21-7546

No.

In the

SUPREME COURT OF THE UNITED STATES

RONALD SCOTT EDDINGTON,

Petitioner,

v.

JOSH TEWALT, IDOC Director,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Attorney for Petitioner:

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Ninth Circuit or the Federal District Court of Idaho have issued a COA on Petitioner's claims based on the evidence that Idaho courts consistently apply obsolete and unconstitutional case law from United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1197, 1201 (1973) to ineffective assistance of counsel claims which is in conflict with and contrary to the governing legal rules set out in Strickland v. Washington, 466 U.S. 668 (1984)?

2. In denying Petitioner a COA, as well as relief, can the Federal District Court of Idaho, on its own, and contrary to Wilson v. Sellers, 138 S. Ct. 1191-92 (2018), inject Idaho state law, not referenced by the Idaho state courts, into its decision? Is it proper for the Idaho federal court to try and come up with any rationale that could have supported the state courts decisions, or must it follow Supreme Court precedent and accede to the specific reasons given by the state courts?

3. Did the Ninth Circuit utilize the appropriate standard for denying Petitioner's request for a COA in accord with this Court's precedent?

LIST OF PARTIES

All parties appear in the caption of the case on the front cover.

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PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Ronald Eddington, respectfully petitions this Court to issue a Writ of Certiorari to review the judgement below.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals at Appendix A to the petition.

The decision on rehearing and rehearing en banc of the Ninth Circuit Court of Appeals at Appendix B to the petition.

The opinion of the United States District Court of Idaho at Appendix C to the petition.

The opinion of the Idaho Appellate Court at Appendix D to the petition.

The opinion of the Ada County District Court of Idaho at Appendix E to the petition.

JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was December 12/14/2021. A copy of that decision appears at Appendix A.

A timely petition for rehearing and rehearing en banc was denied by the Ninth Circuit on January 18, 2022, and a copy of the decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides in pertinent part: (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to or involved in an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

STATEMENT OF THE CASE

Procedural History:

On April 13, 2014, following a plea agreement in which Petitioner, Ronald Eddington, pled to second degree kidnapping and aggravated assault with a deadly weapon, he was sentenced by the district court of Ada County, Idaho, to twenty-two years imprisonment with ten years fixed for second degree kidnapping; and to five years imprisonment fixed for aggravated assault. On August 20, 2014, the Ada court denied Petitioner's motion for reduction of sentence (Appendix F. A-6). On October 6, 2014, the Idaho Supreme Court granted Petitioner's voluntary motion to dismiss his direct appeal. (Id., B-3). On September 30, 2015, Petitioner filed his state post-conviction relief petition. The Ada court dismissed all PCR claims on June 22, 2016. Petitioner appealed on July 25, 2016. The Idaho Appellate Court, on May 8, 2017, remanded three claims for an evidentiary hearing. Evidentiary hearings were held on November 15 and 17, 2017 (Id. E.). The Ada court dismissed all claims on January 22, 2018. (Appendix E). Petitioner appealed and after briefing the Idaho Appellate Court denied all claims. (Appendix D). Petitioner filed a petition for review with the Idaho Supreme Court on May 29, 2019, which was denied on July 18, 2019. (Appendix F. F-6-7). On July 25, 2019, Petitioner filed for a writ of habeas corpus in the Federal District Court of Idaho. The district court, on March 31, 2021, denied relief and refused to issue a certificate of appealability on any of the three claims. (Appendix C). Petitioner appealed to the Ninth Circuit and filed a motion for a COA on May 18, 2021, which was denied on December 13, 2021, in a one sentence order. (Appendix A). A motion for rehearing and rehearing en banc was filed and denied on January 18, 2022. (Appendix B). This petition follows.

Statement of Relevant facts:

In the early morning hours of August 9, 2013, Petitioner opened the garage door and entered the house of Carrie Eddington, his ex-wife. Petitioner had with him a handgun and upon entering the house went upstairs to Carrie's room and woke her up. Carrie reported to the police that Petitioner told her he was going to kill her and himself. After some conversation, Petitioner left the house and returned home and went to sleep. Petitioner was taken into custody in his bedroom by the police and later arrested. He was originally charged on August 12, 2012, in Ada County, Case No. CR-FE-2013-10953, with burglary and aggravated-assault with a deadly weapon with enhancement – use of a deadly weapon in commission of a felony. After a grand jury hearing, he was additionally charged with second degree kidnapping.

Attorney Michael Bartlett began representing Petitioner on October 16, 2013. Then on October 23, 2013, Diana Eddington, Petitioner's mother, was charged with witness tampering/intimidating a witness after writing an email to Carrie on September 18, 2013, pleading for compassion for her son. Bartlett offered to represent Diana, and Bartlett then began to represent Diana, as well as Petitioner. Bartlett failed to obtain informed consent (either verbally or in writing) from either Petitioner or Diana regarding a conflict of interest.

