1-12-2018

Rome v. State Appellant's Brief Dckt. 45140

IN THE SUPREME COURT OF THE STATE OF IDAHO

SONNY ROME,	)	
	)	**NO. 45140**
Petitioner-Appellant,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CV 2016-2158**
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
	)	

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

HONORABLE LANSING L. HAYNES
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR PETITIONER-APPELLANT

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

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Sonny Rome contends the district court erred in denying his post-conviction petition. As an initial matter, he contends the district court's conclusion – that it had not been requested to take judicial notice of documents in the underlying criminal case file – is clearly erroneous, as he made written requests to that point on several occasions. That is particularly problematic because the record is not clear as to whether the district court was relying, at least in part, on its memory of the underlying criminal case in denying Mr. Rome's claims.

The district court's ruling on the merits of his claim that trial counsel was ineffective for not requesting a viable lesser-included instruction is similarly erroneous. Its first reason – that there was no evidence or legal basis showing the court would have granted trial counsel's request to give the lesser-included instruction – ignored trial counsel's unrefuted testimony at the evidentiary hearing. As a result, the district court failed to properly apply the preponderance-of-the-evidence standard in reaching its decision.

The district court's other reason for denying that claim – that there was no prejudice because the jury convicted Mr. Rome on the greater offense – is, as two federal circuit have held, directly contrary to several United States Supreme Court decisions. Thus, its holding should be reversed, and, to the extent the district court's decision on the prejudice prong was dictated by Idaho Supreme Court precedent, that precedent should be overruled as it is manifestly wrong, unjust, unwise, and contrary to the plain, obvious principles of law.

For all those reasons, this Court should reverse the district court's decision to deny Mr. Rome's post-conviction petition and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Rome was charged with aiding and abetting a burglary by agreeing to drive a vehicle to a store to facilitate a theft from that store. *State v. Rome*, 160 Idaho 40, 42 (Ct. App. 2016). In his post-conviction petition, Mr. Rome represented the relevant facts were as follows: he had gone with a woman to Walmart, she had gone into the store, taken a vacuum, gotten into Mr. Rome's truck, showed him a receipt purportedly for the vacuum, and Mr. Rome had driven away from the store.[1] (R., pp.25, 29; *see also* Exhibits, pp.4-5 (Mr. Rome's testimony at the jury trial to this same effect).)[2]

His trial attorney, Jay Logsdon, subsequently testified that he could have, but did not, request the jury be instructed on the lesser-included offense of accessory-after-the-fact. (Tr., p.21, L.20 - p.22, L.3.) The jury convicted Mr. Rome as charged, and he was sentenced to a unified term of twelve years, with four years fixed. *See Rome*, 160 Idaho at 42. He appealed, and trial counsel represented him during that appeal. *See generally id.* The Court of Appeals affirmed the judgment of conviction. *Id.* at 46.

[1] On multiple occasions, Mr. Rome requested the district court take judicial notice of the transcripts and record from the underlying criminal cases, including the record prepared for the direct appeal, and proffered those documents as exhibits to one of his briefs. (R., pp.49-50, 80, 85, 88.) Nevertheless, while discussing its decision to deny Mr. Rome's claim that trial counsel was ineffective for not making certain arguments on the direct appeal, the district court stated that there had been no formal motion for it to take judicial notice, and so, "I never made the decision to take judicial notice of any certain proceedings." (Tr., p.75, L.18 - p.76, L.3.) Nevertheless, it referred to the facts of the underlying criminal case in making its decision. (*See generally* Tr., pp.64-78.)

Unless otherwise noted, all references to "Tr." in this brief refer to the volume containing the transcript of the evidentiary hearing held on February 22, 2017.

[2] "Exhibits" refers to electronic document Exhibits.pdf, which contains several excerpts from the transcript of the jury trial which were admitted during the evidentiary hearing on his post-conviction petition. Page numbers refer to the pdf page number.

