threat evidence” was unfairly prejudicial.

The issue of a threat to a witness was discussed in *U.S. v. Guerrero-Cortez*, 110 F.3d 647 (1997). The threat in that case did not involve a direct threat communicated to a witness, so it was far more attenuated than the threat in this case. The Court in *Guerrero-Cortez* noted, at page 652, that “**an effort to intimidate a witness tends to show consciousness of guilt**” [emphasis added]. In analyzing the admissibility of evidenced the Court wrote, at page 652:

Guerrero-Cortez argues that the letter is not relevant both because Pattatuchi had no connection to the drug conspiracy, and because no evidence was presented that showed Pattatuchi was criminally prone to carry out threats or violence against Acosta. The threshold of relevance, however, is quite minimal. **Relevant evidence is defined as evidence ‘having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ Fed.R.Evid. 401.** We cannot say that the district court abused its discretion in admitting the letter into evidence because the trial court could have viewed the letter as evidence of Guerrero-Cortez’s guilt, and thus relevant to making his involvement in the conspiracy more probable. [emphasis added].

In analyzing the issue of unfair prejudice, the Court, again at page 652 noted: “. . . Unfair prejudice, however, does not include damage that occurs to a defendant’s case because of the ‘legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’”

Here, the evidence was extremely probative, not only to demonstrate consciousness of guilt, but to demonstrate the reason for Mr. Nelson to change his statement. Mr. Nelson had testified at the preliminary hearing in this matter and so had provided prior testimony, subjecting him to cross examination on inconsistent statements by the defense. At the time of the preliminary hearing, the State was not aware of the threat that had just been made to Mr. Nelson

on the way to that hearing by the defendant. The threat had been made by the defendant while the two were in a “holding cell” awaiting transport to the preliminary hearing. Mr. Nelson’s testimony at preliminary hearing held shortly after the threat was “watered-down” to say the least. In fact, at the beginning of his testimony, he denied even having reported any statements of defendant at all to law enforcement.¹ (See attached Preliminary Hearing (“PH”) transcript, pg. 92, lines 7-15. In further questioning about conversations with defendant at the jail, Mr. Nelson responded that defendant told him it was consensual and that he (defendant) had never told him this was a forcible rape. (PH transcript, pg. 92, lines 20-25 and pg. 93, lines 1-9. Mr. Nelson’s testimony then wavered between defendant’s telling him he did have forcible sex with the victim (PH Transcript pg 94, lines 3-14) to “she was all over him” and that they had “consensual sex,” her friends showed up and she (the victim) “started hollerin’ rape, and . . . he left. (PH Transcript pg 96, lines 4-14). Obviously this prior testimony differed greatly from Mr. Nelson’s trial testimony. These contradictions, along with his criminal record, required in the interests of justice, that the jury be provided with a reasonable explanation of the contradictions in testimony and that that be provided prior to the defense’ attack on his credibility.

Besides the explanation of contradictions in Mr. Nelson’s testimony, evidence of witness intimidation is clearly admissible. In *United States v. Hayden* (1996) 85 F.3d 153 the Court approved the admission of a threat against a witness and his family. In discussing *Hayden*, the Court in *United States v. Edwards* (2009) 678 F.3d 405 noted that “witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt.” The

¹ The Respondent has attached a copy of the preliminary hearing transcript, along with a motion requesting that this Court take judicial notice of this document. The Respondent believes that the reading of this testimony is essential in order for this Court to have a better understanding of the history of Mr. Nelson’s prior statements and the reasoning for tactical decisions made by both parties at the trial.

Edwards court noted that admissibility follows the majority of jurisdictions that have addressed the issue.

Effective legal representation does not require that an attorney object to admissible evidence. *State of Idaho v. Aspeytia* 130 Idaho 12 (1997). Here, the “threat evidence” was admissible and therefore Mr. Hull had no duty to object. Even if he had, it is likely that the Nelson testimony would have been admitted into evidence.

2. The victim’s statements to Hoss Dillon fell under the “excited utterance” exception to the Hearsay Rule.

The Respondent addressed this argument to some extent early on, but would like to further explore this argument in light of this Court’s previous ruling on this issue in its Order Granting Partial Summary Dismissal. Rule 803(2) of the Idaho Rules of Evidence provides an excited utterance hearsay exception for “statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” IRE 803(2). The exception stems from a belief that a statement made during a moment of excitement and without the opportunity to reflect on the consequences of one's statement has greater indicia of truth and reliability than a similar statement offered in the relative calm of the courtroom. *White v. Illinois*, 502 U.S. 346, 356 (1992), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004); see also *Idaho v. Wright*, 497 U.S. 805, 820 (1990), abrogated on other grounds by *Crawford*, 541 U.S. at 36; *United States v. Ledford*, 443 F.3d 702, 711 (10th Cir.2005); *United States v. Alexander*, 331 F.3d 116, 122 (D.C.Cir.2003); *United States v. Brown*, 254 F.3d 454, 458 (3d Cir.2001). Accordingly, the Ninth Circuit observed that “a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is ... spontaneous and sincere....” *United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir.2002) (quoting 6 *Wigmore*,

Evidence § 1745 at 193). Testimony covered by a “firmly rooted” exception to the hearsay rule provides the necessary guarantee of its trustworthiness. Therefore, there is no need to independently inquire whether the statements, once found to be “excited utterances,” are trustworthy. See, e.g., *Wright*, 497 U.S. at 815 (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).

For a statement to be admitted under an excited utterance exception to hearsay, most courts in interpreting IRE 803(2), and its federal counterpart, require: 1) an event or condition startling enough to cause nervous excitement; 2) that the statement relates to the startling event; and 3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. See *United States v. Arnold*, 486 F.3d 177, 184 (6th Cir.2007); *Ledford*, 443 F.3d at 710; *Alexander*, 331 F.3d at 122; *Alarcon-Simi*, 300 F.3d at 1175; *Brown*, 254 F.3d at 458; *United States v. Wesela*, 223 F.3d 656, 663 (7th Cir.2000); *Cepeda*, 69 F.3d at 372. “All three inquiries bear on ‘the ultimate question’: ‘[W]hether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.’ “ *Arnold*, 486 F.3d at 184 (quoting *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir.1983)).

The third requirement would be the main issue in this case--that the statement must be made while the declarant is under the stress of the excitement caused by the event. Petitioner argues that while the victim was still under the control of and in sight of her rapist--assisting in cleaning the room and making the bed where she had just been raped, at her rapist’s direction; attempting to escape the scene where she had just been raped, while trying to appear calm because she was still in her rapist’s presence; observing her rapist still on scene and surveying her from the parking lot of the hotel where she had just been raped--that the time was running for her to no

longer be under the stress of the excitement caused by the “event.” In actuality, that “stress” did not begin to alleviate the minute Mr. Cook stopped raping her. The danger of more violence from Mr. Cook still persisted, during his continued presence, and even after leaving the motel room as he was seen waiting outside in his vehicle when the victim left.

Courts look at various external factors as indicia of the declarant's state of mind at the time of the statements and no one factor is dispositive. See e.g., *Wilcox*, 487 F.3d at 1170; *Alexander*, 331 F.3d at 123; *Cepeda*, 69 F.3d at 372; see also *United States v. Joy*, 192 F.3d 761, 766-67 (7th Cir.1999). In deciding whether the statement was the product of stress and excitement rather than reflective thought, courts have considered various factors in totality which may include but are not limited to: the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, age/maturity of the declarant, the physical and/or mental condition of the declarant, characteristics of the event, and the subject matter of the statements. E.g., *Wilcox*, 487 F.3d at 1170; *Alexander*, 331 F.3d at 123; *Cepeda*, 69 F.3d at 372; *United States v. Joy*, 192 F.3d 761, 766-67 (7th Cir.1999).

Although not determinative, a statement made in response to an inquiry could bear on whether the statement was spontaneous or deliberative. However, a victim's statement made in response to an inquiry does not, without more, negate its spontaneity as an “excited utterance.” See, e.g., *Clemmons*, 461 F.3d at 1061; *Alexander*, 331 F.3d at 123 n. 7; *Joy*, 192 F.3d at 767; *Cepeda*, 69 F.3d at 372; *Webb v. Lane*, 922 F.2d 390, 394 (7th Cir.1991); *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir.1980); *State v. McHoney*, 544 S.E.2d 30, 35 n. 3 (S.C.2001).

Often, a witness' description of the declarant's emotional state is sufficiently weighty in determining whether the declarant's state of mind falls within the excited utterance exception. See, e.g., *Schreane*, 331 F.3d at 564-65 (testimony that declarant was “nervous,” “scared,”

“excited,” “eager to ‘get away from the vehicle,’ “ “speaking in a ‘high-pitched voice,’ “ “in need of being ‘slowed down’ “ and had an “excited physical demeanor”); *Jones*, 299 F.3d at 113 (testimony that declarant was “scared,” appeared to be agitated and calling to “come to the front, quick, quick, quick.”). Describing the declarant's voice, appearance, demeanor, whether the declarant was crying or appeared frightened, is often sufficient to demonstrate that the declarant was in an excited state. See e.g., *Schreane*, 331 F.3d at 564-65; *Jones*, 299 F.3d at 113.