Petitioner accepted the state's plea offer on December 16, 2013. On the same day, Petitioner's prosecutor, Whitney Faulkner, forwards Bartlett's plea acceptance email to Diana's prosecutor, Dan Dinger. Bartlett, on December 19, 2013, appeared at Diana's preliminary hearing where he expected Diana's case to be dismissed. However, Dinger informed Bartlett that he would not dismiss Diana's charge until Petitioner pled guilty. Dinger then rescheduled Diana's dismissal for the day after her son's plea hearing on January 16, 2014. On January 17, 2014, Petitioner's prosecutor, Faulkner, took control of Diana's case and refused to dismiss it until after Petitioner

was sentenced. Faulkner rescheduled Diana's new dismissal for the day after Petitioner's sentencing.

These series of actions by these prosecutors created a conflict of interest that put Bartlett in the position of choosing one client over another – and he chose Diana, rather than Petitioner. The dismissal of Diana's charge occurred on March 18, 2014, the day after the filing of Petitioner's Judgement and Commitment pleading. The timing of the dismissal of Diana's felony charge, along with Bartlett's actions show that her dismissal was contingent on Petitioner pleading guilty to the most egregious charges and being sentenced to a lengthy prison term.

REASONS WHY THE PETITION SHOULD BE GRANTED

Question #1:

This Court must clarify that all circuit and federal district courts, in following the Strickland standard, must call out state courts that apply their own unconstitutional rules as additional hurdles for relief. By refusing to acknowledge Idaho's DeCoster rule, the ninth circuit and the district court have given tacit approval of Idaho's ability to abrogate necessary elements of Strickland's governing rules.

In addition, this Court must repudiate Idaho's rule authorizing its state courts to augment the Strickland standard with an additional hurdle to relief for ineffective assistance of counsel claims. The State of Idaho follows an improper scheme for adjudicating ineffective assistance claims. The Idaho state courts applied this scheme throughout Petitioner's post-conviction adjudication.

On July 22, 1975, the Idaho Supreme Court revised its standard for ineffective assistance of counsel in State v. Tucker, 97 Idaho 4, 10, 539 P. 2d 556, 562 (1975). In doing this, the court

relied on United States v. DeCoster, 159 U.S. App. D. C. 326, 487 F.2d 1197, 1201 (1973), stating 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. This Idaho rule, no longer credited to DeCoster, is cited to this day by Idaho courts as the state's standard in adjudicating ineffective assistance of counsel claims. In 1984, this Court's well-established precedent was decided. Strickland v. Washington established the governing legal framework for adjudicating ineffective claims and overruled DeCoster's/Idaho's previous standard. Strickland, U. S. 668 (1984).

While Idaho pays cursory recognition to the Strickland standard, it always incorporates this unconstitutional DeCoster case law as the state's augmented hurdle for relief. As Idaho case law clearly shows, this has been the state's scheme even after Strickland and right up to the present time. And, significant for this case, throughout Petitioner's state post-conviction proceedings. Idaho courts have "long held to the proposition that tactical or strategic decisions of trial counsel will not be second guessed on appeal unless these decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011)." (Appendix D, pp. 3, 8). DeCoster's rule of deference to strategic decisions is contrary to Strickland's focus on the reasonableness of counsel's decisions making it an unreasonable application of clearly established federal law. §2254 (d)(1).

There are multiple instances of Idaho courts using DeCoster to deny Petitioner's claims. The Ada County district court applied DeCoster to Petitioner's claims, and explicitly delineated DeCoster's rule in denying his conflict-of-interest claim. In its order, the Ada court indirectly acknowledged that Petitioner proved an actual conflict of interest. The court states, "Based on

these facts, Petitioner has failed to show by a preponderance of the evidence that any actual conflict was caused by Mr. Bartlett represented (sic) Petitioner and Petitioner's mother...But even if the first prong was met, the Petitioner has failed to show by a preponderance of the evidence that he was prejudiced by his attorney's deficient performance since strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless that decision is shown to have been based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective review." (Appendix E, p. 25). This example explicitly highlights the vagaries of Idaho's practice in applying DeCoster to any claim in order to dismiss it. And in its order, under legal standards, the Ada court cites DeCoster's rule in State v. Osborne, 130 Idaho 365, 372-73, 941 P.2d 337, 334-35 (App. Ct. 1997) and Giles v. State, 125 Idaho 921, 924, 877 P. 2d 365, 1368 (1994). (Id. pp. 3-4). The Idaho Appellate Court affirmed the Ada court's entire order and cited DeCoster in its standard of review and applied it directly to Petitioner's third claim. (Appendix D, pp. 3, 8).

Under § 2254, this Petitioner's entitlement to habeas relief turns on showing that the state court's resolution of his claim of ineffective assistance of counsel under Strickland v. Washington and Cuyler v. Sullivan, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). An "unreasonable application" occurs when a state court "identifies the correct governing legal principles from this court's decisions but unreasonably applies that principle to the facts of petitioner's case." Wiggins v. Smith, 509 U.S. 520 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)).