Mr. Rome subsequently filed a *pro se* petition for post-conviction relief. (R., pp.5-8.) He asserted, *inter alia*, that his trial attorney was ineffective for not requesting a proper instruction regarding the elements of aiding and abetting. (R., pp.31-32.) He was appointed post-conviction counsel and, in response to the State's motion for summary judgment, he clarified that his sixth claim of error was that his trial attorney could have, but did not, argue that he was only an accessory after the fact, and that, had counsel requested proper instructions, there was a reasonable possibility the jury's verdict would have been different. (R., pp.62-63.) The district court denied the State's motion for summary dismissal on procedural grounds and set the case for an evidentiary hearing. (*See generally* 1/27/17 Tr.)

The district court treated the briefs both parties had filed in regard to the motion for summary dismissal as "trial briefing" in preparation for the evidentiary hearing. (1/27/17 Tr., p.9, Ls.1-10.) Mr. Rome's brief expressly requested the district court take judicial notice of various documents from the underlying criminal case file, and both parties referred to the facts from the underlying case in that briefing. (R., pp.49-50; *see generally*, R., pp.40-45, 48-68, 92-99.) Additionally, Mr. Rome filed a proposed finding of fact and conclusions of law based on the anticipated evidence, including that, had an accessory instruction been requested, it would have been given, and that the jury probably would have considered it. (R., p.96.) Consistent with the anticipated evidence, Mr. Rome's trial attorney testified at the hearing that there was a reasonable basis upon which he could have, but did not, requested an accessory instruction, but he had not recognized that fact at the time of the trial. (Tr., p.21, L.20 - p.22, L.3.)

After Mr. Rome rested, the State moved for "a directed verdict," essentially arguing that Mr. Rome had failed to meet his burden of proof. (Tr., p.47, Ls.8-17.) For example, the prosecutor simply argued: "With regard to Claim 6, the aiding and abetting. I don't believe

there's any evidence with regards to aiding and abetting. I don't recall any testimony with regards to that." (Tr., p.52, Ls.10-13.)

In response, post-conviction counsel argued that the facts showed there was a question about when and how Mr. Rome had been involved in the alleged crime. (Tr., p.58, Ls.20 - p.59, L.2.) Given that question, he argued that an accessory instruction would have been a proper under a pleading theory. (Tr., p.59, Ls.3-7.) Finally, he argued the approach which Idaho's courts have used in regard to the failure to give a lesser-included instruction – that, because a conviction was entered on the greater charge, the failure to give a lesser-included instruction was moot – was improper, since it meant the failure to request or give a proper lesser-included instruction "will for[ever] evade review." (Tr., p.59, Ls.16-25.)

The district court granted the State's motion for directed verdict. (Tr., p.64, Ls.15-16.) While it gave oral explanations for its ruling on most of Mr. Rome's claims, the district court's reasoning on the lesser-included instruction claim was only provided in a subsequent written order. (*See* R., pp.102-03; *see generally* Tr., pp.64-78.) Specifically, the district court concluded that, even if trial counsel had requested the accessory instruction, there was no evidence or basis in law indicating that the judge would have given it. (R. p.102.) Further, "even if the trial counsel had successfully obtained a jury instruction on Accessory, the outcome would not have been different because the trial jury unanimously found that the State had proved the charged offense of Burglary beyond a reasonable doubt." (R., pp.102-03.)

Mr. Rome filed a notice of appeal timely from the final judgment. (*See* R., pp.109, 121.)

ISSUES

I. Whether the district court erred by not taking judicial notice of the documents in the underlying criminal case record as requested by Mr. Rome based on its clearly erroneous determination that he had not requested it take judicial notice.

II. Whether the district court's decision to deny Mr. Rome's lesser-included instruction claim fails to apply the proper standards for evaluating a claim of ineffective assistance of counsel at an evidentiary hearing.

ARGUMENT

I.

The District Court Erred By Not Taking Judicial Notice Of The Documents In The Underlying Criminal Case Record As Requested By Mr. Rome Based On Its Clearly Erroneous Determination That He Had Not Requested It Take Judicial Notice

The district court is required to take judicial notice of documents from its records and transcripts when a party makes an oral or written request for it to do so. I.R.E. 201(d). The district court refused to take judicial notice of the documents from the underlying criminal case based its determination that "the Court has not been asked to take judicial notice, at least a formal motion hasn't been made, I haven't been asked to make that determination." (Tr., p.75, Ls.18-21.) That determination is clearly erroneous because it is not supported by substantial or competent evidence. *See Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003) (explaining a conclusion is clearly erroneous when it is not supported by substantial or competent evidence). In fact, it is flatly contradicted by the record, which reveals Mr. Rome expressly requested it take judicial notice of those documents on at least four different occasions. (R., pp.49-50, 80, 85, 88.) In fact, he even represented that he had proffered copies of those documents to the district court and opposing counsel. (R., p.49.) Therefore, the district court erred by not taking judicial notice of the documents from the underlying criminal case pursuant to Mr. Rome's repeated requests.