In this case, the victim was described as “talking really quiet” (when placing the 11 p.m. phone call to Hoss Dillon); “seemed pretty urgent;” “sounded pretty upset.” Tr. Pg 290, lines 1-10. Upon arrival, her demeanor was “kind of reluctant, . . . like, she didn’t have a whole lot of time.” Tr. 291, lines 7-11; and “upset” and that “her eyes were a little red...like she had been crying.” (Tr. 294, lines 14-20). Under this analysis, the trial court clearly could have found that the statements to Hoss Dillon were admissible and therefore not violative of the rules of evidence.

3. Mr. Hull’s testimony at the trial set forth clearly that he made effective strategic decisions with regard to the testimony of Hoss Dillon and Nelson.

Mr. Hull testified in the Respondent’s case regarding his representation of the Petitioner at the criminal trial. Mr. Hull has been an active member of the Idaho State Bar since 1985 and has primarily practiced in criminal defense. At one point in his lengthy career, he was the Kootenai County Public Defender. He testified that he has defended clients in “hundreds” of felony jury trials; approximately 10 rape trials, over a hundred sex crime trials, and “hundreds of major felonies” (felonies having a penalty of up to a life sentence). Since 1985, he estimates his total trials at around a thousand. (3:57)²

² This indicates the time noted on the trial audio cd where this testimony can be found. A copy of that audio of the trial proceeding is attached.

Mr. Hull testified as to his extensive preparation for the trial in this matter. He further testified that he used the preliminary hearing transcript (attached) to impeach the State's witnesses at trial. He testified that he subjected the victim to "substantial cross exam" at "some length." (4:42:35) Mr. Hull set out that his strategy with the victim was to challenge her statements, primarily with regard to her intoxication level/drinking during the night of the incident. He also used the fact that she did not immediately report the rape to Hoss Dillon and that he wanted to point out to the jury that she was not in a hurry to report this to the Dillon brothers, as part of his planning to argue in closing that a rape never occurred.

When considering this final strategic decision of Mr. Hull, it makes sense that he would not object to the Dillon brother's testimony about the victim's statements. The impact of the victim's eventual statements to the Dillon brothers on the jury would be minimal in light of defense's pointing out that she did not immediately report this traumatic event to the first people she saw. But for the other, physical evidence, possessed by the State, the defense's strategy might have worked.

The next area where strategic decisions were made by Mr. Hull go to Mr. Nelson's ("The Jailhouse Snitch") testimony. Here Mr. Hull employed a strategy of impeaching Mr. Nelson by first pointing out that he lied at the preliminary hearing about the absence of a felony record, then pointing out that he actually had two felony convictions for grand theft. The purpose of this strategy was to show the jury that the witness who has previously been dishonest in another hearing, combined with having felony convictions for crimes of dishonesty, could not be believed and anything he had to say should be disregarded.

Mr. Hull made a strategic decision specifically with regard to this "jailhouse snitch" to lend as little credibility to his testimony as possible in the eyes of the jury. This was done by

allowing the witness to make his ludicrous statements, and then pointing out to the jury this witness' lack of credibility: possibility of motive to fabricate in order to get a lenient sentence in his own case; prior 2 grand theft convictions; contradictions in preliminary hearing testimony. As Mr. Hull testified: "the crazier stuff he said, the better." One specific piece of testimony pointed out by Mr. Hull as an example was Nelson's claim that Cook told him that he burst in the door and attacked a lady." (4:45:40) This testimony proved contrary to any of the evidence presented at the trial and the preliminary hearing testimony of other witnesses. Again, this strategy could also have been very effective, but for the State's presentation of the overwhelming physical evidence.

4. Petitioner has failed to show that there was a reasonable probability that but for Mr. Hull's "errors," the result of the proceeding would have been different.

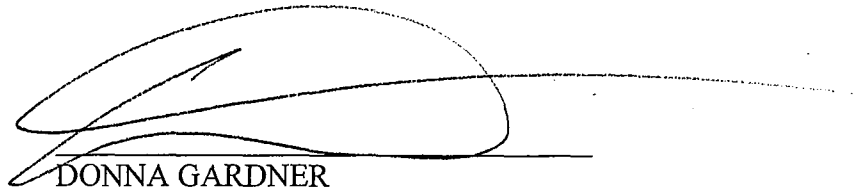
Even if any of this evidence should not have been admitted, the Petitioner's own expert witness could not effectively explain why their admission had the prejudicial effect that Petitioner claims. Starting with the Dillon brothers' testimony, Mr. Reuter claimed that the testimony of the victim's statements was "needlessly cumulative," so should have been excluded (3:38:20) He also opined that the state had Hoss Dillon testify regarding the victim's general credibility so any statements made by her that were consistent was "not proper rehabilitation." In other words, the State doesn't get to rehabilitate its witness by showing prior consistent statements, in Mr. Reuter's opinion (3:40:27). Mr. Reuter admitted that the Dillon testimony was "less serious" in and of itself, but that it's admission was "still error." And that the cumulation of all the evidence "significantly changed" what could be argued by the defense. (3:42:50). Mr. Reuter then began a list of all the facts that could have been argued, and most of which were, by the defense in its closing. These included largely facts that attacked Nelson's

and the victim's credibility; however, Mr. Reuter ignored the fact that these points were all made by Mr. Hull. How the reiteration of defense's closing was relevant is lost on the State; however, it is interesting that Mr. Reuter would have wanted hearsay statements of the victim to come in that were favorable to the defense, while excluding statements that were not. For instance, the victim's statements that were admitted at trial: that she had told Cook about some personal problems she was having and that she told Hoss Dillon that "nothing was wrong," would have been admissible and thus fair game for closing argument, according to Mr. Reuter.

Mr. Reuter's opinion finally was that without these two areas of questioning, the "jury would have been hard pressed to find this was a forced situation." However, he ignores the very convincing physical evidence that favored the State's case. The two items of evidence that tipped the scales towards the guilty verdict in this case had nothing to do with Nelson's or the Dillon brothers' testimony: the photograph of the shoeprint on the fitted sheet of the made-up bed and the semen (confirmed by DNA) located on the victim's panties which were hidden in the bathroom by the defendant. The jury's credibility determination between the defendant and the victim, the only actual witnesses to this rape, stood almost entirely on those two pieces of evidence. Mr. Reuter could not explain how the testimony of Nelson or the Dillon brothers made the jury ignore this overwhelming physical evidence.

"This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." *Piro v. State*, 146 Idaho 86, 88, 190 P.3d 905, 907 (Idaho App., 2008). The Respondent respectfully requests that this Court DENY the relief sought by the Petitioner.

DATED this 15 day of May, 2013.

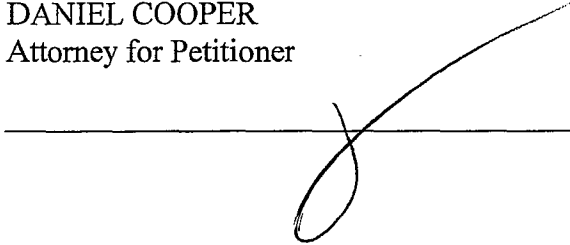


DONNA GARDNER
Deputy Prosecuting Attorney
Kootenai County

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of May, 2013, a true and correct copy of
the foregoing RESPONDENT'S 2nd TRIAL BRIEF AND RESPONSE TO PETITIONER'S
TRIAL BRIEF was caused to be faxed/hand delivered to:

DANIEL COOPER
Attorney for Petitioner



STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 JUN -7 PM 3: 05

CLERK DISTRICT COURT



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
) Petitioner,)
)
) vs.)
)
) STATE OF IDAHO,)
)
) Respondent.)
_____)

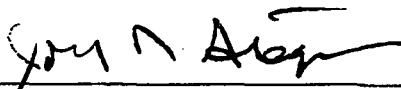
Case No. CV-2011-10315

ORDER SETTING HEARING

It is **ORDERED** that hearing of respondent's Motion to Review Trial Court Document or to Reopen to Consider Admissibility be conducted by telephone conference, to be initiated by the Court, at 10:30 A.M. on June 24, 2013.

In the event that counsel for any party is unable to participate in such planning and scheduling conference because of prior court commitments on the date above scheduled, it is the duty of such counsel to contact the Court and opposing counsel and arrange a mutually satisfactory date to which the matter will be continued.

DATED this 7th day of June 2013.