The issuance of a COA from the Ninth Circuit requires that the Idaho Federal District Court's resolution of this issue be debatable among jurists of reason. DeCoster's long outdated

deference to strategic decisions is contrary to Strickland's focus on the reasonableness of counsel's decisions. "Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgement on which they were based." Strickland, 466 U.S. at 681. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470 (2000). In Wiggins, the state court denied relief on the Strickland claim on the ground that when the decision not to investigate...is a matter of trial tactics, there is no ineffective assistance of counsel. This Court, however, reversed explaining that although Strickland validates reasonable "strategic choices" of counsel, what was required was for the "reviewing court...to consider the reasonableness of the investigation said to support...counsel's strategy," and the state courts failure to engage in this inquiry rendered its application of Strickland "unreasonable" in violation of Section 2254(d)(1). Wiggins, 539 U.S. at 527-28. Idaho's use of DeCoster allows its courts to circumvent this requirement. This deference to long obsolete and unconstitutional federal law is clearly unreasonable to the Strickland standard. And in reviewing the Idaho Appellate Court's order, this inquiry was not done and instead it followed, as the Ada court did, this DeCoster rule.

This Petitioner, in his opening brief and reply brief to the federal district court, specifically pointed out and argued that the state of Idaho's use of DeCoster in its adjudication throughout Petitioner's state post-conviction proceedings was unconstitutional and an unreasonable application of Strickland. (Fed. Dst. Ct. Docket 4, Appendix G). The district court did not acknowledge this in its dismissal order. (Appendix C). The court did not issue a COA on any of the three claims for relief presented by Petitioner. The Ninth Circuit also, despite its awareness, did not acknowledge this issue in denying Petitioner a COA. (9th Cir. Docket 5). In seeking a COA from the Ninth Circuit, "the prisoner need only demonstrate a substantial showing of the

denial of constitutional rights. § 2254(c)(2). He satisfied this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that issues presented were adequate to deserve encouragement to proceed further... He need not convince a judge, or for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

With neither federal court addressing or even acknowledging this salient issue, the question is raised as to whether the state of Idaho can augment the Strickland standard with its own additional hurdle to relief for ineffective assistance of counsel claims. And, if not, the fact that neither federal court acknowledged this issue makes the federal district court's resolution of this issue debatable among jurists of reason and a certificate of appealability should have issued from the Ninth Circuit allowing this Petitioner to appeal.

This issue is of special significance in Idaho. The federal courts silent approval of the State's DeCoster rule conflicts with the standard of whether an attorney has rendered an effective assistance of counsel. In view of the fact that these standards impact an attorney's understanding of their professional responsibilities, Idaho's rule is wrong, deeply troubling, and critically compromises the Sixth Amendment right to competent counsel. And, as criminal defendants in Idaho will pursue federal habeas relief regarding whether the state courts application of federal law is contrary to, or involved in unreasonable application of this Court's precedents, these federal courts, with their silence, have given conflicting guidance.

The Idaho courts have decided an important federal question in a way that conflicts with relevant decisions of this Court. The Ada court's use of DeCoster by applying it directly to this Petitioner's conflict of interest and ineffective assistance claims, with express approval from the

Idaho appellate courts, reveal that this is but one example of a routine practice. This court must repudiate Idaho's unconstitutional rule that places an additional hurdle that doesn't exist in the Strickland framework. Idaho's use of DeCoster abrogates Strickland's specific rules and allows Idaho courts to pay lip-service to this court's precedent. The Ninth Circuit's, as well as the district court's, silence on this matter requires this Court to clarify this issue.

Question 2:

In its dismissal order, the Idaho federal court theorized, "Also weighing against Petitioner's theory that the cases were interdependent is the reality that Idaho law permitted the state to charge Petitioner with aiding and abetting his mother's intimidation of a witness regardless of whether she had been charged at all or whether her case had been dismissed. See I.C. § 19-1430 (abolishing the distinction between principles and aider and abettors). Thus, the prosecutors had no need to leave Diana's case open in order to charge petitioner with aiding and abetting her if his recent jail phone calls supported such a charge." (Appendix C, p. 25). The federal court made it clear that this element aided its decision making in dismissing petitioner's claims and not issuing a COA.

However, neither the Ada court or the Idaho appellate court discussed or even alluded to this element in their dismissal orders. (Appendix D & E). "Deciding whether a state court's decision involves an unreasonable application of federal law or was based on an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons – both legal and factual – why the state courts rejected a state prisoner's federal claims and to give appropriate deference to that decision. Wilson v. Sellers, 138 S. Ct. 1188, 1191-92 (2018); see also Hittson v. Chatman, 576 U.S. 1028 (2015); Harrington v. Richter, 562 U.S. 86, 101 -02 (2011). The district court was not obligated to develop an alternative theory to support the Idaho appellate

court's decision. The state courts did explain their reasons and those reasons unreasonably contradicted clearly established federal law as determined by this Court.