That error is particularly problematic in this case because the district court referred to various facts about the underlying criminal case in ruling on Mr. Rome's claims and it is not clear if it was drawing those facts from the post-conviction record or from its memory of the underlying criminal case. (*See generally* Tr., p.64, L.5 - p.78, L.5.) For example, in denying Mr. Rome's claim that counsel was ineffective for not presenting certain mitigating evidence at sentencing, the district court concluded: "had the Court heard that evidence the sentence would

have been exactly the same anyway. That [mitigating evidence] would not have at all outweighed the fact of his history of previous felony convictions, and the history being a long one, and that this Court felt that it needed to protect society from thefts by Mr. Rome with the sentence it gave." (Tr., p.75, Ls.5-13.)

The fact that Mr. Rome had prior convictions which were being used to prove a habitual offender enhance was discussed in the excerpts from the trial transcript admitted during the evidentiary hearing. (*See, e.g.*, Exhibits, p.15.) However, the sentencing hearing transcript was not similarly admitted. (*See generally* Exhibits.) As a result, there are no facts in the post-conviction record speaking to exactly how long Mr. Rome's prior record was, or the factors weighing for and against the need to protect society with the sentence imposed. (*See generally* Exhibits.) Thus, it appears the district court's decision on that issue was based, at least in part, on its memory of the sentencing hearing.

The Idaho Supreme Court has made it clear that "[a] judge may take judicial notice of personal recollection of prior proceedings to the extent that the judge recalls what occurred. However, the previous hearing must be transcribed so that any alleged error in such judicial notice is subject to appellate review." *Navarro v. Yonkers*, 144 Idaho 882, 887 (2007). If no such record exists to allow that appellate review, the district court cannot take judicial notice of its memory. *Navarro*, 142 Idaho 887; *Matthews v. State*, 122 Idaho 801, 807 (1992); *Roman v. State*, 125 Idaho 644, 648 (Ct. App. 1994). The district court's conclusion in this case – that it had not been asked to take, and so, had not taken, judicial notice of documents from the underlying criminal case – reveals there is no record in the post-conviction record for this Court

to review.[3] *Roman v. State*, 125 Idaho 644, 648 (Ct. App. 1994) ("No part of the record from the criminal case becomes part of the record in the post-conviction proceeding unless it is entered as an exhibit."). Therefore, the district court in this case erred by taking judicial notice of its memory.

The effects of this problem are not necessarily limited to just those claims where there is no evidence properly in the record to support the district court's claims. On other claims, such as the claim regarding counsel's failure to request a lesser-included instruction which is discussed in Section II, is it is unclear if there is other evidence that the district court was considering which could affect the appellate court's review of that issue. For example, post-conviction counsel argued that the accessory instruction was appropriate under the pleading theory. (Tr., p.59, Ls.3-7.) The pleading theory looks at the way in which the offense was charged in the charging document. *See State v. Sepulveda*, 161 Idaho 79, 87 (2016). However, due to the district court's error in regard to the request for judicial notice, it is unclear whether the charging document was properly before the district court. As such, it may be prudent to remand this case to the district court, at least for clarification of the record, and to the extent necessary, reconsideration of the decisions with a proper understanding of what evidence was or should be before the court.

As such, this Court should vacate the decision denying Mr. Rome's petition and remand this case so that the district court can actually rule on Mr. Rome's motion for judicial notice and

[3] To the extent the district court may have impliedly taken judicial notice of the documents proffered by post-conviction counsel (*see* R., p.49), the district court still erred by not identifying with specificity which documents on which it was relying. *See, e.g., Taylor v. McNichols*, 149 Idaho 826, 835-36 (2010); *Fortin v. State*, 160 Idaho 437, 442-43 (Ct. App. 2016); I.R.E. 201(c)-(d) (requiring that "the court shall identify the specific documents that were so noticed").

evaluate his claims in light of the evidence that should have been properly before it under I.R.E. 201.