John R. Stegner
District Judge

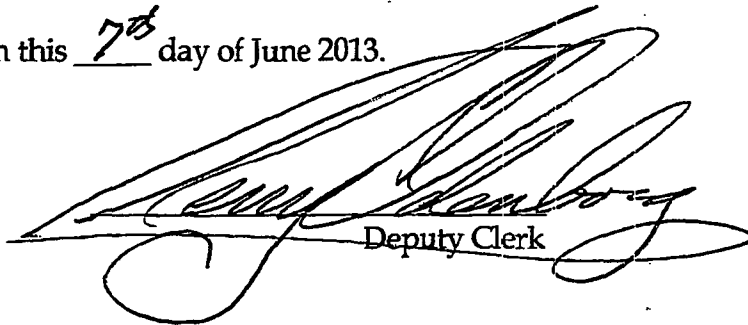
CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER SETTING HEARING was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

on this 7th day of June 2013.



Deputy Clerk

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 4/24/13

AT 11:13 O'CLOCK A.M.
CLERK, DISTRICT COURT

Juan Hoffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

Case No. CV-2011-10315

ORDER VACATING AND
RESETTING HEARING

Due to the unavailability of defense counsel,

It is **ORDERED** that hearing of the State's Motion to Review Trial Court Document or to Reopen to Consider Admissibility scheduled for June 24, 2013 is vacated and rescheduled for 10:30 A.M. on July 9, 2013, in Kootenai County.

DATED this 24th day of June 2013.

John R. Stegner

John R. Stegner
District Judge

ORDER VACATING AND RESETTING HEARING - 1

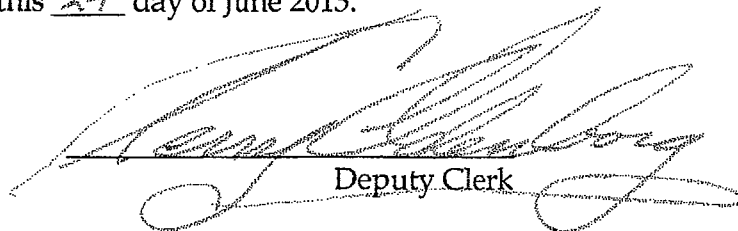
CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER VACATING AND RESETTING HEARING was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

on this 24th day of June 2013.



Deputy Clerk

ORDER VACATING AND RESETTING HEARING - 2

Description	CV 2011-10315 Cook vs State of Idaho 20130709 Motion to Review Trial Court Document Judge Stegner Clerk Denice Larsen PA Donna Gardner DA Dan Cooper		
Date	7/9/2013	Location	1K-COURTROOM9
Time	Speaker	Note	
11:03:40 AM	Judge Stegner	Calls case. Dan Cooper for def. Donna Gardner for State.	
11:04:10 AM	Judge Stegner	State has filed motion to admit	
11:04:34 AM	Donna Gardner	I filed for the court to take notice and review the preliminary hearing transcript. It would assist you in figuring out entire picture what happened prior.	
11:05:21 AM	Judge Stegner	Would counsel be willing to waive court reporter	
11:05:37 AM	Donna Gardner	Waive	
11:05:38 AM	Dan Cooper	Waive	
11:05:41 AM	Donna Gardner	Preliminary hearing transcript, it would help with Mr. Holmes strategic position. It wouldn't hurt Cook, it would only assist you	
11:06:41 AM	Dan Cooper	We would object to reopening of testimony. What I'm hearing is that Mr. Hull wasn't prepared as a witness. That is unfortunate but isn't basis for reopening evidentiary portion of case. There has been no explanation how this will assis the court	
11:07:58 AM	Judge Stegner	I understand it would help me to understand the strategic position of Mr. Hull. My philosophy would be to allow it.	
11:08:40 AM	Dan Cooper	There is nothing in there besides testimony. Nothing explaining any strategy. I don't believe Mr. Hull's conduct during course of prelim hearing and how he handled witnesses is relevant. Not to the prejudice	
11:10:10 AM	Donna Gardner	This case is 5 years old. Mr. Hull as with anybody would have holes in memory. Things come out in trial the way they come out. This was a matter of court record 5 years ago and it can assist you. A lot of these issues would make better sense.	
11:11:09 AM	Judge Stegner	Grant motion to include transcript. Allow information to be considered by me. Ms. Gardner to submit order. I consider case fully submitted as soon as I get the transcript.	
11:12:50 AM		In light of admission of transcript, is there opportunity for us to	



	Dan Cooper	address,
<u>11:13:17 AM</u>	Judge Stegner	Unless you are choosing to supplemental brief, but I consider it fully submitted. If I allow you to brief it would delay the calendar
<u>11:13:55 AM</u>	Dan Cooper	Could we submit supplemental brief due in 7 days.
<u>11:14:05 AM</u>	Judge Stegner	I will give you 7 days and Ms. Gardner 7 days to respond. Ms. Gardner you would have until the 23rd to respond. Mr. Cooper you have until the 16th.
<u>11:14:44 AM</u>	End	

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 7/11/13
AT 5:42 O'CLOCK P.M.
CLERK, DISTRICT COURT
Gwen Hoffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	ORDER GRANTING STATE'S
vs.	)	MOTION TO CONSIDER
	)	PRELIMINARY HEARING
STATE OF IDAHO,	)	TRANSCRIPT FROM
	)	UNDERLYING CRIMINAL CASE
Respondent.)	
_____)	

For reasons articulated on the record at the July 9, 2013, hearing of the State's Motion to Review or Reopen to Consider Admissibility,

It is **ORDERED** that the State's request to include a copy of the transcript of the preliminary hearing conducted in the underlying criminal case as a part of the record for the Court's consideration in this case is **GRANTED**.

DATED this 11th day of July 2013.

John R. Stegner
John R. Stegner
District Judge

**ORDER GRANTING STATE'S MOTION TO
CONSIDER PRELIMINARY HEARING TRANSCRIPT
FROM UNDERLYING CRIMINAL CASE - 1**

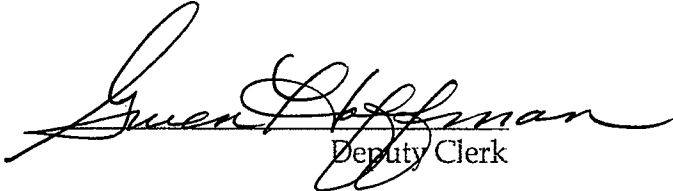
CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing ORDER was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188 1833

Daniel G. Cooper
Attorney at Law
(208) 765-5249

on this 11 day of July 2013.


Deputy Clerk

**ORDER GRANTING STATE'S MOTION TO
CONSIDER PRELIMINARY HEARING TRANSCRIPT
FROM UNDERLYING CRIMINAL CASE - 2**

DANIEL G. COOPER
Attorney at Law
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 504

2013 JUL 16 PM 4:3

CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	MOTION FOR EXTENTION OF TIME TO	
	)	FILE BRIEFING RELATED TO	
V.	)	PRELIMINARY HEARING TRANSCRIPT	
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record hereby moves the Court pursuant to Rules 6(b), 7(b) (3), and 56(c) of the Idaho Rules of Civil Procedure and I.C. § 19-4906 for an order of the Court extending the time in which undersigned counsel is permitted to file Petitioner's brief subsequent to the Court's Order Granting State's Motion to Consider Preliminary Hearing Transcript from Underlying Criminal Case.

This motion is made for the following reasons and based upon the following grounds:

1. After hearing on Tuesday, July 7, 2013 the Court granted the State's Motion to reopen evidence in this matter and admitting the Preliminary Hearing Transcript from Petitioner's underlying criminal case. In addition the Court granted the parties the opportunity to submit further briefing in light of the newly admitted preliminary hearing

MOTION FOR EXTENTION OF TIME TO FILE BRIEFING RELATED TO PRELIMINARY HEARING TRANSCRIPT - Page 1

transcript, making Petitioner's brief due on July 16, 2013 and the State's responsive brief, if any, due seven (7) days later.

2. On Wednesday, July 8, 2013, undersigned counsel was stricken with the stomach flu from which counsel did not fully recover until Monday, July 15, 2013, though counsel did work approximately five (5) hours on Friday, July 12th, 2013. Owing to his flu, counsel has been unable to fully draft his brief.
3. Undersigned Counsel deems another three (3) days time necessary to file Petitioner's brief in this matter, which would make Petitioner's brief due on Friday, July 19, 2013.
4. On July 16, 2013, undersigned counsel contacted opposing counsel, Donna Gardner's office: the Office of the Kootenai County Prosecuting Attorney to inquire whether the State had any objection to this motion being granted. In speaking with Mrs. Gardner's assistant, Kelli, counsel was informed that Deputy Prosecuting Attorney, Bryant Bushling indicated that the State has no objection to this Motion being granted, so long as the State still possesses seven (7) days in which to file its responsive brief.

Based upon the forgoing, Petitioner respectfully requests an additional three (3) days in which to file Petitioner's brief, making the brief due on Friday, July 19th, 2013. Petitioner further request the state be granted until Friday, July 26th, 2013 to file its responsive brief.

Dated this 16th day of July, 2013.