Throughout the adjudication of Petitioner's conflict of interest claim each court has developed a different theory in its dismissal orders. The Ada County court erroneously found that Petitioner's attorney, Bartlett, requested that Diana's dismissal be rescheduled specifically after petitioner's plea and sentencing hearings; as well as ascribing a meaning to Bartlett's statements in petitioner's plea hearing that are conspicuously incorrect. (Appendix F, D-1). And, as shown, the Ada court ultimately settled on Idaho's DeCoster rule to deny this claim. The Idaho appellate court, in turn, acknowledged that the state prosecutors rescheduled Diana's dismissals for after Petitioner's hearings, and then silently invoked DeCoster by attempting to somehow attribute it to a strategic decision by Bartlett. (Appendix D, p. 5).

The federal district court, as explained in detail in this petition's question three, thoroughly undermines Bartlett's testimony and credibility in its endeavor to explain away the actual conflict of interest. The court, however, does not acknowledge this as it then, to the contrary, relies on Bartlett's alleged credibility that it has already undermined. Certainly, with all these incongruous theories, the district court would feel obligated to inject further support to fill in gaps in the state courts reasoning. This, however, does not comport with this Court's precedent. Wilson, 138 S. Ct. at 1191-92. To bolster its own theory regarding Idaho law, the federal court in the same paragraph, states, "Thus, the prosecutors had no need to leave Diana's case open in order to charge petitioner with aiding and abetting her if his recent jail phone calls supported such charges." (Appendix C. p. 25). This theorized statement, again, undermines the court's own argument. The state clearly did not need to keep Diana's case open at all. This explanation calls into question; why then was Diana's case not dismissed on December 19, 2013, as originally promised. With no

reasonable or articulated need to keep her case open, why did the state's prosecutors promise they would dismiss Diana's case only after Petitioner pled guilty and then only after his sentencing. This statement simply bolsters petitioner's claims.

As this Court's precedents make clear, if the state court's reasoned decision unreasonably determines facts or unreasonably applies U.S. Supreme Court precedent, reviewing federal courts cannot ignore those errors and instead conjure up any reasonable hypothetical basis for denying a habeas petitioner's claims. Yet, this is what the Idaho Federal court has done. Therefore, the district court and the Ninth Circuit's denial of a certificate of appealability is incorrect and not in accord with this Court's precedents.

Question 3:

Petitioner's conflict of interest claim is governed by the Cuyler v. Sullivan framework. Under Sullivan prejudice is presumed if (1) the attorney was placed in a situation where conflicting loyalties, pointed in opposite directions (" an actual conflict"), and because of the conflict loyalties, (2) the attorney acted against the defendant's interest, (i.e., the conflict "adversely affected his performance."). Cuyler v. Sullivan, 446 U.S. 350 (1980). In addition, "...if the attorney had to make decisions concerning his representation of the defendant under the constraint of inconsistent duties imposed by an actual conflict of interest, the adequacy of the representation was adversely affected." Id. at 354.

This Petitioner presented clear and convincing evidence that his counsel was operating under an actual conflict of interest. And, as this Court, in vacating the Eleventh Circuit's denial of a COA, stated, "remanding the case for further consideration whether Tharpe is entitled to a COA"; court of appeals decision was "rooted in that court's factfinding," which is "binding on

federal courts including this Court, in absence of clear and convincing evidence to the contrary," but habeas petitioner presented affidavit that contradicts state courts factual determination and, "at the very least, jurists of reason could debate whether Tharpe has shown clear and convincing evidence that the state court's factual determination was wrong," and accordingly "Eleventh Circuit erred when it determined otherwise." Tharpe v. Sellers, 138 S. Ct. 545, 546-47 (2018) (per curium).

While a COA ruling does not require full consideration of the factual or legal basis supporting Petitioner's claims, a determination of a substantial showing of the denial of constitutional rights instructs this Petitioner to detail the extensive evidence concerning his attorney's actual conflict of interest. Petitioner's claims rests on the Sullivan framework and require that an actual conflict be shown. Both the Ada court and the federal district court alluded to the fact that Petitioner did show an actual conflict of interest. As shown in question one, the Ada court then dismisses the claim by applying DeCoster to it. The federal court, in turn, states, "For all the foregoing reasons, petitioner has failed to show that a conflict of interest existed, or, even if it did, that any conflict caused Bartlett to do anything that harmed petitioner's case, including during plea bargaining and at sentencing." (Appendix C, p. 30). This analysis is contrary to Sullivan's precedent where prejudice is presumed, as well as Strickland's framework regarding actual conflicts. Strickland, 466 U.S. at 668, 692.

Of great significance is the weight of the credibility finding placed on Petitioner's counsel by the state courts. This credibility was undermined then bolstered by the federal court. The state's case against Petitioner's claims rests entirely on the credibility of Bartlett's testimony at the evidentiary hearings held on 11/15/17 and 11/17/17. Bartlett denied that there was any conflict of interest and that the initial rescheduling of Diana's dismissal for the day after Petitioner's

change-of-plea hearing was the result of his strategic request to keep Diana's NCO in place to keep her from contacting Carrie.