II.

The District Court's Decision To Deny Mr. Rome's Lesser-Included Instruction Claim Fails To Apply The Proper Standards For Evaluating A Claim Of Ineffective Assistance Of Counsel At An Evidentiary Hearing

A. Standard Of Review

When raising an issue of ineffective assistance of counsel in post-conviction proceedings, a petitioner is required to prove that his attorney's performance was objectively unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to show prejudice, the petitioner need only show "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." *Id*. at 694.

At an evidentiary hearing, a post-conviction petitioner must prove his claims by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008); *see* I.C. § 19-4907. A preponderance of the evidence only requires a showing that the claim is more probably true than not. *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481 (2003); *Ada County Prosecuting Attorney v. DeMint*, 161 Idaho 342, 344 (Ct. App. 2016). This standard is akin to the "sufficiency of the evidence" standard, which is less onerous than even a "clear and convincing evidence" standard. *Ellibee v. Ellibee*, 121 Idaho 501, 505 (1992); *Umphrey v. Sprinkel*, 106 Idaho 700, 706 (1983).

When reviewing mixed questions of law and fact under these standards, the appellate court defers to the district court's factual findings which are supported by substantial evidence,

but it freely reviews the application of the relevant law to those facts. *McKinney v. State*, 133 Idaho 695, 700 (1999); I.R.C.P. 52(a).

B. Trial Counsel's Uncontradicted Testimony Established That A Reasonable Basis Existed Upon Which He Could Have Requested An Accessory Instruction, And Thus, That The District Court Would Have Been Statutorily-Obligated To Give That Instruction, By A Preponderance Of Evidence

The district court's first reason for denying the lesser-included instruction claim was that there was no evidence or legal basis for giving an accessory instruction. (R., p.102.) That conclusion is erroneous for several reasons.

First, it ignores trial counsel's uncontradicted testimony. At the evidentiary hearing in this case, trial counsel expressly testified that, given the way the evidence developed at trial, there was a reasonable ground upon which he could have requested an accessory instruction. (Tr., p.21, Ls.21-23.) Because this testimony existed, the first part of the district court's conclusion – that there was no evidence supporting this claim (R., p.102) – is clearly erroneous. *See Lovitt*, 139 Idaho at 325.

That uncontested testimony is also sufficient, by itself, to satisfy the preponderance burden of proof. *Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 409, 417 (1994) (holding that the uncontradcited testimony of a reliable witness constituted a preponderance of the evidence sufficient to merit relief on a claim of loss, and holding the district court's decision to deny that claim clearly erroneous). And, as this Court recently reaffirmed, a court cannot arbitrarily reject uncontradicted testimony. *Manwaring Investments, L.C. v. City of Blackfoot*, 162 Idaho 763, ___, 405 P.3d 22, 30 (2017). There was no indication or finding that trial counsel was not credible in his testimony. (*See generally* Tr., R.) Thus, ignoring his testimony was arbitrary. *See Seubert Excavators*, 125 Idaho at 417. Since trial counsel's uncontradicted

testimony was the only evidence clearly before the district court at the evidentiary hearing on this issue, and that testimony supports Mr. Rome's claim, he met his burden to prove that it was more probably true than not that there was a basis to request the accessory instruction.

Furthermore, the district court is statutorily-obligated to instruct the jury on a lesser-included offense if: (1) a party requests such an instruction, and (2) a reasonable view of the evidence presented would support a finding of guilt on the lesser, but not the greater offense. I.C. § 19-2132(b). An offense is an included offense under Idaho's pleading theory when it is charged as a means or element of the commission of the charged offense. *State v. Sepulveda*, 161 Idaho 79, 87 (2016). Being an accessory after the fact is one means by which a person can aid and abet a principal, and thus, commit the overarching offense. *See State v. Hauser*, 143 Idaho 603, 613-14 (Ct. App. 2006) ("The test of an accessory after the fact is that he renders his principal some personal help to elude punishment—the kind of help being unimportant.") (punctuation altered); I.C. § 19-1430 (defining principal and accessory as two ways in which a person can commit the overarching offense). As such, accessory is an included offense with aiding and abetting under the pleading theory. Therefore, given trial counsel's unrefuted testimony at the evidentiary hearing – that there was a reasonable view of the evidence which supported the accessory instruction – it is more probably true than not that, had trial counsel requested an accessory instruction, the district court would have given it pursuant to I.C. § 19-2132(b).

