

4-22-2014

# Cook v. State Appellant's Reply Brief Dckt. 41449

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

SEAN COOK,	)	
	)	No. 41449
Petitioner-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CV-2011-10315
	)	
STATE OF IDAHO,	)	
	)	
Respondent-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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District Judge

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**FILED - COPY**

APR 22 2014

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

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ATTORNEY FOR  
DEFENDANT-RESPONDENT

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## ARGUMENT

I.

### The District Court Applied An Incorrect Legal Analysis And Reached An Erroneous Conclusion Regarding Counsel's Tactical Decision To Not Object To Evidence Of The Witness's Explanation For His Prior Inconsistent Testimony

#### A. The District Court Erred By Concluding That The Inadmissibility Of The Evidence Was Alone Sufficient To Sustain A Finding Of Deficient Performance Of Counsel

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." Strickland v. Washington, 466 U.S. 668, 690 (1984). The court must apply a "strong presumption of competence." Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388, 1407 (2011). To overcome the presumption of competence Cook had to prove that the strategic decision to not object "resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). See also Hinton v. Alabama, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1081, 1088-89 (2014) (counsel's decision to not seek additional expert witness at state expense deficient because counsel was unaware of law allowing him to do so).

The district court in this case did not find the "strong presumption" of competence disproved by evidence of "inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review." Rather, it found that there is "no strategic reason to allow highly prejudicial evidence to be admitted if it could be excluded." (R., p. 396.) The district court found deficient performance exclusively upon its determination that the evidence it deemed prejudicial could have been excluded, but was not. Because the district court

found deficient performance without finding any objective shortcoming, it applied an erroneous legal standard and committed reversible error. (Appellant's brief, pp. 6-8.)

Cook argues the district court “not only set out the appropriate legal standard, but then concluded ‘there is simply no strategic reason to allow highly inflammatory prejudicial evidence to be admitted if it could be excluded.’” (Respondent’s brief, p. 3.) Cook cannot point out in the record, however, where the district court ever found an objective shortcoming of counsel, a prerequisite to concluding that counsel’s performance was constitutionally deficient. The district court simply failed to make any factual finding, such as lack of preparation or ignorance of the law, that would actually support a conclusion that counsel’s performance was constitutionally deficient.

The court did find that counsel could have objected and successfully excluded the “inflammatory” and “prejudicial” evidence. Such a finding is inadequate by itself to show deficient performance. See State v. Dunlap, 155 Idaho 345, \_\_\_, 313 P.3d 1, 40 (2013) (claimed failure to object to evidence not deficient performance absent evidence that the lack of objection was “the product of inadequate preparation or ignorance of the relevant law”). The district court did not “indulge the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment.” Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. at 1407 (internal quotes and brackets omitted). The standard actually applied by the district court, by which the petitioner may establish deficient performance merely by showing inadmissible evidence came

in at his trial, employed no presumption, required no proof of objective deficiency, and effectively required the state to prove that counsel was *not* deficient. Cook's argument that a showing of inadmissibility is sufficient to sustain his burden of proof is simply contrary to law.

B. The District Court Erred By Failing To Consider Counsel's Stated Reasons For Not Objecting

Defense counsel's stated reason for not objecting was because the evidence of the threats was "part and parcel of Mr. Nelson's testimony or contention." (Trial Tr., p. 108, Ls. 13-16.) The district court considered whether the evidence would be admissible as evidence of consciousness of guilt, but failed to consider counsel's stated reason for not objecting. (R., p. 395.) The testimony regarding the threats was admissible to demonstrate the reasons for the witness's inconsistent statement at the preliminary hearing; therefore defense counsel reasonably concluded the evidence was admissible. (Appellant's brief, pp. 11-12.)

Cook's response is that trial counsel "stated he believed that the threat evidence was admissible as part and parcel of a confession." (Respondent's brief, p. 5.) This representation is inaccurate. Counsel stated he was not objecting because testimony regarding the alleged threats was "part and parcel of Mr. Nelson's testimony or contention." (Trial Tr., p. 108, Ls. 8-15.) He specifically stated, in response to whether there should be a limiting instruction, "I *don't* see that it's part of an alleged confession." (Trial Tr., p. 108, Ls. 15-16)

(emphasis added).)<sup>1</sup> Trial counsel specifically denied that the evidence of threats was “part and parcel” of any confession; the record clearly establishes that the evidence of threats was “part and parcel” of the witness’s prior inconsistent testimony at the preliminary hearing. The law would not have allowed trial counsel to simultaneously impeach the witness with evidence of his prior inconsistent statements and deny the witness the opportunity to explain the inconsistency. Openshaw v. Adams, 92 Idaho 488, 492, 445 P.2d 663, 667 (1968) (“It is settled that upon introduction of evidence which seemingly impeaches or contradicts a witness’s testimony, the witness must be permitted a reasonable opportunity to explain the impeaching evidence.”) (cited at Appellant’s brief, p. 11).