On December 17, 2013, Bartlett sends an email to Ada County Prosecutor Whitney Faulkner ("Faulkner"). In this email, Bartlett confirms that Petitioner will accept the states plea offer and further states, "I would like to enter the change-of-plea at the pre-trial conference hearing scheduled for January 16, 2014." (Appendix F, E-4, Exhibit HH). Two days later, Bartlett and Ada County Prosecutor Dan Dinger ("Dinger") appeared at the initial preliminary hearing (dismissal) for Diana's case. For reasons unknown to Bartlett, Diana's hearing was postponed. It was then rescheduled the next day by Dinger for January 17, 2014, "the day after her son pleads guilty in district Court." (Id., Exhibit N). Bartlett testified that since it was going to be rescheduled that he asked for it to be after Petitioner's plea hearing for Diana's protection. (Id., E-3, p. 144, Ls. 7-8).

The Ada County District Court found that "it was Bartlett who wanted Diana's preliminary hearing continued to the day after Ron's plea hearing because he was concerned that there wouldn't be a no-contact-order between Diana and Carrie if Diana's case was dismissed." (Appendix E, p. 9). In the only other instance of the court referring to Diana's dismissal, it states, "...the deputy prosecutor Dan Dinger had offered to dismiss the charge, and it was Bartlett who requested it be dismissed after sentencing so that the no-contact-order between the victim and Diana remained in place to avoid further upsetting the victim before the Petitioner's sentencing." (Id., p. 23). This last statement by the court was an error as Bartlett only testified that he requested that the "new" dismissal of Diana's case occur the day after Petitioner's change-of-plea hearing.

The Idaho Court of Appeals addressed this error, which was pointed out in Petitioner's briefing, with this statement, "While Eddington is technically correct that it appears the state – not

trial counsel – proposed the rescheduling of the dismissal, this fact does not undermine the district court's ultimate conclusion that there was no actual conflict of interest." (Appendix D, p. 5). The Idaho Appellate Court then points to Bartlett's testimony in explaining why this factual error by the district court did not undermine its ultimate conclusion. (Id.). This testimony by Bartlett, however, has been undermined by the Idaho Federal District Court's factual analysis.

The Federal Court states, "On direct examination, Bartlett recalled that he had asked the prosecution to schedule Diana's preliminary hearing (where he expected the state to dismiss the charge) after Petitioner's change of plea hearing, for the reason that Diana's no-contact-order would still be in place when she and the victim were both in the courtroom for Petitioner's sentencing. On cross-examination, counsel presented Bartlett with Exhibit N, an email that shows the prosecutors, not Bartlett, had set Diana's preliminary hearing on the day after Petitioner's guilty plea." (Appendix C, pp. 21-22).

The first sentence above does not make factual sense as Bartlett did not say he wanted Diana's dismissal for after Petitioner's plea hearing so that Diana's NCO would be in place for Petitioner's sentencing. In fact, his testimony contradicts this statement. His testimony clearly shows that Bartlett did not pay attention to or have any awareness regarding his alleged strategy to keep Diana out of trouble by violating her NCO at sentencing. (Appendix F, E-2, pp. 267-269). As per these statements by Bartlett, his stated concerns for Diana violating her NCO are not valid given his extreme neglect, and, instead, points to an after the fact post hoc explanation.

On Bartlett's cross-examination, Petitioner's counsel presented Bartlett with Exhibit N and Exhibit HH. Exhibit N shows that Diana's prosecutor, Dinger, emails the Ada County Court Clerk and requests for Diana's new dismissal to be the "day after her son pleads guilty in district court." (Id., E-4, Exhibit N). However, Exhibit HH shows exactly what the Federal Court found the state

prosecutors did. Exhibit HH is Faulkner forwarding Bartlett's plea acceptance email to Diana's prosecutor Dinger. (Id., Exhibit HH). There is nothing in the record that shows that Dinger was ever involved in Petitioner's case. This communication as Petitioner asserts, and as the Federal Court confirmed, is the two state prosecutors coordinating and rescheduling Diana's dismissal for the day specifically after Petitioner's plea hearing. As the Federal Court states, "The state district court mistakenly found that Bartlett had chosen the hearing date, when the prosecutors actually had." (Appendix C, p. 22).

At the 11/17/17 evidentiary hearing, Bartlett is asked by Petitioner's counsel, "And if these cases, Ron and Diana's cases, were completely unrelated then why would it even be mentioned in the email that you were just shown that, yes, let's continue Diana's dismissal for the day after her son pleads guilty. Why was that specifically mentioned in the email if they were completely unrelated?" Bartlett responds, "As I indicated to you in the deposition, I believe I wanted that. And the reason for that is I wanted to protect Diana from doing something in the intervening period of time that might have affected her. And I did not believe it would in any way impact Ron's case, as we had already reached a resolution and knew what we were doing." Petitioner's attorney asks, "So they were discussed interrelated then with the prosecutor?" Bartlett states. "I believe I said I wanted it to be afterwards. So---." (Appendix F, E-3, pp. 43-44).

In addition, when confronted with Exhibits HH and N, Bartlett revealed that he had no idea that the two prosecutors were in communication about the two cases. (Id., E-2, pp. 254-257). Nor do these exhibits correct his memory regarding his alleged decision to have Diana's dismissal rescheduled for after Petitioner's plea hearing, as his asserted testimony that <u>he</u> requested this was made at the following evidentiary hearing on 11/17/17.

The Federal Court states, "Therefore, here, this Court presumes that the finding of fact that the appellate court made – that Bartlett did not select the date of Petitioner's mother's preliminary hearing is correct, this court disregards the state district court's contrary finding." (Appendix C, p. 22).

All of the various findings by these courts regarding who scheduled these dismissals tends to convolute this issue. However, the facts and the acknowledgement by the Federal Court of Idaho that the two prosecutors rescheduled Diana's dismissal for after the plea hearing removes any credibility from Bartlett's claim that he requested any of these moves and, in fact, confirms the actual conflict of interest. The facts and the Court's finding show conclusively that his proffered explanations were developed after the fact. "It is unlikely that [an attorney] would concede that he continued improperly to act as counsel." Wood v. Georgia, 450 U.S. 261 n.5 101 S. Ct. 1097, 1100 n.5 67 L. Ed. 2d 220 (1981). "The existence of an actual conflict of interest cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." Sanders v. Ratella, 21 F. 3d. 1446, 1452 (9th Cir. 1994).

After testifying regarding Exhibits N and HH, Bartlett could have, at any time, clarified for the record that the prosecutors made these scheduling decisions. However, not only did he not do this, but he also testified at the following hearing that it was he who requested this. And he, in addition, testified that he also asserted this in his deposition taken by the state and Petitioner's attorney. (Appendix F, E-3, p. 43, Ls. 22-23). However, as the facts show and the Federal Court found, it quite obviously wasn't Bartlett who was involved in any of this rescheduling. Prosecutors Faulkner and Dinger, on their own, worked together in planning, coordinating and rescheduling Diana's dismissal for after Petitioner's change-of-plea hearing. The question that is never asked

or analyzed by these courts is why would the state do this? Why would they hold out a "facially meritless charge that was expected to be dismissed for lack of support?" (Appendix C, p. 26). Why would they schedule these dismissals for days specifically after these important hearings for Petitioner and not follow through with dismissing the case. Why was Diana's case not dismissed until the state had completed Petitioner's case?

At the January 16, 2014, change-of-plea hearing for Petitioner, the Court wanted to know, since Petitioner had no prior criminal history that "any new crimes committed on or after today's date would be the only ones that would violate the plea agreement?" (Appendix F, E-4, Exhibit H, p. 6, Ls. 20-23). Faulkner states she would like to reserve the right to bring new charges regarding unreviewed phone calls. Bartlett then states, "Specifically, Your Honor, the state has charged his mother with the crime of intimidating a witness, and I'm concerned they'll claim he's aiding and abetting that crime." (Id., p. 7, Ls. 16-18). The Ada County District Court interpreted this statement as Bartlett expressing his concern that without the no-contact-order, Diana might contact Carrie. The Idaho Appellate Court, in its limited analysis, affirmed the district court's full decision. (Appendix D, pp. 4-5). "If the last reasoned state court decision adopts or substantially incorporates the last reasoning from a previous court decision, a court may consider both decisions to 'fully ascertain the reasoning of the last decision'". Edwards v. Lamarque, 475 F. 3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting Baker v. Fleming, 432 F. 3d 1085, 1093 (9th Cir. 2005)). In ascribing a contrary meaning to Bartlett's statement, the state courts have made a factual error "to a material factual issue that is central to Petitioner's claim." Taylor v. Maddox, 366 F. 3d 992, 1000-01 (9th Cir. 2004).

Bartlett testified that it was his strategic decision to hold out Diana's case until after Petitioner's change-of-plea hearing to protect Diana. (Appendix E, p. 9). However, with his

statement of concern at Petitioner's plea hearing, it defies reasoned judgement and strategic competence that Bartlett would hold out Diana's case after stating his concern that Petitioner could be implicated in her case. And, as shown, the Federal Court undermined Bartlett's credibility in finding that the state prosecutors, on their own, made the strategic choice to reschedule Diana's dismissal for after Petitioner's plea hearing. The Idaho Federal Court, in turn, agreed with the Idaho Appellate Court that Bartlett's not challenging the date of Diana's dismissal was based on strategy. (Appendix C, p. 23).

The Federal Court explains that after this statement of concern by Bartlett, the Ada County Court "then asked the prosecutor and Bartlett to meet during a recess to determine what, exactly, their agreement was." (Id., p. 24). The Court then states, "After this recess, the agreement the prosecutor articulated for the court was: "anything from today forward would constitute a new crime, but anything that's happened prior to today's date, would just be fodder at sentencing." (Id., pp. 24-25). Based on the exchanges between the Court, Faulkner, and Bartlett, (Appendix F, E-4, Exhibit H, pp. 6-8), it's clear that there had been no prior discussions between Bartlett and Faulkner regarding the issue of Petitioner's exposure to Diana's charge. And the agreement to consider prior crimes as only fodder for argument at sentencing had not been in place prior to Bartlett's statement of concern to the court. Therefore, holding out Diana's case specifically after Petitioner's plea hearing was inconsistent with Petitioner's best interests. This acquiescence to these prosecutors moves without any objection from Bartlett is not a reasonable strategy under Strickland or any other strategic predicate. Bartlett's inaction does not show strategy, it shows inaction. And, specifically, Bartlett did not say he simply went along with the prosecutor's actions, he testified that he wanted the date of Diana's dismissal to be after Petitioner's plea hearing. However, as shown, this testimony has been proven not credible. Neither is his testimony credible

when he's asked, "Have you been able to come up with any adverse, directly adverse, situations that you can imagine between these two cases?" Bartlett answers, "No." (Id., E-2, p. 236, Ls. 1-4).

Petitioner pointed out evidence to the Federal Court in the record that supported Petitioner's conflict of interest claim. This evidence concerns Ada County Deputy District Attorney Faulkner. Specifically, this evidence concerns the December 3, 2015, court hearing for Petitioner's post-conviction case. (Appendix F, C-2, 12/3/15 Hearing, p. 10). As this evidence shows, Prosecutor Faulkner blatantly misleads the court regarding her involvement in the actual conflict of interest, and, thus, the violation of Petitioner's constitutional rights. At the hearing, Faulkner states, "... However, I did want to make a record that with, specifically with regard to Ms. Eddington's case, this prosecutor did not ever handle that case personally, um, that was handled by Dinger in this office." (Id.) Faulkner made this false statement and presented it to the court as factual evidence and purported to make it part of the evidentiary record.

The evidence shows that Faulkner, despite her false claims on the record was heavily involved in the prosecution of Diana. Specifically, the evidence shows Faulkner updating Dinger on Petitioner's acceptance of her proposed plea deal on December 17, 2013, and Dinger rescheduling Diana's preliminary hearing for the "day after her son pleads guilty in district court." (Appendix F, E-4, Exhibits N; HH). Faulkner also filed and served the First Supplemental Preliminary Hearing Response to request for Discovery and Objections regarding Diana's case on January 16, 2014. (Id., Exhibit EE). Faulkner then took independent control of Diana's case and appeared at hearings in Diana's felony case on January 17, 2014, and then on March 18, 2014. (11/14/17 State's Motion for Stipulation, p. 2). In addition, a copy of a pleading titled "Motion to Dismiss" was hand delivered by Faulkner to Bartlett on March 18, 2014, before the preliminary

hearing calendar. Faulkner then filed the original Motion to Dismiss with the court. The motion had Faulkner's name in the heading but was signed by Dinger. During the hearing, Judge Gardunia granted the state's motion to dismiss in a written order. (Id.) Faulkner's false assertion in court that she was not involved in Diana's case is clear evidence of her attempt to cover up her involvement in the conflict of interest pressed upon Bartlett by she and Dinger. Faulkner's statements, on the record, like Bartlett's, have been shown by clear and convincing evidence to be false.

In Petitioner's case, debate as to whether his attorney was operating under an actual conflict of interest is raised by his actions in three specific events. Two of these events are the basis for Petitioner's second and third claims for relief. (Appendix F, D-1, pp. 21-33; Appendix G, pp. 16-27). In the third event, and as the Petitioner highlighted throughout his briefing; in a jail phone call between Petitioner and Bartlett on December 16, 2013, Bartlett tells Petitioner, "One of the things I want to do is I'm interested in talking with your custody lawyer...I want to be able to give the evaluator some information that shows what was going on in the custody battle. That you were using this lawyer. You were doing things right. That she was consistently held in contempt, you know, because she wasn't following the orders." (Appendix F, E-5, Ex. 23, pp. 27-28, Ls. 16-25). Bartlett also states, "Likewise, I want to be able to try to pull as many e-mails as possible and stuff like that I can show your efforts to communicate and her refusal to communicate with you. These sorts of things. I want those to be part of the record." (Id. p. 28, Ls. 10-13). The next day Bartlett emails Faulkner accepting the state's plea offer. Faulkner then forwards Bartlett's email to Diana's prosecutor Dinger with the heading "FYI." (Appendix F, E-4, Exhibit HH). Dinger then reschedules Diana's dismissal for January 17, 2014, the "day after her son pleads guilty in district court." (Id., Exhibit N). The day after Petitioner's change-of-plea hearing, with Faulkner now in

control of Diana's case, her case is not dismissed, but is now scheduled for the day after Petitioner's sentencing hearing.

After the above series of events, on February 4, 2014, Bartlett sends a letter to Dr. Michael Johnston, who will be doing the psychological evaluation on Petitioner for the court. In this letter, Bartlett states, "To assist with your evaluation, I enclose copies of the discovery we have been provided. I have also attached a list of materials for your convenience." (Id., E-5, Exhibit 10). Per Dr. Johnston's finished report, his list of collateral sources does not include any information pertaining to Petitioner's custody litigation, the police audio interviews or any emails between Petitioner and Carrie. (Id., Exhibit 11). Nor are any of these elements mentioned anywhere in the report or anywhere in Petitioner's PSI. (Id., E-4, Exhibit JJ).