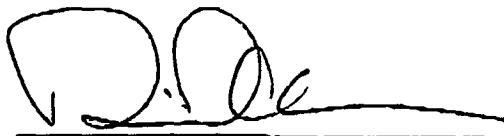
DANIEL G. COOPER
ATTORNEY FOR PETITIONER

MOTION FOR EXTENTION OF TIME TO FILE BRIEFING RELATED TO PRELIMINARY
HEARING TRANSCRIPT - Page 2

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by delivering a copy of the same on the 16th day of July, 2013, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833

A handwritten signature in black ink, appearing to be 'D. Gardner', written over a horizontal line.

MOTION FOR EXTENTION OF TIME TO FILE BRIEFING RELATED TO PRELIMINARY HEARING TRANSCRIPT - Page 3

TEST

TEST

P. UUZ

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 875 *JSS*

2013 JUL 18 AM 10:39

DANIEL G. COOPER
Attorney at Law/Conflict Public Defender
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

CLERK DISTRICT COURT
Donna Gardner
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	STIPULATION OF THE PARTIES FOR	
	)	EXTENTION OF TIME TO FILE BRIEFING	
V.	)	RELATED TO PRELIMINARY HEARING	
	)	TRANSCRIPT	
STATE OF IDAHO,)		
)		
)		
Respondent)		

Sean Cook, by and through his attorney of record, Daniel G. Cooper, Conflict Public Defender, and the State of Idaho, by and through its attorney of record, Donna Gardner, Deputy Prosecuting Attorney, Kootenai County Prosecuting Attorney's Office, hereby stipulate and agree to the following:

1. That Petitioner's brief subsequent to the Court's Order Granting State's Motion to Consider Preliminary Hearing Transcript from Underlying Criminal Case may be filed in this matter no later than 5:00 p.m. on Friday, July 19, 2013;
2. That the State's responsive brief may be filed no later than seven (7) days later on Friday, July 26, 2013; and

STIPULATION OF THE PARTIES FOR EXTENTION OF TIME TO FILE BRIEFING
RELATED TO PRELIMINARY HEARING TRANSCRIPT - Page 1

3. That good cause appears for the Court granting an extension of time to file the above-mentioned briefing owing to Mr. Cooper's illness with the stomach flu July 10th through July 14th, 2013.

Dated this 18th day of July, 2013.



DANIEL G. COOPER
CONFLICT PUBLIC DEFENDER

Dated this 16th day of July, 2013:



DONNA GARDNER
DEPUTY PROSECUTING ATTORNEY

STIPULATION OF THE PARTIES FOR EXTENTION OF TIME TO FILE BRIEFING
RELATED TO PRELIMINARY HEARING TRANSCRIPT - Page 2

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by delivering a copy of the same on the 18th day of July, 2013, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833



STIPULATION OF THE PARTIES FOR EXTENTION OF TIME TO FILE BRIEFING
RELATED TO PRELIMINARY HEARING TRANSCRIPT - Page 3

DANIEL G. COOPER
Attorney at Law
P.O. Box 387
Coeur d'Alene, ID 83816-0387
(208) 664-5155; Fax (208) 765-5249
Bar Number: 6041

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 7/29/13
AT 10:23 O'CLOCK A.M.
CLERK, DISTRICT COURT
John R. Stegner
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,)	
)	
Petitioner,	)	CASE NUMBER CV-11-10315
)	
V.)	
	)	ORDER FOR EXTENTION OF TIME TO
STATE OF IDAHO,	)	FILE BRIEFING RELATED TO
	)	PRELIMINARY HEARING TRANSCRIPT
)	
Respondent.)	

This matter having come before the Court on the Petitioner's Motion for Extention of Time to File Briefing Related to Preliminary Hearing Transcript filed on July 16, 2013, and the Stipulation of the Parties for Extention of Time to File Briefing Related to Preliminary Hearing Transcript, filed on July 17, 2013; the Court having reviewed the Motion and the Stipulation; and finding that the State has no objection to the Motion being granted, and the Court finding this an appropriate case in which to grant the Motion, now, therefore:

IT IS HEREBY ORDERED that Petitioner's brief subsequent to the Court's Order Granting State's Motion to Consider Preliminary Hearing Transcript from Underlying Criminal Case shall be filed in this matter no later than 5:00 p.m. on Friday, July 19, 2013.

IT IS FURTHER ORDERED that the State's responsive brief shall be filed no later than seven (7) days later on Friday, July 26, 2013.

ENTERED this 26th day of July, 2013, *more pro due to July 17, 2013.*

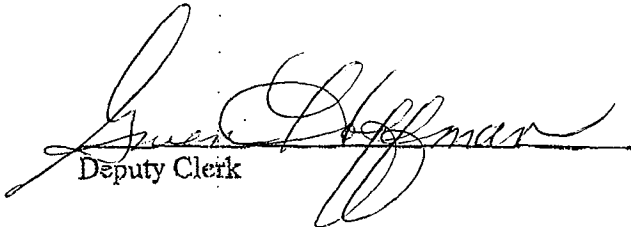
John R. Stegner
JOHN R. STEGNER
District Judge

CLERK'S CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same on the 29 day of July, 2013, addressed to:

Kootenai County Prosecuting Attorney: Fax: (208)-446-1833
ATTN: Donna Gardner, Deputy Prosecuting Attorney

Daniel G. Cooper Fax: (208) 765-5249
Attorney for Petitioner


Deputy Clerk

2013 SEP -4 PM 3: 10

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-11-10315

MEMORANDUM OPINION

Sean Cook has petitioned this Court seeking post-conviction relief following his November 7, 2008, conviction for rape. Cook's petition is based on claims that he was deprived of his right to the effective assistance of counsel.

BACKGROUND

Cook was convicted by a jury of rape on November 7, 2008, in Kootenai County Case No. CR-2008-13006. Cook was then sentenced to not less than ten and not more than thirty years imprisonment, which was later reduced to not less than

ten and not more than twenty years imprisonment. *Order Reducing Sentence* (Feb. 4, 2009).

Cook appealed his conviction alleging prosecutorial misconduct and an excessive sentence. *See State v. Cook*, No. 36145 (Idaho Ct. App. Nov. 22, 2010). The Idaho Court of Appeals upheld Cook's conviction and rejected his claim that he was subjected to an excessive sentence.

Cook then filed an application for post-conviction relief on the grounds that he was denied a fair trial due to prosecutorial misconduct, and ineffective assistance of counsel. The State then moved to summarily dismiss Cook's post-conviction petition. On June 15, 2012, this Court granted the State's motion in part and dismissed Cook's claims alleging prosecutorial misconduct (which had previously been decided by the Idaho Court of Appeals) and denied the State's motion as to Cook's claims of ineffective assistance of counsel. An evidentiary hearing on Cook's post-conviction relief petition was then conducted on April 12, 2013.

LAW

A post-conviction relief applicant asserting an ineffective assistance claim must satisfy the two-pronged analysis established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the applicant must show that that his attorney's performance was deficient. *Strickland*, 466 U.S. at 687-88. To show a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *State v. Piro*, 146 Idaho 86, 88, 190 P.3d 905, 907 (Ct. App. 2008).

To satisfy *Strickland's* second prong, the applicant must show that he was prejudiced by his attorney's deficiency. *Id.* To establish that he suffered 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. *Id.*

There is a strong presumption that counsel's performance fell within a wide range of professional assistance. *State v. Yakovac*, 145 Idaho 437, 44, 180 P.3d 476, 483 (2007). Therefore, tactical or strategic decisions of trial counsel will not be second-guessed, unless those decisions were based on inadequate preparation, ignorance of the law, or other objective shortcomings. *Piro*, 146 Idaho at 88, 190 P.3d at 907.

In considering a post-conviction challenge to an attorney's failure to pursue a motion, a district court may consider the probability of success of the motion in question to determine whether the attorney's inactivity constituted incompetent performance. *Id.* at 89, 190 P.3d at 908. The conclusion that the motion would not have been granted is generally determinative of both prongs of the *Strickland* test. *Id.*

ANALYSIS

Cook presents two claims of ineffective assistance of counsel. First, that his attorney should have objected to the testimony offered by Paul Nelson that Cook had threatened to harm his family because the testimony was unfairly prejudicial. Second, Cook argues that his attorney should have objected to Hoss Dillon's testimony in which he recounted the victim's statements as inadmissible hearsay.

1. Cook's attorney's failure to object to the testimony that Cook threatened Paul Nelson's family fell below a reasonable standard of performance because the testimony should have been excluded.

In this case, Nelson testified that Cook had confessed to raping Danielle Whitten while the two shared a jail cell. Nelson also testified that after Cook learned Nelson intended to testify against him, Cook threatened to rape Nelson's wife and daughter and that his family would be "taken care of" if he testified. Tr. 381 Ln. 20-25, 382 Ln. 1-21.

The State does not directly address whether the threat testimony unfairly prejudiced Cook, commenting only that "unfair prejudice, however, does not include damage that occurs to a defendant's case because of the legitimate probative force of the evidence." Res. 2nd Tr. Br. and Response to Pet. Tr. Br. at 2. While everything the prosecution introduces in its case is likely to be prejudicial to the defendant, when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, an objection to the prejudicial nature of the evidence will be sustained. I.R.E. 403.