As a result, the district court's first reason for granting the motion for directed verdict on the lesser-included instruction claim is clearly erroneous, as it is disproved by the record. Under the proper standard, Mr. Rome proved by a preponderance of the evidence that there was a

reasonable basis for trial counsel to have requested the accessory instruction and that it would have been given had it been requested.

C. The District Court's Prejudice Analysis Is Directly Contrary To United States Supreme Court Precedent

1. The United States Supreme Court Has Expressly Recognized That A Reasonable Probability Of Prejudice Exists When An Appropriate Lesser-Included Instruction Is Not Given

The district court's second reason for denying the lesser-included instruction claim was that Mr. Rome had failed to prove prejudice because the jury had convicted him on the greater aiding and abetting charge. (R., pp.102-03.) That analysis is in direct conflict with the test for prejudice set forth in *Strickland*. Essentially, the district court was, as its own words reveal, considering whether "even if the trial counsel had successfully obtained a jury instruction on Accessory, the outcome *would not have been* different . . . ." (R., pp.102-03 (emphasis added).) *Strickland*'s standard is lower, as it only requires the district court to determine whether there is "*a reasonable probability* that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). Essentially, the district court demanded surety of a different outcome, when *Strickland* only requires a petitioner to undermine confidence in the outcome. *Id.*

Under the proper standard, the district court's conclusion is plainly wrong because, forty years ago, the United States Supreme Court expressly recognized that *there is* a reasonable probability that the jury may render a different verdict if they had been given the absent lesser-included instruction: "We cannot say that the availability of a third option—convicting the defendant of [the lesser included offense]—could not have resulted in a different verdict."

Keeble v. United States, 412 U.S. 205, 213 (1973); *accord State v. Curtis*, 130 Idaho 525, 528-29 (Ct. App. 1996) (Lansing, J., dissenting).

The United States Supreme Court explained that reasonable probability exists because a jury could have reasonable doubts as to one element of the greater offense but also believe the defendant committed some sort of crime, and if not presented the appropriate lesser-included option in those circumstances, the jury "is likely to resolve its doubts in favor of conviction." *Id.* at 212-13; *accord Beck v. Alabama*, 447 U.S. 625, 634 (1980) (holding a state rule which prevented giving a lesser-included instruction in a capital case was unconstitutional because of that risk). Thus, "a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will divulge from theory" about deliberation procedures. *Keeble*, 412 U.S. at 212.

This risk, the United States Supreme Court has subsequently explained, remains present "even if we assume that the instructions required a unanimous vote before the jury could consider a lesser offense" because that vote is not a final verdict, and so, there is nothing preventing the jury from reconsidering that vote. *Blueford v. Arkansas*, 566 U.S. 599, 607 (2012); *cf. State v. Caramouche*, 155 Idaho 831, 837-38 (Ct. App. 2013) (holding that the judge in a bench trial can reconsider and amend his initial oral findings prior to actually entering the verdict because, up until that point, the verdict was not final). "The very object of the jury system, after all, is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Blueford*, 566 U.S. at 607 (internal quotation omitted). Thus, under an acquit-first instruction, the jurors could initially, unanimously vote to acquit on the greater charge and start considering the lesser-included offense, but after comparing their views on that lesser charge, decide to return a verdict convicting the defendant of the greater offense. *See id.*

Based on that Supreme Court precedent, the Third and Ninth Circuits have both granted *habeas* relief in the face of analysis identical to that used by the district court in this case, holding it is clearly improper under *Strickland*'s actual standard for prejudice. *Crace v. Herzog*, 798 F.3d 840, 849-50 (9th Cir. 2015) (vacating decision to deny post-conviction relief by the Washington Supreme Court); *Breakiron v. Horn*, 642 F.3d 126, 140 (3rd Cir. 2011) (vacating decision to deny post-conviction relief by the Pennsylvania Supreme Court).[4]