These series of events show how Bartlett's actual conflict of interest impacted his performance. Despite his clear understanding and acknowledgement of the necessity for Dr. Johnston and the PSI evaluator to receive all of the salient information that will be needed to write their reports. Bartlett does not follow through on any of these elements he highlighted for Petitioner. With Diana's next dismissal scheduled for the day after Petitioner's sentencing by Faulkner, Bartlett's inaction reflects his coerced restraint by his actual conflict of interest.

At the March 13, 2014, sentencing hearing for Petitioner, Dr. Johnston is questioned by Judge Norton regarding his report. The court asks, "I do have one question before Mr. Bartlett is offered an opportunity to cross-examine. Dr. Johnston on page 2 and 3, it lists collateral sources, so you also reviewed the police reports, a thumb-drive containing an internet search history, an investigative report from the prosecutor's office and an email from a witness; is that correct?" Dr. Johnston answers, "That's correct." The court then asks, "I just wanted to correct because you said everything was based on the defendant's self-reporting, but I did want to clarify you actually

reviewed other materials other than interviews; is that correct?" Dr. Johnston states, "Yes. There were aspects of the history that was based solely on self-report... But the nature of the aspects of the crime, internet searches, criminal history, accounts from witnesses that they're related to predominately focusing on the crime were based also on collateral information..." (Id., E-4, Exhibit I, pp. 52-53). This exchange shows that Judge Norton was going to use Dr. Johnston's conclusion that Petitioner was a moderate risk to re-offend based only on the collateral information provided to him, as a significant factor in her sentencing determination. Petitioner's moderate risk to re-offend was referenced repeatedly by Judge Norton at sentencing. (Id. pp. 100-101). This example, again, shows how Bartlett's performance was impacted by his actual conflict of interest.

The example above, in conjunction with the examples described in Petitioner's second and third claims, make clear that Bartlett was embroiled in the "struggle to serve two masters." Glasser v. United States, 315 U.S. 75, 62 (1942). As the Federal Court found, Bartlett did not "strategically" request to continue Diana's dismissal to the day after Petitioner's plea hearing. Nor did he have anything to do with rescheduling her dismissal for the day after Petitioner's sentencing hearing. And, since he had nothing to do with the rescheduling of Diana's case, he, contrary to his testimony, had no strategy. His statement of concern at Petitioner's plea hearing also contradicts his testimony where he stated, "And I did not believe it would, in any way, impact Ron's case as we had already reached a resolution and knew what we were doing." (Ev. Hr. 11/17/17 (Tr., p. 44, Ls. 1-4)). Bartlett, quite clearly, had not discussed any issues regarding the two cases with Faulkner, and, therefore, did not know what he was doing. This statement does, however, correlate with the Federal Court's credibility finding. With his credibility undermined, these statements by Bartlett can be viewed for what they are - post hoc rationalizations. Leaving the state's defense without merit.

It's clear that Bartlett, through his decisions, actions, non-credible testimony, and by simply tracing the series of events that occurred throughout the case, was operating under an actual conflict of interest that impacted his performance in regard to Petitioner. In Sullivan, the Supreme Court acknowledged that concurrent representation almost always involves conflicts. Sullivan, 466 U.S. at 348. Explanations involving his conflict of interest that Bartlett proffered during his testimony don't just minimize the risk involved in this concurrent representation, he dismisses it completely. (Appendix F, E-3, p. 34, Ls. 15-25; p. 44, Ls. 1-4). His testimony, as the Idaho Federal Court found, when compared with the facts, is not credible and cannot be used to support his strained explanations. The Supreme Court stated that a conflict of interest is pernicious most often because of what it causes a lawyer to refrain from doing, rather than what it causes a lawyer to do. Holloway v. Arkansas, 435 U.S. 490-91 (1978). Bartlett's actions regarding this claim embody this statement. The Idaho Appellate Court, in its opinion states, "Actual conflicts may include, for example, trial counsel's failure to present a defense or important evidence on Petitioner's behalf to benefit or avoid harming the jointly represented defendants." (Appendix D, p. 4). This statement correlates exactly with Bartlett's actions regarding not objecting to the continuous rescheduling of Diana's dismissal for days after Petitioner's hearings, his decision to not send Dr. Johnston the police audios, information on custody litigation, or email, phone call and text records between Petitioner and Carrie, as well as his failure to defend Petitioner at sentencing with readily available evidence refuting the state's narrative.

This petitioner has clearly shown that the district courts resolution of his claims are debatable among jurists of reason and a COA, per this Court's precedent, should have issued. The state courts factual determination is easily contradicted and at the very least, jurists of reason could

debate whether this petitioner has shown clear and convincing evidence that the state's courts factual determination was wrong.

CONCLUSION

This court should grant Mr. Eddington's Petition in order to rectify the state of Idaho's continued use of its DeCoster standard as an additional hurdle for relief and to impose consistency on the decisions of the Ninth Circuit Court of Appeals and its sister circuits in their adjudication of claims in federal habeas proceedings.

Respectfully submitted this 1 day of April 2022.

Ronald Eddington, Petitioner, pro se