In this case trial counsel elected to put the evidence (inconsistent statements *and* explanation that inconsistent statements were the result of threats) because he believed that the jury would ultimately conclude the witness was not credible. (Trial Tr., p. 108, Ls. 4-16.) Because keeping out the threat evidence would likely also have resulted in the exclusion of the inconsistent statement evidence, the election to put both before the jury instead of neither

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<sup>1</sup> Cook is conflating trial counsel’s statements in relation to two different parts of the evidence. Counsel did state that evidence of Cook’s threats that he would harm the *victim* to prevent her from testifying was “an admission type statement.” (Trial Tr., p., 114, Ls. 13-18 (cited at Respondent’s brief, p. 5).) The district court found deficient performance for failing to object to evidence that “Cook threatened to rape Nelson’s wife and daughter and that his family would be ‘taken care of’ if he testified.” (R., p. 295.) The district court did not address any failure to object to evidence of threats to harm the victim. (R., pp. 392-401.) Because the district court did not base any finding of deficient performance on any lack of objection to evidence of threats against the victim, such is beyond the scope of this appeal.



was a quintessential tactical decision. The court's conclusion that just because the evidence *could have been* excluded an objection *must have been* made is contrary to law.

C. The District Court Erred In Its Prejudice Analysis

The district court erred in two ways. First, by failing to recognize that the evidence of threats was relevant to explain the prior inconsistent statement it erred because the evidence was admissible on this ground or, alternatively, exclusion of the evidence of the explanation for the inconsistent statement would have resulted in exclusion of the inconsistent statements as well. (Appellant's brief, pp. 11-12.) Second, the district court's analysis focused on whether the jury would have "ignored" the evidence instead of whether, considering the trial as a whole, there was a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. (Appellant's brief, pp. 12-13.) Because the district court failed to address the proper legal standards for admission of the challenged evidence and because it ultimately applied an incorrect prejudice analysis it erred and must be reversed.

In response Cook adopts the district court's opinion and claims the "State failed to show the district court erred." (Respondent's brief, p. 6.) Application of the correct standards of admissibility of evidence, however, shows that the evidence of threats was admissible to explain the inconsistent testimony offered at the preliminary hearing, and that if the evidence had been excluded such would have foreclosed impeachment with the prior inconsistent testimony. Neither of these results was prejudicial to Cook. Likewise, the court's rationale is

flawed because the jury would not have “ignored” the testimony regarding the threats only if they found it credible, and if they found the witness’ testimony credible they likely would have convicted anyway. The district court applied incorrect legal theories and reached an erroneous result.

II.


The District Court Applied An Incorrect Legal Analysis And Reached An Erroneous Conclusion Regarding Counsel's Tactical Decision In Relation To Evidence Of The Victim's Disclosure Of The Rape

The record establishes that trial counsel affirmatively used evidence of the victim’s disclosure to argue that the timing of the disclosure evinced fabrication and unreliability. (Appellant’s brief, pp. 14-15.) Once again the district court erroneously concluded that a determination that the evidence was subject to objection established both prongs of an ineffective assistance of counsel claim. (Appellant’s brief, pp. 15-19.) Cook has chosen to not respond to the state’s argument. (See, generally, Respondent’s brief.) For the reasons stated in the Appellant’s brief, the district court erred.

CONCLUSION

The state respectfully requests this Court to reverse the district court’s order and judgment granting post-conviction relief.

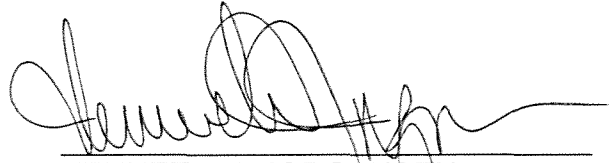
DATED this 22nd day of April, 2014.

  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2014, I caused two true and correct copies of the foregoing REPLY BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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KKJ/pm