The threat evidence here is arguably relevant because it is probative as to Cook's guilt. *See State v. Pokorney*, 149 Idaho 459, 413, 235 P.3d 409, 463 (Ct. App. 2010) ("[e]vidence of a defendant's efforts to influence or affect evidence, such as intimidating a witness . . . may be relevant to demonstrate consciousness of guilt"). Italics added. However, even relevant evidence may be excluded if it is unfairly prejudicial. I.R.E. 403. Unfair prejudice occurs when the evidence somehow leads the jury to decide the case on an improper basis. *State v. Russo*, ___ P.3d ___, 2013

WL 777438, *6 (Idaho Ct. App. 2013). Whether evidence is unfairly prejudicial is generally not amenable to broad per se rules because it is determined in the context of the facts and arguments in each particular case. *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008). However, evidence that is likely to arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence, suggests that it is unfairly prejudicial. *See id.*

Therefore, the question in this case is whether the potential of the jury's emotional response to the evidence that Cook threatened to rape and murder Nelson's family would have caused the jury to decide Cook's case without regard to the evidence's probative value. In the context of the other evidence that had been admitted at Cook's trial, Nelson's testimony about Cook's threats was clearly inflammatory. Given the circumstances, the probative value of Cook's threat was substantially outweighed by the risk of the evidence eliciting a strong emotional response from the jury. As a result, it is likely that a motion to suppress Nelson's testimony that Cook threatened to rape his wife and daughter likely would have been granted. While it is true that a reviewing court will not second-guess strategic decisions of defense counsel, there is simply no strategic reason to allow highly prejudicial evidence to be admitted if it could be excluded. Therefore Cook's attorney's failure to make the motion to preclude that evidence fell below an objective standard of representation.

2. An objection to Hoss Dillon's hearsay testimony of the victim's statements that Cook had raped her likely would have been granted because it was inadmissible hearsay.

Cook also argues that his attorney's performance was deficient because he did not object to Hoss Dillon's testimony on the grounds that it was hearsay. Hoss Dillon was allowed to testify that the victim told him, after being repeatedly questioned by Dillon, that she had been raped by Cook. Specifically, Cook complains that his attorney failed to object to Hoss Dillon's recounting of the victim's statement that Cook had raped her. Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Hearsay statements are not admissible unless they fit within one of the exceptions listed in the Idaho Rules of Evidence. I.R.E. 802.

The statements the victim made to Hoss Dillon were hearsay because they were offered for the truth of the matter asserted, that Cook had raped her. In this case, the only potentially applicable hearsay exception is the excited utterance exception. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." I.R.E. 803(2). This exception has two requirements. *State v. Thorngren*, 149 Idaho 729, 732, 240 P.3d 575, 578 (2010). First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer. *Id.* Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of

reflective thought. *Id.* To determine whether this exception applies, courts consider the totality of the circumstances, including the amount of time elapsed between the startling event and the statement, the nature of the event, and age and condition of the declarant, the presence of self-interest, and whether the statement was volunteered or made in response to a question. *Id.*

The passage of time is an important factor in determining whether a statement falls within the excited utterance exception, but it is not a controlling factor and there is no rigid test. *See State v. Zimmerman*, 121 Idaho 971, 975, 829 P.2d 861, 865 (1992). However, a long period of time between the startling event and the statement reduces the likelihood that a statement is made without deliberate thought. *See id.*

In sexual assault cases, especially in cases involving statements by children, the time requirement is less demanding. *State v. Griffith*, 144 Idaho 456, 363, 161 P.3d 675, 582 (2007). In this case, the victim was not a child—she was twenty-three years old. Idaho's appellate courts have upheld the admission of statements even when several hours have passed following the event. *Id.* Thus in order to fall into the exception, there must be evidence that the statement was made at a time when the victim was still in the state of nervous excitement and not before she had time to reflect and contrive a statement.

Whether the response was volunteered is another important factor in whether the statement falls under the excited utterance exception. *State v. Thorngren*, 149 Idaho 730, 732, 240 P.3d 576, 578 (2007). In *Thorngren*, the

defendant's son had just been informed his father had been murdered. *Id.* After noticing that the son was shaking, his friend asked him what was wrong. *Id.* The son replied "I think my Mom [the defendant] did it." *Id.* In holding that the statement fell under the excited utterance exception, the Idaho Supreme Court reasoned that the question did not deprive the statement of its spontaneity because it was open ended and the son responded immediately and briefly.

In this case, although rape would be a sufficiently startling event to render the victim's normal thought process impaired, *see State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007), the circumstances surrounding her statements are troubling. In particular, the victim's statements were not made voluntarily, but after repeated questioning from Hoss Dillon. Unlike the defendant's son in *Thorngren*, who answered immediately after being asked what was wrong, the victim in this case was prodded for a response. The totality of the circumstances in this case—that the questioning occurred about thirty minutes after the incident, the victim's upset demeanor, and in particular that the victim only answered after prodding—indicate that her statement was made only after having time to reflect about the statement. As a result, Hoss Dillon's testimony included inadmissible hearsay and if an objection had been made to the testimony it likely would have been granted. As a result Cook's attorney's conduct fell below an objective standard of representation.

3. Cook was prejudiced by his attorney's ineffective assistance.

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. *State v. Piro*, 146 Idaho 86, 88, 190 P.3d 905, 907 (Ct. App. 2008). A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome." *Strickland*, 499 U.S. at 688. In the context of Cook's post-conviction action, it refers to the confidence that the jury's verdict would have been the same if the threat and hearsay evidence had not been considered. The ultimate benchmark is "whether 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." *Id.* at 686. In evaluating whether prejudice is proved, the court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

In this case, the threat evidence sufficiently undermined confidence in the outcome of the trial. The purpose of Idaho Rule of Evidence 403 is to essentially shield parties from evidence that would cause a jury to decide a case on an improper basis. Here, the inflammatory nature of the threat evidence was significant and should have been apparent to Cook's attorney. By failing to object, Cook's attorney allowed the prejudicial threat evidence to come before the jury. This Court concludes the jury could not have ignored the inflammatory nature of the threat in determining Cook's guilt.

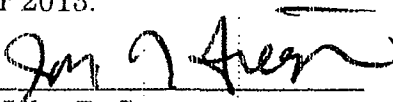
In addition to the threat evidence, the jury was also exposed to Hoss Dillon's hearsay testimony. Hearsay is prohibited on the theory that it is inherently untrustworthy and prone to error. *See Isaacson v. Obendorf*, 99 Idaho 304, 309, 581 P.2d 350, 355 (1978). Further, hearsay cannot be effectively cross-examined. *Id.* In this case, Cook was prejudiced by the hearsay testimony because it provided the State an opportunity to repeat the victim's testimony. Because the hearsay evidence was not objected to, the jury was allowed to consider testimony from persons who had no first-hand knowledge of the factual issues in dispute at Cook's trial.

Cook's attorney's failure to object to both the inflammatory threat evidence and the hearsay evidence undermined the proper functioning of the adversarial process at Cook's trial. Thus, Cook has met his burden in establishing that a reasonable probability exists that the outcome of his trial would have been different if not for his attorney's deficient performance.

CONCLUSION

Cook has shown that he was deprived of the effective assistance of counsel at his criminal trial. Moreover, Cook was prejudiced by his attorney's deficient performance. Accordingly, Cook's Petition for Post-Conviction relief is granted, his conviction is reversed, and this case is remanded for a new trial.

Dated this 3rd day of September 2013.


John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing order were delivered to:

Donna Gardner [] U.S. Mail
Kootenai County Prosecuting Attorney's Office [] Overnight Mail
P.O. Box 9000 [X] Fax
Coeur d'Alene, Idaho 83816 [] Hand Delivery
208-446-1833 #926

Daniel G. Cooper [] U.S. Mail
Attorney at Law [] Overnight Mail
P.O. Box 397 [X] Fax
Coeur d'Alene, Idaho 83816 [] Hand Delivery
208-765-5249 #927

On this 4th day of September, 2013.

CLIFFORD T. HAYES

Clifford T. Hayes

Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 SEP 18 AM 9:26

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2011-10315


FINAL JUDGMENT

Pursuant to I.R.C.P. 54(a) and 58(a), as well as I.C. §§ 19-4907(a) and 19-4909, this final judgment is entered separately from this Court's Memorandum Opinion in this case, dated September 3, 2013. Upon the findings of fact and conclusions of law stated in that Memorandum Opinion, and good cause appearing,

FINAL JUDGMENT

It is ORDERED that Sean Cook's conviction for rape in Kootenai County
Case No. CR-2008-13006 is set aside.

Dated this 17th day of September 2013.