That analysis, the Ninth Circuit explained, "sanctioned an approach to *Strickland* that sidesteps the reasonable-probability analysis that *Strickland*'s prejudice prong explicitly requires." *Crace*, 798 F.3d at 847. It allows the trial court to simply evaluate whether the evidence was sufficient to maintain a conviction rather than "weigh all the evidence of the record (including Breakiron's testimony . . .) to determine whether there was a reasonable probability that the jury would have convicted him only of [the lesser offense] if it had been given that option." *Breakiron*, 642 F.3d at 140. Thus, that analysis "converted *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question" because under that analysis, if the verdict on the greater offense was supported by the record, there was "*categorically* no *Strickland* error." *Crace*, 798 F.3d at 849 (emphasis from original).

[4] Pennsylvania uses a "progression" instruction when dealing with lesser-included offenses, which appears to be an acquittal-first instruction. *See, e.g., Commonwealth v. Hallman*, 67 A.3d 1256, 1262-63 (Pa. 2013) (giving the following example of a progression instruction: "*Commonwealth v. Sanders*, 380 Pa.Super. 78, 551 A.2d (1988) (charge that jury should consider second degree robbery charge only if defendant was *acquitted of* first degree robbery did not invade the province of the jury).") (internal quotation omitted) (emphasis added). Washington uses an "unable to agree" instruction which, unlike an acquittal-first instruction, does not require unanimous agreement on the greater offense before considering the lesser. *State v. Ervin*, 147 P.3d 567, 571 n.7 (2006), *en banc*. Nevertheless, that instruction still requires the jurors to start with, and agree to move past, the greater offense before considering the lesser. *See id*. Therefore, in the context of the *Strickland* analysis, both Pennsylvania's and Washington's lesser-included instructions are substantially similar to Idaho's.

"The problem with this analysis," the Third Circuit explained, "is it rests solely on the jury's duty as a theoretical matter to acquit if it does not find every element of a crime and does not acknowledge the substantial risk that the jury's practice will diverge from theory when it is not presented with the option of convicting of a lesser offense instead of acquitting outright." *Breakiron*, 642 F.3d at 139 (quoting *Beck*, 447 U.S. at 634 (quoting *Keeble*, 412 U.S. at 212)) (internal quotation marks omitted). "Indeed, just the opposite is true." *Crace*, 798 F.3d at 849. "[I]n ineffective-assistance cases involving a failure to request a lesser-included-offense instruction, *Strickland requires* a reviewing court to assess the likelihood that the defendant's jury would have convicted on the lesser included offense. *Cf. Keeble*, 412 U.S. at 213, 93 S. Ct. 1993 ('We cannot say that the availability of a third option . . . could not have resulted in a different verdict.')." *Crace*, 798 F.3d at 849 (emphasis and ellipsis from *Crace*). Therefore, only by accounting for *Keeble*'s conclusion "can a court answer the question expressly posed by *Strickland*: whether there is a reasonable probability that, if the defendant's lawyer had performed adequately, the outcome of the proceeding would have been different." *Id.*; *accord. Breakiron*, 642 F.3d at 139.

Since the sort of analysis the district court used in Mr. Rome's case, like the analysis used by the Washington and Pennsylvania courts, authorizes "courts to avoid analyzing prejudice in the way that *Strickland* requires[, t]his approach to *Strickland* is not merely wrong, but is objectively unreasonable." *Crace*, 798 F.3d at 849-50 (internal quotations omitted). Because that analysis fails to "acknowledge the substantial risk to which [the defendant] was exposed in the absence of [the lesser included] instruction and did not weigh the evidence of the record to determine whether it prejudice him[,] its ruling is both contrary to and an unreasonable application of *Strickland*." *Breakiron*, 642 F.3d at 140.

The Ninth Circuit also explained there was no justifiable reason to fear that finding prejudice in this sort of situation would require the courts to conclude the jurors had disregarded the instruction on how to approach lesser included offenses. *Crace*, 798 F.3d at 848; *see also State v. Raudebaugh*, 124 Idaho 758, 763 (1993) (noting that the purpose of the acquittal-first instruction is to guide the jury as to "the order and method of considering the lesser included offenses"). "*Keeble*'s logic does not rest on the proposition that juries deliberately and improperly choose to convict in the absence of reasonable doubt." *Crace*, 798 F.3d at 848. Rather, "[w]hat *Keeble* teaches us is that a lesser-included-offense instruction can affect a jury's *perception* of reasonable doubt: the same scrupulous and conscientious jury that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more choices." *Crace*, 798 F.3d at 848 (emphasis from original). Thus, when they are "[p]roperly understood, *Strickland* and *Keeble* are entirely harmonious: *Strickland* requires courts to presume that juries follow the law and *Keeble* acknowledges that a jury—even one following the law to the letter—might reach a different verdict when presented with additional options." *Id*. at 848 n.3.

As a result, both the Third and Ninth Circuits threw out the state courts' denials of post-conviction relief because the objectively-unreasonable failure to request a valid lesser-included instruction does cause prejudice under *Strickland*. *Id*. at 850-51; *Breakiron*, 642 F.3d at 140-41. This Court should reverse the district court's similarly-erroneous analysis in this case for the same reasons.

2. To The Extent The District Court's Decision On The Prejudice Prong Is Dictated By Idaho Supreme Court Precedent, That Precedent Should Be Overruled

Despite the United States Supreme Court's clear explanations about the harm caused by not giving a lesser-included instruction, the Idaho Supreme Court has held that, because of the acquit-first instruction, the district court's erroneous refusal to give a requested lesser-included instruction is categorically harmless. *State v. Joy*, 155 Idaho 1, 7 (2013). Should this Court determine that the district court's extension of that analysis to the post-conviction context was mandated by *Joy*, this Court should overrule *Joy* because it is manifestly wrong, unjust, unwise, and contrary to the plain, obvious principles of law recognized by the United States Supreme Court. *See, e.g.*, *State v. Owens*, 158 Idaho 1, 4-5 (2015) (reaffirming that a court should overrule precedent that is "manifestly wrong, has proven overtime to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice").

As discussed in Section II(B)(1), *supra*, the plain, obvious principles of law recognized by the United States Supreme Court are directly contrary to the way the Idaho Supreme Court has analyzed Idaho's acquit-first rule. *Joy* refuses to see harm in the failure to give a lesser-included instruction even though the United States Supreme Court has expressly recognized it exists. *Keeble*, 412 U.S. at 213. As such, overruling *Joy* in this respect would vindicate those plain, obvious principles of law. As the Ninth Circuit succinctly put it, "*Strickland* and *Keeble* demonstrate beyond doubt that [such a] decision was wrong." *Crace*, 798 F.3d at 848 n.3.

To that point, it is true that *Keeble* and *Beck* both reserved the constitutional question, and so, are not binding precedent. *See Curtis*, 130 Idaho at 528-29 (Lansing, J., dissenting) (though Judge Lansing went on to explain that the rationales from *Keeble* are still applicable under Idaho law and, as such, the same conclusion should result under Idaho law). However, in

reserving that question, however, the *Keeble* Court expressly warned that there may, in fact, be a constitutional component in this area of the law, as it stated that interpreting the law in a way that would preclude lesser-included instructions "would raise difficult constitutional questions." *Keeble*, 412 U.S. at 213.

The *Beck* Court expounded on that point, noting that, while it had not decided whether due process required such instructions, "the nearly universal acceptance of the rule [regarding the need to instruct jurors on lesser-included offenses] in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck*, 447 U.S. at 637. Based on that, the Utah Supreme Court has recognized that not giving such instructions ultimately results in the defendant being deprived of "the full benefit of the reasonable doubt standard," since a jury could, as the *Keeble* Court pointed out, resolve reasonable doubts in favor of conviction in such cases. *State v. Baker*, 671 P.2d 152, 156-57 (Utah 1983) (quoting *Keeble*, 412 U.S. at 212-13). As a result of these concerns, the *Beck* Court actually did hold that the Due Process clause requires the jury be given lesser-involved instructions in capital cases. *Beck*, 447 U.S. at 637

These same concerns exist in non-capital cases because of the fact that a jury can reconsider a vote to move past the greater offense after properly considering the lesser offense. *See Blueford*, 566 U.S. at 607; *Caramouche*, 155 Idaho at 837-38. As such, a jury in a non-capital case could, just as easily as a capital jury, resolve reasonable doubts about the defendant's guilt of the charged offense in favor of conviction if they are convinced the defendant did something illegal, even if it was not necessarily the charged offense. *See Keeble*, 412 U.S. at 212-13. As *Beck* pointed out, a contrary rule expects a jury to set a defendant free when the evidence establishes beyond doubt that he is guilty of some offense, and so, "requires our juries[']clinical detachment from the reality of human experience." *Beck*, 447 U.S. at 642

(internal quotation omitted); *compare* I.C.J.I. 104 (instructing the jurors to use their common sense and experience in their deliberations).