John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing order were delivered to:

Donna Gardner
Kootenai County Prosecuting Attorney's Office
P.O. Box 9000
Coeur d'Alene, Idaho 83816
208-446-1833 #439

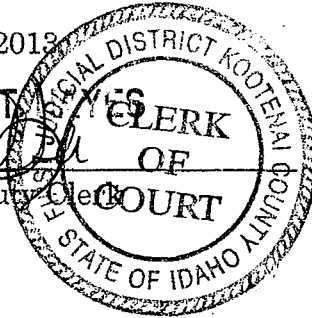
- U.S. Mail
- Overnight Mail
- Fax
- Hand Delivery

Daniel G. Cooper
Attorney at Law
P.O. Box 397
Coeur d'Alene, Idaho 83816
208-765-5249 #440

- U.S. Mail
- Overnight Mail
- Fax
- Hand Delivery

On this 18th day of September, 2013

CLIFFORD T. [Signature]
Deputy Clerk



ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: JSS

BARRY MCHUGH
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800

2013 SEP 25 PM 3:11

CLERK DISTRICT COURT
[Signature]
DEPUTY

ASSIGNED ATTORNEY:
DONNA GARDNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)
)
)
vs.)
)
STATE OF IDAHO,)
)
Defendant.)
_____)

Case No. CV-2011-10315

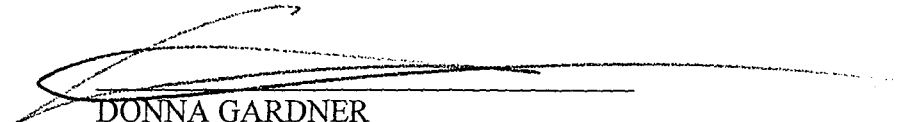
MOTION FOR STAY PENDING
APPEAL

COMES NOW, DONNA GARDNER, Deputy Prosecuting Attorney for Kootenai County, Idaho, and hereby moves this Court for entry of an Order of Stay Pending Appeal, pursuant to I.R.C.P. 38. Specifically, Respondent, State of Idaho, requests that this Court issue a Stay of further execution of its judgment entered September 17, 2013 whereby this Court Set Aside Cook's conviction for Rape, pending the outcome of the Appeal in this matter. Respondent filed a timely Notice of Appeal of this decision on September 16, 2013.

MOTION FOR ORDER
CONSISTENT WITH COURT OF
APPEALS DECISION

WHEREFORE, the State respectfully requests that this Court STAY any further action in this matter pending Appellate decision.

DATED this 23rd day of September, 2013.


DONNA GARDNER
Deputy Prosecuting Attorney

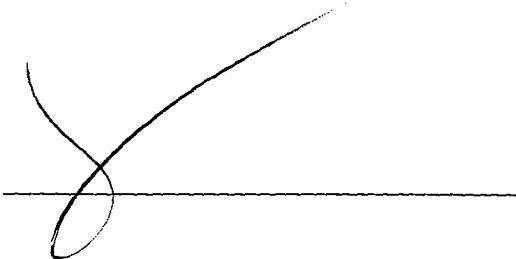
CERTIFICATE OF MAILING

I hereby certify that on the 24 day of Sept, 2013, a true and correct copy of the foregoing was caused to be sent mailed/sent interoffice mail/faxed/e-mailed as follows:

DANIEL G. COOPER
Attorney at Law
P.O. Box 397
Coeur d'Alene, ID 83816
Fax: (208) 765-5249

KENNETH K. JORGENSEN
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
ken.jorgensen@ag.idaho.gov

LANSING L. HAYNES
Kootenai County District Judge
Kootenai County Courthouse
324 W. Garden, PO Box 9000
Coeur d'Alene, ID 83816



**MOTION FOR ORDER
CONSISTENT WITH COURT OF
APPEALS DECISION**

ORIGINAL

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 9-30-13
AT 11:00 O'CLOCK A.M.
CLERK, DISTRICT COURT
Shirley Hoffmann DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)
) Case No. CV-2011-10315
)
vs.) ORDER FOR STAY PENDING
) APPEAL
STATE OF IDAHO,)
)
Defendant.)
_____)

The Court having before it the above State's motion, and good cause appearing now, therefore,

IT IS HEREBY ORDERED that any further action in this above entitled matter is STAYED pending any Appellate decision.

ENTERED this 30 day of SEP, 2013.

Ben R. Stegner
JUDGE For Judge Stegner

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of September, 2013, copies of the foregoing document(s) were sent by facsimile or emailed as follows:

- ✓ Kootenai County District Court, Judge Lansing Haynes: I.O. Mail
- ✓ Deputy Prosecuting Attorney for Kootenai County: FAX 208-446-1833
- ✓ Defense Counsel: DAN COOPER: FAX: 765-5249
- ✓ Other: Dep. A.G. Ken Jorgensen: ken.jorgensen@ag.idaho.gov 208-854-8071
- ✓ Central Records: CentralRecords@idoc.idaho.gov

CLIFFORD T. HAYES
CLERK OF THE DISTRICT COURT

6893

By: [Signature]
Deputy Clerk

ORDER TO STAY:

Page 1



ORIGINAL

DANIEL G. COOPER
Attorney at Law/Conflict Public Defender
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2013 OCT 15 PM 3:31

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	MOTION TO RECONSIDER ORDER FOR	
	)	STAY PENDING APPEAL	
V.)		
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

Sean Cook, by and through his attorney of record, Daniel G. Cooper, Conflict Public Defender, hereby moves the Court pursuant to Rules 7(b)(1) and 11(a)(2)(B) of the Idaho Rules of Civil Procedure and Rule 13(b)(14) of the Idaho Appellate Rules for reconsideration of the Order for Stay Pending Appeal entered herein on September 30, 2013 by the Honorable, Benjamin R. Simpson, District Judge.

This Motion for Reconsideration is made upon the following grounds and for the following reasons:

1. On September 4, 2013 the Honorable, John R. Stegner, District Judge issued his Memorandum Opinion granted Petitioner, Sean Cook relief in the above-entitled post conviction relief case therein reversing Cook's conviction for rape in the Kootenai County matter, *State of Idaho v. Sean Cook*, CR-2008-13006 and ordering that Cook

be granted a new trial. On September 18, 2013, Judge Stegner further entered a Final Judgment setting aside Cook's rape conviction.

2. On September 23, 2013, the State of Idaho filed an appeal from the Court's Final Judgment to the Idaho Supreme Court. However, in filing its appeal, the State of Idaho failed to serve undersigned counsel with a copy of its Notice of Appeal.
3. On September 25, 2013, the State of Idaho further filed a Motion for Stay Pending Appeal of the Court's Final Judgment. Thereafter, on September 30, 2013, the Honorable, Benjamin R. Simpson entered an order staying further action in this matter pending appeal. *See, Exhibit A, attached.*

Petitioner, Sean Cook hereby moves the Court for an Order reconsidering the Order for Stay Pending Appeal and permitting Petitioner's release from custody on his own recognizance or the setting of bail. This motion is made upon the grounds that the State of Idaho has provided no basis to the Court in its application for stay pending appeal that the District Judge, John R. Stegner's Memorandum Opinion, Final Judgment and decision to grant Cook post conviction relief, vacate Cook's conviction and order a new trial are legally incorrect.

This motion is further made upon the grounds that District Judge, Benjamin R. Simpson, who entered the Order for Stay Pending Appeal, was not the judge presiding over Cook's post-conviction relief action and trial therein and likely does not have first-hand knowledge of the merits of the State of Idaho's appeal from District Judge, John R. Stegner's Final Judgment granting Cook post-conviction relief.

This motion is further made upon the grounds that District Judge, Benjamin R. Simpson's Order for Stay Pending appeal was made *carte blanche* without a hearing, oral argument or the

MOTION TO RECONSIDER ORDER FOR STAY PENDING APPEAL - Page 2

opportunity for Cook to respond to the State of Idaho's Motion for Stay Pending Appeal.

Accordingly, the Order for Stay Pending Appeal was entered without any judicial consideration of the imposition of any conditions under which the stay was to be imposed, including releasing Cook on his own recognizance pending appeal or the setting of a reasonable bail bond.

Based upon the forgoing, Petitioner Sean Cook respectfully requests the Court to reconsider its Order for Stay Pending Appeal, and set conditions of the stay pending appeal, including releasing Cook on his own recognizance or setting reasonable bail in the matter.

Undersigned counsel requests a hearing of this Motion for Reconsideration in which to submit evidence and argument in support thereof. The estimated time necessary for said hearing is 45 minutes.

Dated this 15th day of October, 2013.

A handwritten signature in black ink, appearing to read 'D. G. Cooper', written over a horizontal line.

DANIEL G. COOPER
CONFLICT PUBLIC DEFENDER

CERTIFICATE OF DELIVERY


I hereby certify that a true and correct copy of the foregoing was personally served by delivering a copy of the same on the 15th day of October, 2013, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner

By Fax: (208) 446-1833

Ken Jorgensen
Deputy Attorney General
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

By Fax: (208) 854-8074
 U.S. Mail, Postage Prepaid

BY: 

ORIGINAL

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 9-30-13
AT 11:00 O'CLOCK AM
CLERK, DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE _____ DEPUTY
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M. COOK,)
) Case No. CV-2011-10315
)
vs.) ORDER FOR STAY PENDING
) APPEAL
)
STATE OF IDAHO,)
)
Defendant.)

The Court having before it the above State's motion, and good cause appearing now, therefore,

IT IS HEREBY ORDERED that any further action in this above entitled matter is STAYED pending any Appellate decision.

ENTERED this 30 day of SEP, 2013.

Ben R. Stegner
JUDGE For Judge Stegner

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of September 2013, copies of the foregoing document(s) were sent by facsimile or emailed as follows:

- Kootenai County District Court, Judge Lansing Haynes: I.O. Mail
- Deputy Prosecuting Attorney for Kootenai County: FAX 208-446-1833
- Defense Counsel: DAN COOPER: FAX: 765-5249
- Other: Dep. A.G. Ken Jorgensen: ~~ken.jorgensen@ag.idaho.gov~~ 208-854-8071
- Central Records: CentralRecords@idoc.idaho.gov

CLIFFORD T. HAYES
CLERK OF THE DISTRICT COURT

By: *Clifford T. Hayes*
Deputy Clerk

ORDER TO STAY:

Page 1

EXHIBIT NO. A
IDENTIFICATION/EVIDENCE
CASE NO. _____
DATE: SUPREME COURT DOCKET 41449

STATE OF IDAHO
COUNTY OF KOOTENAI } SS:
FILED:

2013 OCT 21 AM 10:21

CLERK DISTRICT COURT

Sherry Huffman
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

SEAN COOK,)
)
) Petitioner,)
)
) vs.)
)
) STATE OF IDAHO,)
)
) Respondent.)
)
)

Case No. CV-2011-10315

**ORDER SETTING HEARING OF
MOTION TO RECONSIDER ORDER
FOR STAY PENDING APPEAL**

It is **ORDERED** that hearing of the defendant's Motion to Reconsider Order for Stay Pending Appeal is scheduled for hearing by telephone conference, to be initiated by the Court at 10:30 A.M. Pacific Time on October 30, 2013.

DATED this 21st day of October 2013.

John R. Stegner

John R. Stegner
District Judge

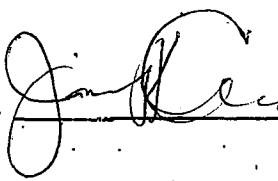
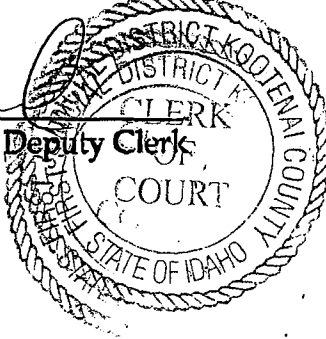
CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing **ORDER SETTING HEARING OF MOTION TO RECONSIDER ORDER FOR STAY PENDING APPEAL** was transmitted by facsimile to:

Donna Gardner
Deputy Prosecutor
(208) 446-1188 ✓ #620

Daniel C. Cooper
Attorney at Law ✓
(208) 765-5249 ✓ #620

on this 21st day of October 2013.


Deputy Clerk


STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 715 JSS KC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

2013 OCT 31 AM 11:32

CLERK DISTRICT COURT
Lisa Duxten
DEPUTY

- COURT MINUTES -

John R. Stegner
District Judge

Sheryl L. Engler
Court Reporter
Recording: Z: 3/2013-10-30
Time: 10:32 A.M.

Date: October 30, 2013

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	APPEARANCES:
vs.)	
	)	Petitioner represented by counsel,
STATE OF IDAHO,	)	Daniel Cooper, Coeur d'Alene, ID
)	
Respondent.	)	Respondent represented by counsel,
	)	Donna Gardner, Deputy Prosecutor
	)	Bryant Edward Bushling, Deputy Prosecutor

Subject of Proceedings: MOTION TO RECONSIDER ORDER FOR STAY
PENDING APPEAL by telephone conference pursuant
to Rule 7(b)(4), I.R.C.P.

This being the time fixed pursuant to written notice for hearing of the petitioner's Motion to Reconsider Order for Stay Pending Appeal in this case, Court noted the participation of counsel in this conference call.

Court inquired if a Motion to Stay had been filed. Ms. Gardner stated that it had been filed in September and her records indicate that a copy was faxed to this Court's chambers. Ms. Gardner further stated that she did not know how Judge Simpson came to sign the Order to Stay, but that it was signed without a hearing.

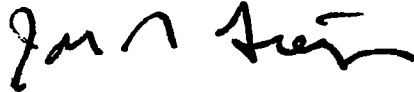
Mr. Cooper argued in support of the petitioner's Motion to Reconsider Order for Stay Pending Appeal. Ms. Gardner argued in opposition to the motion. Mr. Cooper argued in rebuttal. Ms. Gardner argued in surrebuttal. Mr. Cooper argued further in rebuttal. Ms. Gardner argued further in surrebuttal. Mr. Cooper argued further. Ms. Gardner argued further. Mr. Cooper argued further.

For reasons articulated on the record, Court granted the stay.

Court scheduled a bond hearing for 11:00 A.M. on November 26, 2013. Court instructed Mr. Cooper to prepare an order to have the defendant transported to Coeur d'Alene for that hearing.

Court recessed at 11:11 A.M.

APPROVED BY:



JOHN R. STEGNER
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing COURT MINUTES was transmitted by facsimile to:

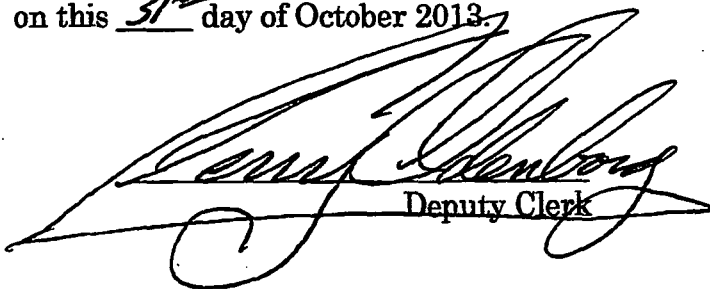
Donna Gardner
Deputy Prosecutor
Bryant Bushling
Deputy Prosecutor
(208) 446-1188

Daniel C. Cooper
Attorney at Law
(208) 765-5249

and the original mailed, for placement in the court file, to:

Gwen Hoffman
Kootenai County District Court

on this 31st day of October 2013.


Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

- COURT MINUTES -

John R. Stegner
District Judge

Sheryl L. Engler
Court Reporter
Recording: Z: 3/2013-10-30
Time: 10:32 A.M.

Date: October 30, 2013

SEAN COOK,)	
	)	Case No. CV-2011-10315
Petitioner,)	
	)	APPEARANCES:
vs.)	
	)	Petitioner represented by counsel,
STATE OF IDAHO,	)	Daniel Cooper, Coeur d'Alene, ID
)	
Respondent.	)	Respondent represented by counsel,
	)	Donna Gardner, Deputy Prosecutor
	)	Bryant Edward Bushling, Deputy Prosecutor

=====
Subject of Proceedings: **MOTION TO RECONSIDER ORDER FOR STAY
PENDING APPEAL by telephone conference pursuant
to Rule 7(b)(4), I.R.C.P.**

This being the time fixed pursuant to written notice for hearing of the petitioner's Motion to Reconsider Order for Stay Pending Appeal in this case, Court noted the participation of counsel in this conference call.

Court inquired if a Motion to Stay had been filed. Ms. Gardner stated that it had been filed in September and her records indicate that a copy was faxed to this Court's chambers. Ms. Gardner further stated that she did not know how Judge Simpson came to sign the Order to Stay, but that it was signed without a hearing.

Mr. Cooper argued in support of the petitioner's Motion to Reconsider Order for Stay Pending Appeal. Ms. Gardner argued in opposition to the motion. Mr. Cooper argued in rebuttal. Ms. Gardner argued in surrebuttal. Mr. Cooper argued further in rebuttal. Ms. Gardner argued further in surrebuttal. Mr. Cooper argued further. Ms. Gardner argued further. Mr. Cooper argued further.

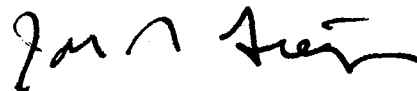
For reasons articulated on the record, Court granted the stay.

Terry Odenborg
Deputy Clerk
STATE OF IDAHO VS COOK

Court scheduled a bond hearing for 11:00 A.M. on November 26, 2013. Court instructed Mr. Cooper to prepare an order to have the defendant transported to Coeur d'Alene for that hearing.

Court recessed at 11:11 A.M.

APPROVED BY:



JOHN R. STEGNER
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete and correct copy of the foregoing COURT MINUTES was transmitted by facsimile to:

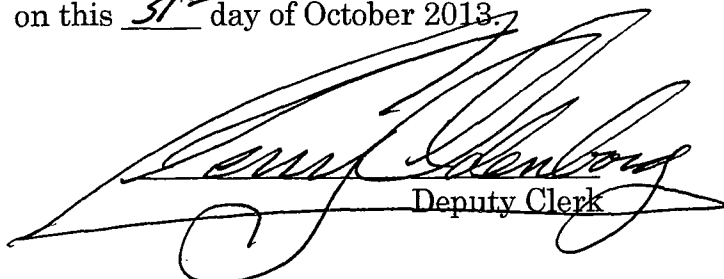
Donna Gardner
Deputy Prosecutor
Bryant Bushling
Deputy Prosecutor
(208) 446-1188

Daniel G. Cooper
Attorney at Law
(208) 765-5249

and the original mailed, for placement in the court file, to:

Gwen Hoffman
Kootenai County District Court

on this 31st day of October 2013.



Deputy Clerk

Terry Odenborg
Deputy Clerk
STATE OF IDAHO VS COOK

SUPREME COURT DOCKET 41449

419 of 428

DANIEL G. COOPER
Attorney at Law; Conflict Public Defender
PO Box 387
Coeur d'Alene, ID 83816
Phone: (208) 664-5155; Fax: (208) 765-5249
Bar Number: 6041

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 11/4/13
AT 4:47 CLOCK P M
CLERK, DISTRICT COURT
James R. Stegner
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN COOK,	)	CASE NUMBER	CV-2011-10315
)		
Petitioner,	)	ORDER TO TRANSPORT PETITIONER FOR	
	)	BOND HEARING	
V.)		
)		
STATE OF IDAHO,)		
)		
)		
Respondent.)		

This matter having come before the Court for telephonic hearing on October 30, 2013 on Petitioner's Motion to Reconsider the Stay Pending Appeal; with the State represented by Deputy Prosecuting Attorneys, Donna Gardner and Bryant Bushling, and Petitioner, Sean Cook represented by his attorney of record, Daniel G. Cooper, Conflict Public Defender; the Court having considered the Motion for Reconsideration and having entered a decision denying the Motion, but granting Petitioner a hearing on a motion for bond and/or release on his own recognizance which has been scheduled by the Court for Tuesday, November 26, 2013 at 11:00 a.m.. in Kootenai County, now, therefore:

IT IS HEREBY ORDERED that the Idaho Department of Corrections shall transport, Petitioner, Sean Cook to the Kootenai County Jail before Tuesday, November 26, 2013 so that he may participate at his bond hearing.

Entered this 4th day of November, 2013.

John R. Stegner

JOHN R. STEGNER
District Judge

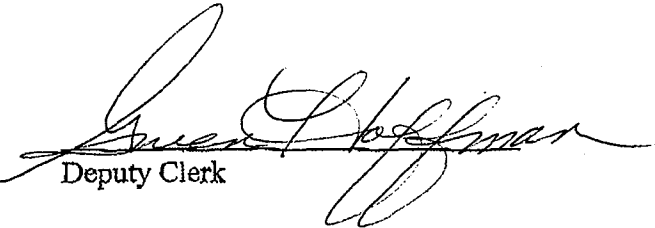
CLERK'S CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 4 day of November, 2013, addressed to:

Kootenai County Prosecuting Attorney's Office
Attention: Donna Gardner
By Fax: (208) 446-1833

Daniel G. Cooper
Attorney for Petitioner
By Fax: (208) 765-5249

IDOC - Central Records
"Inmate Placement"
By Fax: (208) 327-7480


Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED IDI *JSS*

LAWRENCE G. WASDEN
Attorney General
State of Idaho

2013 SEP 16 PM 2:18

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

CLERK DISTRICT COURT
Sherry K. Hoffman
DEPUTY

KENNETH K. JORGENSEN
Idaho State Bar # 4051
Deputy Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR KOOTENAI COUNTY

SEAN M. COOK,	)	District Court No.
	)	CV-2011-10315
Petitioner-Respondent,)	
	)	Supreme Court No.
vs.)	
	)	NOTICE OF APPEAL
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	
)	

TO: SEAN COOK, THE ABOVE-NAMED RESPONDENT, DANIEL G. COOPER, ATTORNEY AT LAW, PO Box 397, COEUR D'ALENE, IDAHO 83816 AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, State of Idaho, appeals against the above-named respondent to the Idaho Supreme Court from the MEMORANDUM

OPINION, entered in the above-entitled action on the 4th day of September, 2013, the Honorable John R. Stegner presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rule 11(b)(1).

3. Preliminary statement of the issue on appeal: Whether the district court erred in concluding that Cook had demonstrated ineffective assistance of counsel.

4. To undersigned's knowledge, no part of the record has been sealed.

5. Appellant requests the preparation of the following portions of the reporter's transcript: The evidentiary hearing held April 12, 2013 (court reporter Sheryl Engler, no estimated number of pages provided).

6. Appellant requests the normal clerk's record pursuant to Rule 28, I.A.R.

7. I certify:

(a) A copy of this notice of appeal is being served on each reporter of whom a transcript has been requested as named below at the address set out below:

SHERYL L. ENGLER
Latah County Courthouse
PO Box 8068
Moscow, ID 83843

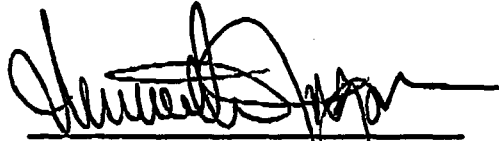
(b) Arrangements have been made with the Kootenai County Prosecuting Attorney who will be responsible for paying for the reporter's transcript;

(c) The appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212(2));

(d) There is no appellate filing fee since this is an appeal in a post-conviction case (I.A.R. 23(a)(10));

(e) Service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 16th day of September, 2013.



KENNETH K. JORGENSEN
Deputy Attorney General
Attorney for the Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 16th day of September, 2013, caused a true and correct copy of the attached NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

HONORABLE JOHN R. STEGNER
Latah County Courthouse
PO Box 8068
Moscow, ID 83843


DONNA GARDNER
Kootenai County Prosecutor's Office
PO Box 9000
Coeur d'Alene, ID 83816

DANIEL G. COOPER
Attorney at Law
PO Box 397
Coeur d'Alene, Idaho 83816

SHERYL L. ENGLER
Latah County Courthouse
PO Box 8068
Moscow, ID 83843

HAND DELIVERY

MR. STEPHEN W. KENYON
CLERK OF THE COURTS
P.O. Box 83720
Boise, Idaho 83720-0101



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

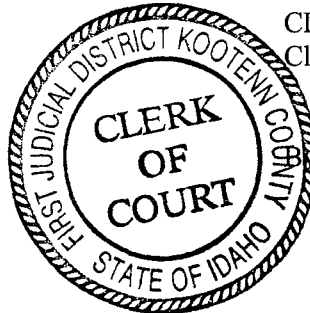
SEAN M COOK)	
)	
Petitioner-Respondent)	
	)	Supreme Court Docket No. 41449
vs)	
	)	Kootenai County Docket 2011-10315
STATE OF IDAHO)	
)	
Respondent-Appellant)	
)	
)	
)	

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was electronically filed, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Petitioner-Respondent and Respondent-Appellant were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 8th day of November 2013.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 8th day of November 2013.



CLIFFORD T. HAYES
Clerk of the District Court

Cherry Huffman
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M COOK)	
)	
Petitioner-Respondent)	
	)	Supreme Court Docket No. 41449
vs)	
	)	Kootenai County Docket 2011-10315
STATE OF IDAHO)	
)	
Respondent-Appellant)	
)	
)	
)	

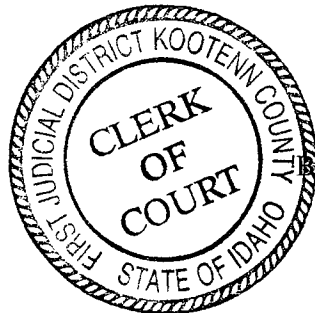
CLERK'S CERTIFICATE OF EXHIBITS

I, Clifford T Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forward to the Supreme Court Of Appeals.

PLAINTIFF'S EXHIBITS:

ADMITTED X (1) Transcript On Appeal

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 8 day of Nov, 2013



CLIFFORD T. HAYES
Clerk of District Court

Sherry Huffner
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SEAN M COOK)	
)	
Petitioner-Respondent)	
	)	Supreme Court Docket No. 41449
vs)	
	)	Kootenai County Docket 2011-10315
STATE OF IDAHO)	
)	
Respondent-Appellant)	
)	
)	
)	
)	

CLERK'S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to the attorneys of record in this cause as follows:

Attorney for Petitioner-Respondent
Daniel G Cooper
Public Defender
PO Box 387
Coeur d'Alene, ID 83816

Attorney for Respondent-Appellant
Kenneth K Jorgensen
Deputy Attorney General
PO Box 83720
Boise, ID 83720-0010

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this November 8, 2013.



Clifford T. Hayes
Clerk of District Court

By: *Sherry Huffman*
Deputy Clerk