As a result, *Joy*'s holding – that the failure to give an appropriate lesser-included instruction is categorically harmless – is manifestly wrong, as it is directly contrary to these plain, obvious, and potentially-constitutional principles of law which have been recognized by the United States Supreme Court.[5] As *Keeble* put it, "a defendant is entitled to a lesser offense instruction—in this context or <u>any</u> other—precisely because he should not be exposed to the substantial risk that the jury's practice will divulge from theory" about deliberation procedures. *Keeble*, 412 U.S. at 212 (emphasis added).

Additionally, *Joy*'s rule is unjust and unwise. The way in which the district court understood *Joy*'s rule means that a defendant has <u>no</u> forum in Idaho's courts in which his otherwise-meritorious claim that he was deprived of this important procedural safeguard can be remedied. (*See* Tr., p.59, Ls.16-25 (arguing this understanding means the failure to request or give a lesser included instruction "will for[ever] evade review").) He cannot receive relief for that deprivation in the direct appeal because the failure to give a requested lesser-included instruction is *per se* harmless, *Joy*, 155 Idaho at 6-7, and he cannot receive relief for that

[5] Nevertheless, because the *Beck* Court reserved the question about whether the Constitution demands lesser-included instructions be given in non-capital cases, the circuit courts remain split on whether there is an actionable claim in federal *habeas* based on the district court's refusal to give a lesser included instruction. *See, e.g., Solis v. Garcia*, 219 F.3d 922, 928-29 (9th Cir. 2000) (identifying a three-way split: (1) the Third and Sixth Circuits holding there is a claim because there is a due process right to lesser-included instructions in non-capital cases; (2) the First and Seventh Circuits generally not recognizing a claim exists, but allowing an exception to prevent fundamental injustice; and (3) the Fifth, Ninth, Tenth, and Eleventh Circuits not recognizing a claim because there has been no clear recognition of the due process right in non-capital cases). The state courts which have addressed this issue are similarly split. *See, e.g. People v. Sherman*, 172 P.3d 911, 916-17 (Colo. Ct. App. 2006) (noting that Florida and Utah hold there is a due process right to the lesser included instruction in non-capital cases while Arizona, Connecticut, Iowa, Montana, North Dakota, Wisconsin, and Colorado do not).

deprivation in post-conviction because counsel's failure to get the lesser-included instruction is also *per se* not prejudicial. (R., pp.102-03.) As Judge Lansing summarized it, that rule "leaves Idaho jurisprudence embracing the anomaly that, while a defendant is unquestionably entitled to have the jury instructed on lesser included offenses that are supported by the evidence, I.C. § 19-2132(b); [*State v. Tribe*, 123 Idaho 721, 726-27 (1993)], there will never be a remedy for a denial of that right." *Curtis*, 130 Idaho at 530 (Lansing, J., dissenting).

In other words, a defendant has no *meaningful* opportunity to be heard on his otherwise-meritorious claim that a lesser-included instruction should have been given, but was not. As a result, *Joy*'s rule, as it is currently understood, violates the fundamental tenets of due process separate and apart from any due process right to the lesser-included instruction itself. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations omitted).

For all those reasons, *Joy*'s application of the acquit-first rule is manifestly wrong, unjust, and unwise. As such, it should be overruled to vindicate the plain obvious principles of law. Additionally, the district court's decision running contrary to those principles should be reversed for the same reasons.

CONCLUSION

Mr. Rome respectfully requests that this Court vacate the district court's order dismissing his post-conviction petition and remand this case with instructions for the district court to grant the appropriate relief.

DATED this 12th day of January, 2018.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of January, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SONNY ROME
INMATE #113227
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

LANSING L HAYNES
DISTRICT COURT JUDGE
E-MAILED BRIEF

MICHAEL G PALMER
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas