No.

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In the

***SUPREME COURT OF THE UNITED STATES***

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RONALD SCOTT EDDINGTON,

*Petitioner,*

v.

JOSH TEWALT, IDOC Director,

*Respondent.*

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

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**APPENDIX OF PETITIONER**

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Attorney for Petitioner:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 13 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| RONALD SCOTT EDDINGTON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>JOSH TEWALT, IDOC Director,<br><br>Respondent-Appellee. | No. 21-35325<br><br>D.C. No. 1:19-cv-00291-REB<br>District of Idaho,<br>Boise<br><br>ORDER |

Before: O'SCANNLAIN and BYBEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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|---|---|
| RONALD SCOTT EDDINGTON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>JOSH TEWALT, IDOC Director,<br><br>Respondent-Appellee. | No. 21-35325<br><br>D.C. No. 1:19-cv-00291-REB<br>District of Idaho,<br>Boise<br><br>ORDER |

Before: PAEZ and HURWITZ, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RONALD SCOTT EDDINGTON,

Petitioner,

vs.

JOSH TEWALT, IDOC Director,

Respondent.

Case No. 1:19-cv-00291-REB

**JUDGMENT**

In accordance with the Order entered on this date, IT IS ORDERED, ADJUDGED, and DECREED that this entire case is DISMISSED with prejudice. This case is also ordered closed.

DATED: March 31, 2021

Honorable Ronald E. Bush
Chief U. S. Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RONALD SCOTT EDDINGTON,

Petitioner,

vs.

JOSH TEWALT, IDOC Director,

Respondent.

Case No. 1:19-cv-00291-REB

**MEMORANDUM DECISION AND ORDER**

Petitioner Ronald Scott Eddington ("Petitioner," "Eddington," or "Ron") filed a Petition for Writ of Habeas Corpus challenging his state court conviction. (Dkt. 1.) Respondent Josh Tewalt ("Respondent") has filed a Response. The Petition is now fully briefed and ripe for adjudication. (Dkts. 1, 12, 14, 17.) All named parties have consented to the jurisdiction of a United States Magistrate Judge to enter final orders in this case. (Dkt. 6.) *See* 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

The Court takes judicial notice of the records from Petitioner's state court proceedings, which have been lodged by the parties. *See* Fed. R. Evid. 201(b); *Dawson v. Mahoney*, 451 F.3d 550, 551 (9th Cir. 2006). Having carefully reviewed the record, including the state court record, the Court finds that the parties have adequately presented the facts and legal arguments in the briefs and record and that oral argument is

unnecessary. *See* D. Idaho L. Civ. R. 7.1(d). Accordingly, the Court enters the following Order.

## BACKGROUND

The Idaho Court of Appeals set forth the facts supporting Petitioner's Idaho state court convictions of second degree kidnaping and aggravated assault with a deadly weapon against victim Carrie Eddington, his ex-wife ("Carrie"), as follows:

> On August 9, 2013, Eddington broke into his ex-wife's home, held her at gunpoint, and threatened to kill both himself and his ex-wife. Once Eddington left the house, the ex-wife called her father, who then called the police. The State charged Eddington with second degree kidnapping pursuant to Idaho Code § 18-4503, burglary pursuant to I.C. § 18-1401, aggravated assault pursuant to I.C. § 18-905(a), and using a deadly weapon in the commission of a felony pursuant to I.C. § 19-2520. Eddington retained private counsel. Soon after Eddington was charged, his mother was charged with witness intimidation, I.C. § 18-2604. The charge stemmed from a letter Eddington's mother wrote to her ex-daughter-in-law about Eddington's charges.[1] Eddington's trial counsel then agreed to represent Eddington's mother.
>
> Eddington pled guilty to second degree kidnapping and aggravated assault, and the remaining charges were dismissed as the result of a plea agreement. Eddington was sentenced on March 17, 2014. During the sentencing hearing, the State put several witnesses on the stand. The witnesses most relevant to the post-conviction proceedings were Eddington's ex-wife,

[1] The letter from Petitioner's mother to the victim, in part, stated: "We know the decision about [the Petitioner's] future is in your hand, Carrie. We know you will do what is best for you and the children. This frightening event will be put to rest in your mind in time but the children have to live the humiliation of having their father in prison for the rest of their lives. How do they explain that to people? How does [your 12-year-old son R.E.] tell his buddies where the father he adores is living? Our greatest wish would be that the charges would be dropped and he could get the psychological help he needs...." (Footnote not in original; *see* letter at State's Lodging E-1, p. 251.)

> the ex-wife's father, the detective who responded to the scene of the crime, and a forensic psychologist. The district court then imposed a unified sentence of twenty-two years, with ten years determinate, for second degree kidnapping and a concurrent unified sentence of five years, with five years determinate, for aggravated assault. On March 18, 2014, Eddington's mother's charge was dismissed.

(State's Lodging D-5, pp. 1-2.)

Petitioner's judgment of conviction was entered on March 13, 2014. (State's Lodging A-2, pp. 107-08.) Petitioner filed a direct appeal, but voluntarily dismissed it. (State's Lodging B-2.) He next filed a post-conviction action through counsel, which was summarily dismissed. (State's Lodgings C-1 to C-2.) The Idaho Court of Appeals remanded four of Petitioner's ineffective assistance of trial counsel claims for an evidentiary hearing. (State's Lodging D-5.) After a hearing was held by Judge Lynn Norton (the same judge who presided over Petitioner's original criminal case), Petitioner's claims were denied and dismissed. (State's Lodgings E-1 to E-3.) Dismissal was affirmed on appeal, and the Idaho Supreme Court denied Petitioner's petition for review. (State's Lodgings F-1 to F-8.) Petitioner now seeks federal habeas corpus relief.

## PETITIONER'S CLAIMS

In the Petition for Writ of Habeas Corpus, Petitioner brings four Sixth Amendment ineffective assistance of trial counsel claims: first, that trial counsel had an actual conflict of interest when he represented both Petitioner and his mother simultaneously on related criminal charges; second, that trial counsel pressured Petitioner into pleading guilty

because of the conflict of interest; third, that trial counsel failed to investigate the discovery he obtained in the case, namely, he failed to listen to the audio recordings of police interviews of Petitioner's ex-wife; and fourth, because of the conflict of interest, counsel failed to prepare adequately for sentencing, namely, he failed to cross-examine his ex-wife with a police interview transcript, emails, and other evidence that tended to controvert her victim statement about Petitioner's alleged violent and harassing behavior in their past relationship.

## STANDARDS OF LAW

### *1. AEDPA Deferential Review Standard*

Federal habeas corpus relief may be granted where a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A challenge to a state court judgment that addressed the merits of any federal claims is governed by Title 28 U.S.C.§ 2254(d), as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

The AEDPA limits relief to instances where the state court's adjudication of the petitioner's claim:

> 1. 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; 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 proceeding.

28 U.S.C. § 2254(d). A federal habeas court reviews the state court's "last reasoned decision" in determining whether a petitioner is entitled to relief. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

As to the facts, the United States Supreme Court has clarified "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011); 28 U.S.C. §2254(e)(2). This means that evidence not presented to the state court may not be introduced on federal habeas review if a claim (1) was adjudicated on the merits in state court and (2) the underlying factual determination of the state court is not unreasonable. *See Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014). In such case, a "determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner must show, by clear and convincing evidence, that the factual findings are not just erroneous, but unreasonable, in light of the evidence presented to the state courts. 28 U.S.C. § 2254(e)(1); § 2254(d)(2).

In *Pizzuto v. Yordy*, the Ninth Circuit reiterated the high standard for such a showing:

> Under § 2254(d)(2), we may not characterize a state court's factual determinations as unreasonable "merely because [we] would have reached a different conclusion in the first instance." *Brumfield*, 135 S. Ct. at 2277 (alteration in original) (quoting *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). "Instead, § 2254(d)(2) requires that we accord the state trial court substantial

> deference." *Id.* "If '[r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's ... determination.'" *Id.* (alterations in original) (quoting *Wood*, 558 U.S. at 301, 130 S.Ct. 841).

947 F.3d 510, 530 (9th Cir. 2019).

Where a petitioner contests the state court's legal conclusions, including application of the law to the facts, § 2254(d)(1) governs. That section consists of two alternative tests: the "contrary to" test and the "unreasonable application" test.

Under the first test, a state court's decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court] [has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

Under the second test, to satisfy the "unreasonable application" clause of § 2254(d)(1) the petitioner must show that the state court—although it identified "the correct governing legal rule" from Supreme Court precedent—nonetheless "unreasonably applie[d] it to the facts of the particular state prisoner's case." *Williams (Terry) v. Taylor*, 529 U.S. 362, 407 (2000). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [Supreme Court] precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S 415, 426 (2014).

Though the source of clearly established federal law must come only from the holdings of the United States Supreme Court, circuit precedent may be persuasive authority for determining whether a state court decision is an unreasonable application of Supreme Court precedent. *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999). However, circuit law may not be used "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

Like the deference due to state court findings of fact, a federal court cannot grant habeas relief simply because it concludes in its independent judgment that the state court's legal conclusions are incorrect or wrong; rather, the state court's application of federal law must be objectively unreasonable to warrant relief. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Bell v. Cone*, 535 U.S. at 694. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter* ("*Richter*"), 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court emphasized that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (internal citation omitted).

***2. De Novo Review Standard***

In some instances AEDPA deferential review under § 2254(d)(1) does not apply: (1) if the state appellate court did not decide a properly-asserted federal claim, (2) if the

state court's factual findings are unreasonable under § 2254(d)(2), or (3) if an adequate excuse for the procedural default of a claim exists. In such instances, the federal district court reviews the claim de novo. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). As in the pre-AEDPA era, a district court reviewing a claim de novo can draw from both United States Supreme Court and circuit precedent, limited only by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

Under de novo review, if the factual findings of the state court are not unreasonable, the Court must apply the presumption of correctness found in 28 U.S.C. § 2254(e)(1) to any facts found by the state courts. *Pirtle*, 313 F.3d at 1167. Contrarily, if a state court factual determination is unreasonable, or if there are no state court factual findings, the federal court is not limited by § 2254(e)(1). In such a case, the federal district court may consider evidence outside the state court record, except to the extent that § 2254(e)(2) might apply. *Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014).

***3. Ineffective Assistance of Counsel Standard of Law***

The clearly-established law governing a Sixth Amendment claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* dictates that, to succeed on an ineffective assistance claim, a petitioner must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that (2) the petitioner was prejudiced by the deficient performance. *Id.* at 684.

In assessing trial counsel's performance under *Strickland*'s first prong, a reviewing court must view counsel's conduct at the time that the challenged act or omission occurred, making an effort to eliminate the distorting lens of hindsight. *Id.* at 689. The court must indulge in the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

In assessing prejudice under *Strickland*'s second prong, a court must find that, under the particular circumstances of the case, there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 684, 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 694.

A petitioner must establish both deficient performance and prejudice to prove an ineffective assistance of counsel claim. 466 U.S. at 697. On habeas review, the court may consider either prong of the *Strickland* test first, or it may address both prongs, even if one is deficient and will compel denial. *Id.*

The foregoing standard, giving deference to counsel's decisionmaking, is the de novo standard of review. Another layer of deference—to the state court decision—is afforded under AEDPA. In giving guidance to district courts reviewing *Strickland* claims on habeas corpus review, the United States Supreme Court explained:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the

> inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams*, *supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

*Richter*, 562 U.S. at 112.

## FACTS FROM EVIDENTIARY HEARING RELEVANT TO ALL CLAIMS

Upon remand of four ineffective assistance of counsel claims challenging trial counsel Michael Bartlett's performance, the state district court held an evidentiary hearing. (State's Lodgings E-1 to E-2.) The following evidence was presented, and the state district court engaged in the following factfinding.

The Petitioner confessed to police officers shortly after the crime occurred. The confession greatly limited counsel's ability to defend Petitioner at trial. (State's Lodging E-1, p. 259.) Bartlett recalled that Petitioner had "told police that he would accept what [the victim] said as being accurate, as he didn't have a complete recollection of the event." (State's Lodging E-3, p. 21.)

Petitioner originally pleaded not guilty to the four criminal charges, but later entered into a plea agreement in which the State agreed to dismiss two of the charges if he pleaded guilty to the remaining two. At the change of plea hearing, Petitioner

acknowledged that he had initialed each section of the guilty plea advisory form and that he had signed and completed it correctly and truthfully. (State's Lodging A-3, p. 13.) As the factual basis for the plea, he admitted that he went into Carrie's house in the "in the middle of the night and confined her into her bedroom." (*Id.*, p. 17.) He admitted that he had the intent to keep her there against her will, that he threatened to shoot her with a gun, which is a "deadly weapon," and that his threats created in her a well-founded fear in that violence was imminent. (*Id.*, pp. 18-19.)

In contrast, at the post-conviction hearing, while Petitioner admitted that he signed the guilty plea advisory form, he added, "I was threatened, though." He testified that he "essentially" lied on the form. After much waffling, he agreed that signing the form without disclosing the alleged threats was the equivalent of lying to the sentencing judge about not having been threatened to enter the plea agreement. (*Id.*, pp. 165-67.)

In support of his coerced plea claim, Petitioner testified at the post-conviction evidentiary hearing that Mr. Bartlett became upset when Petitioner said he did not want to plead guilty. Mr. Bartlett started yelling at him and told him, "Just sign the damn thing." (*Id.*, p. 117.) Petitioner said, "I didn't do these things." (*Id.*) Mr. Bartlett responded, "Then call your parents and tell them you need another $20,000 for your defense." (*Id.*) Then Mr. Bartlett said, "Look, your mom's case is going to be dismissed the day after you plead out tomorrow. You need to just sign the paper so we can move forward with all this." (*Id.*, p. 118.) Later in their conversation, Petitioner said, "I'll sign

your paper, but I'm going to stand up in the hearing and say I'm not guilty of these things." And Mr. Bartlett allegedly got "really mad" again, "stood up and pointed his finger at [Petitioner,] and said, 'You're going to say exactly what I tell you to say at that hearing, and you're not going to change anything or things won't go forward like they should.'" (*Id.*, p. 120.)

The state district court found that, at the time of Petitioner's representation, Bartlett had been working with the law firm of Nevin, Benjamin, McKay & Bartlett for about 20 years, and 99.9% of his work was criminal. Bartlett also taught criminal law continuing education seminars. (State's Lodging E-1, pp. 251-52.) In assessing the case, Bartlett knew Petitioner confessed to police. Bartlett didn't think the confession was challengeable.

While Petitioner suggested that they use a "whacked out on Ambien" defense, Bartlett didn't think that would be "an effective strategy at all," citing all of the detailed tasks Petitioner completed that evening with no difficulty—leaving his own house without waking his current wife, driving to his ex-wife's house, gaining entry to his ex-wife's house, loading his weapon, and then doing most of those tasks all over again in the reverse order, ending with him getting back in bed with his wife as if he had never left. (*Id.*, pp. 201-02; 259-60.) Bartlett concluded there was a possibility of conviction on each of the four counts, with the kidnapping count being the weakest. (*Id.*, p. 205.)

Responding to Petitioner's allegations that Bartlett used coercive tactics to make Petitioner plead guilty, Bartlett testified as follows.

Q. And were there any problems communicating with Mr. Eddington that day?

A. I don't recall any communication problems with Ron that day, no.

Q. Did Ron ever tell you he was absolutely not going to plead guilty?

A. No.

Q. Did you blow up at Ron and shake your fingers at him and tell him he was pleading guilty?

A. Of course not.

Q. Did Ron ever say, "Mr. Bartlett, I'll sign your paper, but I'm going to tell the judge I'm not guilty?"

A. No, of course not. If Ron had told me he didn't want to go forward or that he would say something different in open court, then I would have had a meaningful, thoughtful conversation with him about what he wanted to do instead, and we would have taken that course of action. That would have been a foolish thing to do.

Q. Did you ever point your finger at Mr. Eddington and say, "You're going to say exactly what I tell you to say"?

A. Of course not. That's ridiculous.

Q. Did you ever tell him, "You're going to say what I tell you to say" and ever allude to his mother's case?

A. No, of course not.

Q. Did you need Mr. Eddington's plea to dismiss Diana Eddington's case?

> A. Diana Eddington's case, as I indicated earlier, was incredibly weak. I didn't believe it would ever get past preliminary hearing. I never for a moment thought that they were connected in any way, shape, or form.

(State's Lodging E-2, pp. 221-22.)

Bartlett went on to testify that he takes great pride in caring for his clients, that he cared about Ron, and that if Ron had wanted to do something different, Bartlett would have talked it through with him until they reached a conclusion about what they needed to do. Bartlett clarified that there is a difference between a client saying, "I don't want to plead guilty," and one saying, "I won't plead guilty," because *no one* wants to plead guilty to a crime, but he believed Petitioner made the conscious choice, knowingly, intelligently, and voluntarily to enter a plea. (*Id.*, pp. 222-23.) "And, if any one of those things hadn't been present in my mind, I wouldn't have wanted to go forward and I wouldn't have gone forward with the plea colloquy the next day," testified Bartlett. (*Id.*, p. 224.)

As to the conflict of interest between Petitioner and his mother, Diana, Petitioner alleged in post-conviction proceedings that Bartlett would have used Diana's letter in support of Petitioner or called her as a witness at sentencing but for Bartlett's conflict in trying to protect Diana's case. Testifying on behalf of Petitioner at the post-conviction hearing, Diana said that Bartlett told her the letter could negatively influence her own case, so he wasn't going to submit it in Petitioner's sentencing proceedings. (State's Lodging E-2, pp. 42-43.)

As to other aspects of the conflict claim, Diana admitted that, when Petitioner phoned her from the jail, they never talked about Petitioner pleading guilty to aid in getting her case dismissed. (*Id.*, p. 49.) Diana admitted signing an affidavit that said: "Mr. Bartlett repeatedly informed me that the charges against me were unfounded, and he would get them dismissed." (*Id.*, p. 76.)

In the "Order Dismissing after Evidentiary Hearing (on remand)," the state district court found:

> Petitioner's testimony about Bartlett's anger, threats and yelling on January 14, 2014 is simply not credible given the extensive conversations recorded between Petitioner and Bartlett and Bartlett's extensive explanation about the importance of Petitioner making his own decision whether to enter a guilty plea. The guilty plea hearing and guilty plea form also show by a preponderance of the evidence that there was no covert plea agreement linking dismissal of Diana's case with Ron's guilty plea. While the Petitioner testified at the evidentiary hearing that he was lying at the plea hearing and that his testimony at the evidentiary hearing was more credible, the Court finds by a review of all of the evidence that the Petitioner's testimony at the guilty plea hearing was the truth as supported by the record and that Petitioner's testimony at the evidentiary hearing was not credible.

(State's Lodging E-1, p. 263.)

As to the non-submission of Diana's letter at Petitioner's sentencing hearing, the court found:

> Bartlett addressed Petitioner's [mother's letter], saying that it was absolutely intentional that he did not submit [it] to the Court. Bartlett testified that his representation of Diana did not limit his ability to represent Ron. He testified that

> Diana's letter was inappropriate for submission as originally written because it talked about the effect of the case on the children without recognizing the Court could attribute the poor effects of the children to Ron's behavior. It also contained a phrase about Carrie charging Diana with a felony and having a no contact order as blaming the victim or showing that the whole situation was made worse by Carrie. Bartlett testified he always asked anyone writing a letter of support to leave out any statement that seemed to blame the victim. Bartlett said that, in his experience, when someone close to a defendant blames the victim, the judge thinks that attitude mirrors [his] client's thoughts and is ultimately unhelpful. So, he prefers letters of support that focus on good qualities. He testified having Diana testify at Petitioner's sentencing hearing was never a consideration in Bartlett's mind because he felt that it was a "particularly poor strategic decision" to let a parent, especially a mother, take the stand because a parent could very easily get walked into providing information that would be harmful to Ron. Bartlett testified that mothers don't accept responsibility for their children's crimes and that judges expect parents to love their children and want positive outcomes. Bartlett testified that, in his experience parents testifying at sentencing provided a big danger with limited benefit.

(State's Lodging E-1, pp. 263-64.)

After the evidentiary hearing, the state district court rejected all four of Petitioner's ineffective assistance of trial counsel claims. (State's Lodging E-1, pp. 251-272.) The court found that Petitioner never expressed that he felt he had to enter a guilty plea to obtain dismissal of his mother's case; Diana acknowledged that Petitioner never told her that he felt he had to enter a guilty plea to get her case dismissed; and Diana never told him that his guilty plea would bring about dismissal of her charge. The court also found that Bartlett consistently advised Diana that her criminal charges would soon

be dismissed because there was no evidence that her email was intended to hurt the victim—not because her charges were dependent upon Petitioner's plea agreement. The trial court also found that there was never any discussion among Bartlett and the two prosecutors about a resolution in Petitioner's case being tied to his mother's case. (*Id.*, pp. 252-56; 268-71.)

**CLAIM 1: CONFLICT OF INTEREST**

Claim 1 is that Bartlett had a conflict of interest when he agreed to represent Petitioner and Petitioner's mother, Diana, at the same time. This claim was decided on the merits by the Idaho Court of Appeals and by denial of the petition for review by the Idaho Supreme Court; therefore, the Idaho Court of Appeals' decision is entitled to AEDPA deference. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[A] federal court should 'look through' [an] unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.").

Petitioner contends that there was a secret, off-the-record, plea agreement or mutual understanding that his mother's charge in the separate case would be dismissed only if he accepted the state's plea offer. (See State's Lodging F-5, p.4; Dkt. 14, pp.8-16.) This is why, Petitioner asserts, his mother's preliminary hearing at which the charge against her was dismissed was re-scheduled to a date *after* Petitioner's case was resolved.

(Dkt. 14, pp.8-16.) In order to "protect" the dismissal of his mother's charge, Petitioner asserts, trial counsel coerced him into accepting the state's plea offer. (*Id.*)

For the reasons that follow, this claim will be denied.

**1. Conflict of Interest Standard of Law**

A criminal defendant has the right to be represented by conflict-free counsel under the Sixth Amendment. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). A "possible conflict of interest" is created "that could prejudice either or both clients" when the same counsel represents two defendants in criminal actions arising from the same set of facts. *Burger v. Kemp*, 483 U.S. 776 (U.S. 1987). However, it is settled that "[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel." *Id.* at 783 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)). To the contrary, "[i]n many cases, a common defense gives strength against a common attack." *Id.* (internal citations and quotation marks omitted).

The United States Supreme Court has made it clear that the mere "possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan* ("*Sullivan*"), 446 U.S. 335, 350 (1980). When a conflict is shown, prejudice is presumed only when (1) "the defendant demonstrates that counsel actively represented conflicting interests"; and (2) "an actual conflict of interest adversely affected his lawyer's performance." *Burger*, 483 U.S. at 73 (quoting *Strickland*, 466 U.S. at 692), and citing *Sullivan*, 446 U.S. at 348.

*See also Mickens v. Taylor*, 535 U.S. 162, 172-73 (2002) (rejecting the proposed rule of automatic reversal of a conviction where there existed a conflict that did not affect counsel's performance).

Therefore, a defendant who brings an attorney conflict of interest claim must "show that potential conflicts impermissibly imperil[ed] his right to a fair trial." *Sullivan*, 446 U.S. at 348 (internal citations omitted). The *Sullivan* Court provided the following example of a conflict of interest that adversely affected the defendant's trial:

> In *Glasser v. United States*, [315 U.S. 60 (1942)], for example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. *Id.*, at 72-75, 62 S.Ct. at 465-467. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." *Id.*, at 75, 62 S.Ct., at 467. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction.

446 U.S. at 348-49.

**2. Idaho Appellate Court Decision**

The Idaho Court of Appeals reviewed the conflict of interest claim as a federal constitutional issue, citing to state law cases relying on *Sullivan*:

> In support of Eddington's argument that trial counsel's joint representation created an actual conflict, Eddington points to numerous, diffuse facts including that his parents were paying for his defense; trial counsel expressed concern that the State might claim Eddington had aided and abetted

his mother's witness intimidation; his presentence investigation report detailed his mother's conduct giving rise to her charge; the prosecutors communicated about the status of Eddington's case and his mother's case; his mother attended his sentencing hearing despite the existence of a "no contact order" prohibiting her from being near his ex-wife, who also attended the hearing; and his mother's charge was only dismissed after he pled guilty. Eddington argues the inferences from these facts clearly establish that his and his mother's cases were "linked," making his guilty plea a condition of the dismissal of his mother's charge and adversely impacting his representation.

We disagree. The district court correctly concluded that Eddington had failed to show an actual conflict of interest by a preponderance of the evidence. Among other things, the district court correctly found that there were never any discussions between the prosecutors and trial counsel about Eddington's case being linked to his mother's case; there were never any plea offers made linking the two cases together; there were no discussions between Eddington and his mother to support his claim that their cases were "linked"; and Eddington never stated during sentencing that he was pleading guilty so the prosecution would dismiss his mother's case. Further, there is no evidence trial counsel was biased in favor of Eddington's mother, despite her payment of Eddington's legal fees.

Eddington's argument on appeal places significant focus on the fact that his mother's dismissal occurred after his guilty plea. In particular, he challenges as inaccurate the district court's finding that "it was [trial counsel] who requested [Eddington's mother's charge] be dismissed after [Eddington's] sentencing so that the No Contact Order between the [ex-wife] and [the mother] remained in place to avoid [the mother] from further upsetting the [ex-wife] before [Eddington's] sentencing." Eddington disputes this finding and argues "the State, not [trial counsel], strategically scheduled [the mother's] dismissal."

> 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. Trial counsel testified the no-contact order protected Eddington's mother against his ex-wife making further accusations of intimidation, which protection was important because of the case's emotional nature. As this testimony shows, trial counsel's decision not to challenge the State's rescheduling of the dismissal was not the result of an actual conflict but, rather, of trial counsel's reasonable strategy.
>
> The circumstantial facts Eddington identifies on appeal are inadequate to conclude the district court's findings are clearly erroneous. Based on these findings, the district court correctly ruled there was no actual conflict of interest. Accordingly, the district court did not err in concluding trial counsel was not ineffective because he jointly represented Eddington and his mother.

(State's Lodging F-5, pp. 4-5.)

**3. Analysis**

The Court first addresses the state district court's incorrect finding of fact that the Idaho Court of Appeals acknowledged and corrected its opinion, cited directly above. 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. (State's Lodging E-2, pp. 254-55.) The state district court mistakenly found that Bartlett had chosen the hearing date, when prosecutors actually had. However, the Idaho Court of Appeals corrected that error on review and noted that the error did *not* affect the outcome of the claim. Petitioner asserts that the Idaho Court of Appeals made an unreasonable determination of fact when it found that Bartlett's choice *not to challenge* the prosecution's rescheduling of Diana's preliminary hearing was based on "reasonable strategy."

On federal habeas review, the findings of fact of the state appellate court (and any state district court findings of fact not in conflict with state appellate court findings of fact) are entitled to AEDPA deference. *See James v. Ryan,* 733 F.3d 911, 916 (9th Cir. 2013) (noting that *Johnson* "does not require us to ignore a state court's explicit explanation of its own decision"); *Ylst*, 501 U.S. at 804 (holding that the court looks "to the last reasoned decision" resolving a claim). 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.

Petitioner argues that the fact that Bartlett did not choose the hearing date definitively shows that he really had no strategy to have Diana's case dismissed after Petitioner's to keep the no-contact order in place as a protection against any trouble that might arise between Diana and the victim at sentencing. However, the Idaho Court of

Appeals focused not on whether Bartlett *requested* the hearing on that date based on strategy, but on whether Bartlett, after received notice of the hearing, *chose not to oppose the rescheduling* to that date *based on strategy*. In other words, while Bartlett's memory of who requested the date of the hearing was imperfect, his memory of his reason for agreeing with that date remained intact and was based in strategy. This is a finding of fact by the Idaho Court of Appeals that is entitled to deference, meaning that Petitioner bears the burden of showing that fairminded jurists could not disagree on this point. Petitioner must show that this factfinding about a strategic reason behind Bartlett's non-opposition to Diana's hearing date was not merely erroneous, but also unreasonable.

The Court concludes that Petitioner has not met this burden. The Idaho Court of Appeals' factfinding is supported by the overall record. There is little in Bartlett's testimony to show that he had any motive to lie about this point (or about any other). Human minds are not infallible when trying to recall what happened four years earlier in a certain case on a certain day. Elsewhere in his post-conviction testimony, Bartlett was quick to admit in the hearing when he felt he *had* been wrong—such as his failure to use evidence at sentencing that showed a lack of violence and harassing contact between Petitioner and his ex-wife prior to the crime. That willingness to admit wrongdoing in one area bolstered his credibility overall.

Bartlett's overall testimony about Diana's representation was credible. He testified that he had little desire to press for a quicker preliminary hearing for Petitioner's mother

to see whether she would be bound over for trial, because the prosecutors said they would dismiss the case. "Why would I take any risk at all if they said they were going to dismiss it?" he testified. (State's Lodging A-3, p- 253-54.) He also stated: "I had already had discussions, and they said they were going to dismiss it. And I haven't had a prosecutor tell me they were going to dismiss a case and then not do that in my career." (*Id.*, p. 253.)

To bolster his argument, Petitioner points to another topic at the change of plea hearing to attempt to show that his case and Diana's case were interdependent. At the plea hearing, the Court wanted to know specifically which charges were included in the plea agreement. The prosecutor said she was not aware of any new acts for which Petitioner might be charged, but that she had not had opportunity to review Petitioner's telephone call transcripts from the jail for about six weeks. The prosecutor said she would like to reserve the right to bring new charges arising from any of those unreviewed calls and did not want that time period included in the claims the State was giving up in the plea agreement. In response Bartlett stated: "Specifically, Your Honor, the state has charged his mother with the crime of intimidating a witness, and I'm concerned that they'll claim that he's aiding and abetting that crime." (State's Lodging A-3, pp. 6-8.) The Court then asked the prosecutor and Bartlett to meet during a recess to determine what, exactly, their agreement was. (*Id.*, p. 7.)

After the 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 for argument at sentencing." (*Id.*, p. 8.)

Petitioner argues that Bartlett's "statement of concern to the court at the plea hearing about Petitioner's exposure to Diana's charge renders false Bartlett's statement at the evidentiary hearing that he "did not believe [Diana's case] would, in any way, impact [his] case." But Petitioner is mixing apples and oranges with this assertion. The "new acts" issue is about whether Petitioner *could be charged* with a *new* crime that would specifically be excluded from his current case—which is a completely different issue from whether Petitioner was *required to plead* guilty to the *existing* criminal charges to effectuate the prosecutor's alleged promise to dismiss Diana's case.

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 principals and aiders 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 charges.

Most recently, Petitioner filed a Motion for Leave to Present New Evidence (Dkt. 19) to support his argument that his counsel's conflict of interest is made clear based on "new evidence" that the prosecutor in his case—Whitney Faulkner—was intimately

involved in prosecuting Petitioner's mother's case, at the side of prosecutor Dan Dinger, even though she denied that to the trial court. Respondent is correct that this evidence, in the form of the written transcript, is already before the Court. Petitioner desires to submit the audio version of the hearing, even though it was not considered by the state appellate courts. The Court will deny the Motion as moot.

As the Court of Appeals found, "there were never any discussions between the prosecutors and trial counsel about Eddington's case being linked to his mother's case," nor were there "any plea offers made linking the two cases together." Even assuming that Ms. Faulker did work on both Petitioner's case and Petitioner's mother's case, the Court sees nothing in the record showing that disposition of Diana's case was dependent upon disposition of Petitioner's case, or that Petitioner's counsel was involved in some sort of illicit agreement with the prosecutors to that effect.

After a review of the entire record, this Court fully agrees with the Idaho Court of Appeals' decision that Petitioner failed to show an actual conflict of interest when Petitioner's counsel simultaneously represented Petitioner's mother on a facially meritless charge that was expected to be dismissed for lack of factual support. As the state district court found, Diana "testified that she, Bartlett, Ron Sr., and a bondsman met at the jail and Bartlett went through Diana's email to Carrie line-by-line and concluded it wasn't intimidation." (State's Lodging E-1, p. 7.) Bartlett also relied on his experience that the prosecutor's office had never gone back on its word that it would dismiss a

charge. Further, there is insufficient evidence that Bartlett or the prosecutors were involved in any joint deal to dismiss Petitioner's mother's claim only if Petitioner first pleaded guilty. The mere timing of Petitioner's mother's hearing being set by the prosecutor on a date after Petitioner's change-of-plea hearing does *not* show that dismissal of the mother's charge was *conditioned upon* Petitioner's guilty plea.

The Court agrees with the state courts that Petitioner's post-conviction testimony is not credible compared to the more credible testimony he gave at the change-of-plea hearing and the sentencing hearing. At the post-conviction hearing, Petitioner testified that Bartlett told him he had to admit he committed the crime, but Petitioner protested and told Bartlett he did not commit the crime. However, in Petitioner's allocution at sentencing, he clearly stated that he committed the crime:

> I would like to take this opportunity to express my deep sorrow and apologize to Carrie, our children, both of our families for the incredible pain and anguish I have caused through my actions. I know the damage I've done to Carrie is irreparable. I pray that she and her family will be allowed to heal in peace.
>
> I accept full responsibility for my actions on August 9.

(State's Lodging A-5, p. 96.)

This Court also agrees that Petitioner has pointed to nothing counsel did that harmed Petitioner's case because of the dual representation. Counsel rightly omitted Diana's letter and testimony from his sentencing for a strategic reason that benefitted Petitioner's case, and counsel would have done so regardless of whether he represented

Diana. The content of the letter placed Petitioner's extended family in a bad light, which could have reflected badly on Petitioner. The fact that omission of the letter *also* helped Diana's case does not detract from the fact that the letter likely would have harmed Petitioner's case.

Under *Strickland*, Bartlett was entitled to make strategic decisions about what evidence to present at sentencing. His strategic decisions were based upon years of experience—and actual bad experiences—with mothers providing what they erroneously viewed as "supporting" testimony for their convicted adult children. The record objectively reflects that the content of Petitioner's mother's letter *did* contain some potentially harmful content.

Petitioner also argues that the "conflict of interest" generally prevented his counsel from performing effectively at sentencing. He asserts: "No defensive argument could be made for Petitioner at sentencing because doing so would have prejudiced Diana's interest in having her case dismissed the next day." (*Id.* p. 15.) This allegation is controverted by the sentencing hearing transcript.

The record reflects that Bartlett put on an adequate defensive argument in light of the overwhelming bad facts facing Petitioner. Bartlett asked the Court to not consider past custody issues, but to acknowledge that the family law courts always considered Petitioner fit to have 40% custodial time with the children—a decision that would not have been made if Petitioner had been violent during that time. Bartlett painted a picture

of Petitioner as a compassionate nurse with a 17-year-long career. Bartlett highlighted Petitioner's record of 48 years without a crime, as well as the particular life stressors Petitioner was facing that culminated in his decision to go to his ex-wife's house to threaten her: Petitioner had just ended an affair, Petitioner's current wife was pregnant and he was unsure whether he wanted another child, Petitioner had just lost his job, and Petitioner felt that he was being shut out as an "outsider" because his ex-wife and children were heavily involved with a church that he did not attend and a religious lifestyle he did not embrace. Bartlett asked for the court to consider placing Petitioner in a Rider program and permitting him to relocate to Montana and remain far away from his ex-wife.

This was a reasonable defense argument in light of the gravity of the crime and clear evidence that Petitioner planned and carried out the crime. An investigating officer testified that he analyzed the computer in Petitioner's home and found the following:

> In the Google searches I observed, you know, put into Google itself to search for topics "Murdered Wives", "Gunshots", "Gunshots to the Head", "Suicide", "Suicide Gunshots to the Head", "Rape," some porn was on there, some dating sites, like someone attempted to get on a dating site, and I also observed research done. It looked like for that case Betty Broderick, who ... had gone through a divorce. It seemed like she was infatuated with him. Kept harassing him. He had since remarried, I think, it was, like, five years afterwards, since their divorce. She would make entry into their house, but eventually, the bottom line was, she entered the house, shot his new wife twice. Once in the head, once in the chest and then shot herself—or shot him—excuse me—and killed her ex-husband by breaking into their house.

(*Id.*, pp. 32-33.) In addition, Petitioner committed the crime on the wedding anniversary date of Petitioner and the victim, also indicating a plan. (*Id.*, p. 64.)

For all of 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. This claim fails under the deferential AEDPA standard, because fair-minded jurists could disagree whether the Idaho Court of Appeals' decision is inconsistent with a prior holding of the United States Supreme Court. It is quite the opposite in this case based on the evidence from the post-conviction remand hearing—few, if any, reasonable jurists would *agree* with his position. Alternatively, this claim fails under the de novo review standard. This claim will be denied and dismissed with prejudice.

## CLAIM 2: COERCED GUILTY PLEA

Claim 2 is that trial counsel was ineffective for pressuring Petitioner to accept the State's plea offer. For the reasons that follow, this claim will be denied.

### 1. Standard of Law

The United States Supreme Court has held that the validity of a guilty plea turns on "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court held that a plea is not knowing

and voluntary if it was the result of defense counsel's advice amounting to ineffective assistance of counsel. *Id.* at 59.

The United States Supreme Court has noted that "there is no per se rule against encouraging guilty pleas." *Corbitt v. New Jersey*, 439 U.S. 212, 218–19 (1978). However, a voluntary plea must be free from either "physical or psychological coercion." *Henderson v. Morgan*, 426 U.S. 637, 653 (1976). These standards underlie the *Strickland* ineffective assistance of counsel standard set forth above.

**2. Idaho Appellate Court Decision**

On appeal after remand of the coerced plea claim, the Idaho Court of Appeals addressed the deficient performance aspect of this claim, but declined to address the prejudice aspect because it was not presented in a procedurally proper posture on appeal:

> Eddington contends that the day before the hearing to change his plea to guilty, trial counsel "raise[d] his voice," "yelled" at Eddington, and "was coercing [him] and threatening him with his mother's imprisonment and financial ruin if [he] did not plead guilty." He also contends that he was "shocked," "terrified," and had "no alternative" but to plead guilty. Trial counsel testified to the contrary that he did not recall getting angry with Eddington. The district court also noted the existence of "extensive" recorded conversations between trial counsel and Eddington in which trial counsel explained the importance of Eddington making his own decision about whether to plead guilty.
>
> Based on this evidence, the district court rejected Eddington's assertion that trial counsel "yelled at [Eddington], got angry, told him he had to [plead guilty], and inferred his mother's case would not be dismissed [as] just incredulous" and "simply not credible." Likewise, the district

> court also rejected Eddington's testimony at the evidentiary hearing that he was lying under oath at the sentencing hearing about the voluntariness of his guilty plea due to pressure from his trial counsel. These findings are credibility findings within the district court's province, are supported by the evidence, and will not be disturbed on appeal.
>
> Finally, Eddington asserts he "would have made a different decision regarding his plea" if he were "aware of the multiple contradictory and compassionate [sic] statements" his ex-wife made to the police. This argument, however, is not one Eddington alleged in his petition for relief or argued to the district court. For these reasons, we decline to address the argument. *See State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) (noting longstanding rule not to consider arguments raised for first time on appeal).
>
> Regardless, "the decision to plead guilty before the evidence is in frequently involves the making of difficulty judgments." *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970). "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *Id.* The district court concluded that trial counsel's advice was "competent and reasonable" and that Eddington "ultimately made up his own mind" to plead guilty. We agree; the evidence supports that Eddington's plea was knowing and voluntary.

(State's Lodging F-5, pp. 6-7.)

**3. Analysis**

The record reflects that, at the evidentiary hearing, Bartlett convincingly refuted the claim that he coerced Petitioner to plead guilty to gain dismissal of Petitioner's mother's case to benefit her or to end the case because he thought Petitioner could not

afford a trial. Telephone calls presented at the hearing supported Petitioner's counsel's testimony. The state district court carefully made findings of fact regarding Petitioner's lack of credibility when placed against the backdrop of testimony from all of the witnesses, the telephone calls, and the plea agreement documents.

Petitioner argues that the Idaho Court of Appeals made an unreasonable finding of fact when it found that the state district court correctly found that the January 14, 2014 phone call between Petitioner and his mother did not contain "discussions ... that their cases were linked." (State's Lodging F-5, p. 5.) Petitioner argues that the state district court wrongly thought the alleged angry discussion between Petitioner and Bartlett occurred on that date, when it really occurred the day after that conversation, the timing of which makes the trial court's factual finding impossible. Petitioner asserts that the phone call between him and his mother shows that Petitioner was "confused and anxious" as to why his mother's case had not yet been dismissed, and that, but for Bartlett's advice to them that they not discuss the cases over the recorded jail phone lines, Petitioner and his mother would have been more explicit about the dismissal and guilty plea connection during their phone calls.

Even assuming that this is an error rather than merely a different perspective of the content of the phone call, the record still strongly supports the remainder of the Idaho Court of Appeals' factfinding. In particular, much more on point is a telephone call between Bartlett and Petitioner demonstrating that —far from demanding that Petitioner

plead guilty against his will—Bartlett took extra care to make sure that the guilty plea was Petitioner's decision. The state district court described it as follows:

> Petitioner and Bartlett discussed the plea offer to which Petitioner says, "Wow, kidnaping, that's bad." Bartlett followed up with, "So, I have your permission to go forward?" and Petitioner responds, "Yeah, I guess." Upon hearing that tentative response, Bartlett actually told Petitioner to think more about whether to plead because Bartlett didn't want the Petitioner to guess. Bartlett tells Petitioner that he thinks pleading out is the right thing to do but that Bartlett wants the Petitioner to have more time to think about it. There was no discussion about Diana's case on any calls recorded to this point. Petitioner did not enter a plea at the status conference on December 12, 2013.

(State's Lodging E-1, p. 257.) In addition, this claim rests on Petitioner's credibility, because Bartlett denied any angry outbursts. The record shows that Bartlett's testimony at the post-conviction hearing was more credible than Petitioner's testimony, both in content and because Petitioner's newer testimony completely contradicted his own prior testimony at the change of plea and sentencing hearings.

There is insufficient corroborating evidence to support Petitioner's story that Bartlett coerced or pressured him to plead guilty. Rather, the record reflects that, consistent with two decades of criminal law experience, Bartlett gave advice, analyzed evidence, predicted a negative outcome at trial, recommended taking the plea, and encouraged Petitioner to take the time to make his own decision on whether to plead guilty or proceed to trial.

The Court concludes that Petitioner has not shown that the Idaho Court of Appeals made an unreasonable finding of fact when it decided that the evidentiary hearing transcript supported the state district court's findings; that Bartlett testified more credibly than Petitioner at the evidentiary hearing; and (b) that Petitioner's plea was knowing and voluntary. Petitioner's reference to a vague conversation between his mother and himself that does not address the particular topic at issue is not convincing. In addition, no other corroborating evidence shows that any coercion or undue pressure entered into Petitioner's decision to plead guilty, especially given his denial of coercion at the change of plea hearing and his admission of guilt at the sentencing hearing. No deficient performance is evident from the record. Petitioner has failed to show that fair-minded jurists could not disagree whether the Idaho Court of Appeals' decision that his counsel did not perform deficiently is inconsistent with *Strickland*. Because an ineffective assistance claim that fails on either *Strickland* prongs fails altogether, Petitioner is not entitled to relief on this claim. The result is the same under de novo review.

**CLAIM 3(A): FAILURE TO INVESTIGATE DISCOVERY MATERIALS**

Claim 3(a) is that Bartlett failed to investigate the discovery he obtained in the case; namely, that he failed to listen to the audio recordings of police interviews of Petitioner's ex-wife that contravened her sentencing hearing testimony that Petitioner had been violent throughout their history.

**1. Idaho Appellate Court Decision**

The Idaho Court of Appeals addressed this claim as follows:

> The district court concluded that Eddington "has not met his burden of showing that counsel was ineffective because he failed to listen to the audio recordings [of his ex-wife's] police interviews. The preponderance of the evidence is that [trial counsel] did listen to that audio and was prepared to address it at sentencing." The evidence supports this conclusion, which turns on a credibility issue. Evaluating the credibility of the testimony of Eddington and trial counsel; weighing that testimony; and drawing inferences therefrom are functions solely within the district court's province, and we decline to second-guess such matters.

(State's Lodging F-5, p. 6.)

**2. Analysis**

Here, Petitioner provides no convincing factual or legal argument to show that the Idaho Court of Appeals' factfinding about Bartlett's credibility and Petitioner's lack of credibility was erroneous or unreasonable. There were two sets of audio recordings referenced at the post-conviction hearing—present jail phone calls and past investigative audios. Bartlett testified that there were about 160 present jail phone calls between Ron and Diana, Ron and Tracy, and Ron and other people. (State's Lodging E-3, p. 11.) Bartlett testified: "I listened to all of the audios in the case with the exception of some of the jail calls. Of course, they just kept rolling out and rolling out and rolling out. But I listened to all the investigative audios in the case multiple times." (State's Lodging E-2, p. 245.)

Petitioner testified that Bartlett told him that Petitioner's family, who was paying for the defense, could not afford for trial counsel to listen to all of the audiotapes. It is unclear whether "audiotapes" meant the jail phone calls, the investigative audios, or both. Only the investigatory audiotapes are relevant to the sentencing claim. Regardless, the state court found that Petitioner was not credible, and Bartlett was credible in testifying that he listened to the investigatory audiotapes several times. The record supports such a finding. Therefore, Petitioner has failed to show deficient performance in preparation, and this claim fails on the first prong of *Strickland*. Because reasonable jurists could disagree whether the Idaho Court of Appeals' opinion is inconsistent with *Strickland*, this claim fails under deferential AEDPA review. It also fails under de novo review.

**CLAIM 3(B): FAILURE TO PREPARE FOR SENTENCING**

Related to Claim 3(a) is Petitioner's Claim 3(b), that Bartlett failed to prepare adequately for sentencing because of the alleged conflict of interest, specifically that Bartlett failed to cross-examine the victim during the victim impact statement at the sentencing hearing.

**1. Idaho Appellate Court Decision**

On appeal after remand in the post-conviction matter, the Idaho Court of Appeals assumed that Bartlett performed deficiently based on his own admission,[2] but denied the

[2] Bartlett testified at the post-conviction hearing as follows:

claim for failure to show prejudice to the defense. However, Petitioner takes issue with the following italicized portions of the appellate court's opinion:

> Eddington claims his trial counsel was ineffective for failing to object to Eddington's ex-wife's testimony or to cross-examine her at his sentencing hearing. Eddington does not identify any objections trial counsel should have made or any specific cross-examination. Eddington does, however, reference the audiotapes of his ex-wife's police interviews and his phone calls, emails and texts to her, and he suggests this information would have disputed the State's narrative that he was "an obsessive, controlling, manipulative, stalking individual who was violently abusive."
>
> Generally, whether to object or to cross-examine a witness involves trial counsel's tactical or strategic decisions, which this Court will not second-guess on appeal unless the decisions are a result of inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales*, 151 Idaho at 172, 254 P.3d at 73. In this instance, however, trial counsel expressly acknowledged he mistakenly failed to highlight at Eddington's sentencing hearing the inconsistency between the testimony of Eddington's ex-wife about his abuse and prior information indicating Eddington had never been physically abusive.

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Q. Now, with regards to your sentencing notes, had you intended to make that [that Carrie never claimed abuse during marriage before] an issue at sentencing?

A. I had. I intended to make an issue that Carrie had never claimed during the very contentious??? long custody dispute that there was violence between them, had told Dixon in an interview that he hadn't been violent before. There was the discussion about also e-mails, that there weren't threats of violence in those. And I intended to make that point.

Q. And, what did you discover?

A. I discovered that I failed to make that point in any kind of clear way, and that was an absolute failure.

(State's Lodging E-2, p. 243.)

> Given trial counsel's acknowledgement of the mistake, we assume for purposes of our analysis that trial counsel's representation fell below an objective standard of reasonableness. *See Aragon*, 114 Idaho at 760, 760 P.2d at 1176. Despite this assumption, however, Eddington has failed to establish prejudice. *To establish prejudice, Eddington must show a reasonable probability that, but for his trial counsel's mistake, the outcome of the sentencing would have been different. See Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (explaining prejudice standard extends to sentencing); *see also Richman v. State*, 138 Idaho 190, 194, 59 P.3d 995, 999 (Ct. App. 2002) (requiring evidence [showing that the] court would have ordered different sentence to show deficient performance prejudiced defendant).
>
> *Eddington failed to make this showing.* As the district court noted, trial counsel's failure to mention the lack of prior physical abuse does not overshadow the gravity of Eddington's offense and the related facts, including that he held his ex-wife at gunpoint for over an hour, threatening to kill her; contemplated the crime over a course of time; and, before his crime, reviewed "gruesome photos of head wounds" and conducted Internet searches of "gunshot wounds" and of "murdered wives." Relying on these facts, *the district court concluded Eddington would have received the same sentence*, regardless of the audiotapes of his ex-wife's police interviews. This conclusion is supported by the evidence, and *we agree trial counsel's failure to object to the testimony of Eddington's ex-wife and to cross-examine her did not prejudice Eddingto*n.

(State's Lodging F-5, pp. 8-9 (emphasis added).)

**2. Analysis**

With respect to the *Strickland* prejudice prong, Petitioner argues that the above portion of the state appellate decision applied the wrong standard because the state

district court decision also applied the wrong standard—that is, whether the sentencing court "would have given a different sentence," rather than whether there was a "reasonable probability" of a different outcome. (Dkt. 14, pp. 25-28; see also State's Lodging E-1, pp. 277-278 (state district court's analysis of *Strickland* prejudice prong).)[3] The problematic feature of his argument is that the post-conviction judge and the sentencing judge were one and the same. Petitioner argues, "[e]ven if the evidence did not, in fact, change Judge Norton's mind, there could still have been a reasonable probability that it would have changed her mind." (Dkt. 14, p. 27.)

Under a different set of procedural facts, such an argument would be well-taken, based on the following explanation of *Strickland* given by Justice O'Connor in her concurring opinion in *Williams v. Taylor*:

> Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we

[3] In *Strickland v. Washington*, 466 U.S. 668, 695 (1984), the Court explained:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors.... When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

> held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052.

*Id.* (O'Connor, J., concurring), 529 U.S. at 405–06.

However, in Idaho, post-conviction cases are assigned whenever possible to the same judge who presided over the original criminal case. (*See* State's Lodgings A-5, E-1.) Doing so gives the judge the benefit of having experienced the pretrial and trial proceedings first hand, including having observed the demeanor of the parties and witnesses at trial and sentencing.[4] Therefore, it makes sense in this particular procedural

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[4] The United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have addressed and approved of the propriety of assigning cases according to this model. For example, in the context of a due process claim in *Murray v. Schriro*, the court explained:

> Roger has not identified any Supreme Court case holding that a defendant is deprived of due process when the trial judge presides over post-conviction proceedings. Rather, the opposite is true. *See id.*; *see also Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012) (noting that the trial judge was "ideally situated" to make an assessment of the facts when resolving post-conviction issues) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 476, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ). The distinction is plain. As a fact witness, the judge would be seeking to persuade the finder of fact to a certain view of the evidence. As the presiding jurist, the judge is the factfinder, with absolutely no incentive to shade the facts one way or the other. *See, e.g.*, Fed. R. Evid. 605 (providing that the presiding judge may not testify as a witness in the trial over which he presides); *see also United States v. Berber–Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007) (holding that a trial court judge is not a competent witness to factual matters in a case over which he presides). No similar conundrum exists when the trial judge presides over post-conviction proceedings. In the post-conviction proceedings, the judge functions as a reviewer of the trial proceedings rather than as a chronicler of the facts. As the Supreme Court has explained, the trial judge's unique knowledge of the trial court proceedings renders him "ideally situated" to review the trial court proceedings. *Landrigan*, 550 U.S. at 476, 127 S.Ct. 1933.

*Id.*, 882 F.3d 778, 820–21 (9th Cir.), *cert. denied sub nom. Murray v. Ryan*, 139 S. Ct. 414 (2018).

context for the post-conviction judge to use the phrase that the additional evidence "would not have made a difference," because the judge was analyzing her own sentencing decision, as opposed to analyzing another judge's sentencing decision. In contrast, a judge analyzing a different judge's sentencing decision could determine only there there was, or was not, "*a reasonable probability* that it would have made a difference" to the sentencing judge.[5]

At the state appellate court level, however, the jurists making the decision are different from the original factfinding sentencing judge; therefore, they must use the "reasonable probability " standard, as the Idaho Court of Appeals recognized.

As noted above, the Idaho Court of Appeals presumed deficient performance and analyzed the claim on *Strickland*'s prejudice prong. (State's Lodging F-5, pp. 8-9.) The appellate court therefore identified the correct standard of law—not that the outcome of the sentencing would have been different—but, "a reasonable probability that, but for his trial counsel's mistake, the outcome of the sentencing would have been different." (*Id.* at

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[5] In *Strickland*, the Court explained the reasoning behind the "reasonable probability" standard:

> In determin[ing] whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.... The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

466 U.S. at 694–95.

8.) The Idaho Court of Appeals then concluded: "Eddington failed to make this showing." (*Id.*)

In the same paragraph, the appellate court discussed the lower court's reasoning and its ruling:

> As the district court noted, trial counsel's failure to mention the lack of prior physical abuse does not overshadow the gravity of Eddington's offense and the related facts, including that he held his ex-wife at gunpoint for over an hour, threatening to kill her, contemplated the crime over a course of time, and, before his crime, reviewed "gruesome photos of head wounds" and conducted Internet searches of "gunshot wounds" and of "murdered wives." Relying on these facts, the district court concluded Eddington would have received the same sentence, regardless of the audiotapes of his ex-wife's police interviews.

(*Id.*)

Also in the same paragraph, in analyzing the district court's conclusion, the Idaho Court of Appeals did *not* conclude that the sentence "would not have been different," but instead concluded that the deficiencies "did not prejudice Eddington." (*Id.*)

Petitioner asserts that the Idaho Court of Appeals opinion is contrary to the *Strickland* standard, even though the Idaho Court of Appeals identified the correct standard of law, concluded that Petitioner failed to make that showing, and concluded that the deficiencies "did not prejudice" Petitioner. However, a habeas corpus court is not "require[d] ... to ignore a state court's explicit explanation of its own decision." *James v. Ryan,* 733 F.3d at 916. The double deference standard requires Petitioner to

show that no reasonable jurist would disagree with his contention that the Idaho Court of Appeals did not use the "reasonable probability" standard to review the state district court's decision. *See id.* Indeed, in the context of and because of the serious nature of the crime and the gruesome research Petitioner conducted before the crime, Petitioner failed to show that there was a reasonable probability that, but for his trial counsel's mistake, the outcome of the sentencing would have been different" had a different reasonable sentencing judge heard Petitioner's case. (*Id.* at 8.)

Assuming, as the state courts did, that Bartlett rendered deficient performance on this point, the Court turns to whether that omission prejudiced Petitioner's defense at sentencing. The Court agrees with the Idaho courts that it did not.

First, Bartlett *did* make the argument that Carrie exaggerated the degree of violence in her relationship with Petitioner. Bartlett made the important point that the custody judge would not have continued to give Petitioner 40% custody of their children if there had been such violence. That point was undisputed. Bartlett certainly could have bolstered his argument if he had remembered to ask for admission of the police interview that showed Carrie admitting that violence had not occurred during their long custody dispute. However, Bartlett still would have had to tread very lightly in that area so as not to be perceived as attacking the victim.

Along with his emphasis upon the fact that Petitioner had 40% physical custody of his children, Bartlett made a fairly convincing argument at trial that the prior custody battles were not relevant:

> And it's very easy now with Mr. Eddington sitting here, to say every little bad thing you can possibly imagine about him because, frankly, I'm not in a position, no more inclined to want to be, attack Ms. Eddington about those things, about why they didn't get along, about why there were so many difficulties in the custody issue, and, yet, every little thing, her perception of him, has come in, and I'm troubled by that because this court's supposed to be sentencing for the conduct for which he pled guilty, and I trust the court knows that.
>
> Carrie Eddington and her family are angry, and they're frustrated, and they're mad, and they're scared, and for that reason, they don't have perspective.

(State's Lodging A-5, p. 80.)

At the post-conviction hearing, Bartlett testified about the extreme care with which a defense attorney has to bring forward evidence aimed at the victim's credibility at a sentencing hearing:

> I represent the client, and I don't want to be seen as attacking a victim ... [b]ecause I am in some way the embodiment of the client. If I am attacking a victim, then it is though the defendant is reattacking the victim.
>
> * * *
>
> Also, it ignores the fact that a crime has been committed and that person is in fact a victim of that crime. And so attacking a person at sentencing I think is almost always going to backfire. In fact, there have been times when I have desperately tried to make a point that came close to attacking. That wasn't the purpose, but one could see it that

> way, and it has backfired. It's something you have to be very careful about because, of course, the system is there for a reason. This is a sentencing of your client, not the victim.
>
> And a bunch of bad information about the victim, particularly if it is not related to the offense, is not useful to the court and is likely to result in harm to your client.

(State's Lodging E-2, pp. 230-31.)

While perhaps Bartlett could have very gently raised the evidence that showed a lack of violence and harassing behavior before the crime was committed without directly attacking Carrie, this Court's review of the entire record leads it to conclude that the failure to bring forward the police interview, emails, or other minor discrepancies between what Carrie said before and after the crime would have done little to deflate the terrifying circumstances of the crime.

At sentencing, Carrie testified as follows:

> Honorable Judge, the actions of Ron Eddington have greatly affected my life. The night that he broke into my home and held me at gunpoint for an extended period of time was by far the worst night of my life. I have never felt a paralyzing fear like I did when I opened my eyes to find my ceiling fan on and Ron standing in front of me holding a handgun. Immediately my body started shaking so badly that I felt soreness in my arms and shoulders for days afterwards.
>
> I found it difficult to open my mouth to speak or even breathe normally. I realized later that I had urinated on my bed without knowing it I was so afraid. I was unable to work for almost two weeks. Having Ron point a gun at me repeatedly, over and over, telling me his plan to shoot me and then lay down beside me and kill himself, hearing a clicking sound coming from a handgun, seeing his finger on the

> trigger, to even go so far as to describe the type of bullets he would use to murder me, is beyond terrifying.

(*Id.*, p. 6.)

Carrie's father recounted that he had received a telephone call from the victim about 3:52 in the morning:

> She was crying, frantic and hysteric, I guess. It's hard to describe. And she immediately told me that Ron had come to her house, broken in, pointed a gun at her, threatened to kill her and then kill himself, and, told me that, she didn't need to worry. It wouldn't hurt, that he had hollow point bullets in the gun, and there would be no pain, whatsoever, and he wanted to be found laying in bed, his bed, with her, and then, of course, I immediately told her that I was on my way to come to her.

(*Id.*, p. 16.)

This Court concludes that the Idaho Court of Appeals recognized and applied the correct federal standard, and this Court is bound to review "the last reasoned decision" by a state appellate court, not the underlying district court opinion. *See Ylst*, 501 U.S. at 804. Where the state district court findings and conclusions differ from the state appellate court, it is the state appellate court's decision that governs and is reviewed by the federal habeas court. *See James v. Ryan*, 733 F.3d at 916. Because Petitioner has not shown that fair-minded jurists could not disagree that the Idaho Court of Appeals applied the correct standard and came to the correct conclusion on the prejudice prong of *Strickland*, he is not entitled to federal habeas corpus relief. Therefore, this claim will be denied and dismissed with prejudice.

## ORDER

**IT IS ORDERED:**

1. Respondent's Motion for Extension of Time (Dkt. 16) is GRANTED. The sur-reply brief is deemed timely and has been considered.
2. Petitioner's Motion for Leave to Present New Evidence (Dkt. 19) is DENIED as moot.
3. The Petition for Writ of Habeas Corpus (Dkt. 1) is DENIED and DISMISSED with prejudice.
4. The Court finds that its resolution of this habeas matter is not reasonably debatable, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); Rule 11 of the Rules Governing Section 2254 Cases. If Petitioner files a timely notice of appeal, the Clerk of Court shall forward a copy of the notice of appeal, together with this Order, to the United States Court of Appeals for the Ninth Circuit. Petitioner may seek a certificate of appealability from the Ninth Circuit by filing a request in that court.

DATED: March 31, 2021

Honorable Ronald E. Bush
Chief U. S. Magistrate Judge

APPENDIX D

**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 45803**

| | | |
|---|---|---|
| **RONALD EDDINGTON,** | ) | |
| | ) | **Filed: May 17, 2019** |
| **Petitioner-Appellant,** | ) | |
| | ) | **Karel A. Lehrman, Clerk** |
| **v.** | ) | |
| | ) | **THIS IS AN UNPUBLISHED** |
| **STATE OF IDAHO,** | ) | **OPINION AND SHALL NOT** |
| | ) | **BE CITED AS AUTHORITY** |
| **Respondent.** | ) | |
| | ) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Lynn G. Norton, District Judge.

Order denying petition for post-conviction relief, affirmed.

Ronald Eddington, Eagle Pass, Texas, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

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BRAILSFORD, Judge

Ronald Eddington appeals pro se from the district court's order denying his petition for post-conviction relief. For the reasons discussed below, we affirm.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Eddington's appeal follows this Court's remand for an evidentiary hearing on several factual issues raised in Eddington's petition for post-conviction relief. This Court previously set forth the following factual background:

> On August 9, 2013, Eddington broke into his ex-wife's home, held her at gunpoint, and threatened to kill both himself and his ex-wife. Once Eddington left the house, the ex-wife called her father, who then called the police. The State charged Eddington with second degree kidnapping pursuant to Idaho Code § 18-4503, burglary pursuant to I.C. § 18-1401, aggravated assault pursuant to I.C. § 18-905(a), and using a deadly weapon in the commission of a felony pursuant to I.C. § 19-2520. Eddington retained private counsel. Soon after

> Eddington was charged, his mother was charged with witness intimidation, I.C. § 18-2604. The charge stemmed from a letter Eddington's mother wrote to her ex-daughter-in-law about Eddington's charges. Eddington's trial counsel then agreed to represent Eddington's mother.

*Eddington v. State*, 162 Idaho 812, 816-17, 405 P.3d 597, 601-02 (Ct. App. 2017).

Eddington pled guilty to second degree kidnapping and aggravated assault. During the sentencing hearing, the State called several witnesses, including Eddington's ex-wife. At sentencing, Eddington's trial counsel neither objected to the testimony of Eddington's ex-wife nor cross-examined her. The day after Eddington pled guilty, the State dismissed the witness intimidation charge against Eddington's mother. *Id.* at 817, 405 P.3d at 602.

Eddington filed a petition for post-conviction relief, and the district court granted the State's motion for summary dismissal of the petition in its entirety. *Id.* Eddington appealed, and this Court concluded the district court erred in summarily dismissing several of Eddington's claims of ineffective assistance of counsel. *Id.* at 824, 405 P.3d at 609. Specifically, this Court concluded there were genuine issues of material fact regarding: (1) whether trial counsel's representation of both Eddington and his mother created an actual conflict of interest; (2) whether trial counsel pressured Eddington to plead guilty; (3) whether trial counsel was ineffective for failing to cross-examine or to object to the testimony of Eddington's ex-wife at sentencing; and (4) whether trial counsel was ineffective for not listening to police audiotapes. *Id.* This Court remanded the case for an evidentiary hearing on these claims.

On remand, the parties conducted discovery and then the district court held a two-day evidentiary hearing during which Eddington, his mother, his current wife, and trial counsel testified. Thereafter, in a written decision, the district court denied Eddington's four remaining claims of ineffective assistance of counsel. Eddington timely appeals this denial.

## II.

## STANDARD OF REVIEW

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Barcella v. State*, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009). To prevail on an ineffective assistance of counsel claim, the petitioner must show that trial counsel's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To establish a deficiency, the petitioner has the burden

of showing that trial counsel's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Knutsen v. State*, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). Where, as here, the petitioner was convicted on a guilty plea, to satisfy the prejudice element, the petitioner must show that there is a reasonable probability that, but for trial counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006).

This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011). There is a strong presumption trial counsel's performance was within the acceptable range particularly as to the lack of objections, which are generally considered to fall within the realm of tactical or strategic decisions. *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). "Choosing not to bring additional attention to statements . . . does not equate to inadequate preparation, ignorance of the law, or other shortcomings." *State v. Hall*, 163 Idaho 744, 834, 419 P.3d 1042, 1132 (2018).

In order to prevail in a post-conviction proceeding, the petitioner must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Baxter v. State*, 149 Idaho 859, 861, 243 P.3d 675, 677 (Ct. App. 2010). When reviewing a decision denying post-conviction relief after an evidentiary hearing, this Court will not disturb the district court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the district court's province. *Dunlap*, 141 Idaho at 56, 106 P.3d at 382; *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Baxter*, 149 Idaho at 862, 243 P.3d at 678.

## III.

## ANALYSIS

### A. Trial Counsel Did Not Have an Actual Conflict of Interest

Trial counsel jointly represented both Eddington and Eddington's mother. Eddington argues this joint representation compromised his representation. Whether trial counsel's joint representation was ineffective turns on whether there was an actual conflict of interest. Joint representation is not a per se violation of a defendant's constitutional right to legal representation unburdened by conflicts of interest. *State v. Guzman*, 126 Idaho 368, 371, 883 P.3d 726, 729 (Ct. App. 1994). "[J]oint representation of defendants does *not* constitute ineffective assistance of counsel unless [an] *actual* conflict is demonstrated." *Giles*, 125 Idaho at 923, 877 P.2d at 367.

An actual conflict of interest will not be presumed; rather, the petitioner must show an actual conflict. *Guzman*, 126 Idaho at 371, 883 P.3d at 729. Actual conflicts may include, for example, trial counsel's failure to present a defense or important evidence on the petitioner's behalf to benefit or avoid harming the jointly represented defendant. *Giles*, 125 Idaho at 923, 877 P.2d at 367. Once a petitioner demonstrates an actual conflict of interest, prejudice may be presumed. *Guzman*, 126 Idaho at 371, 883 P.3d at 729. Prejudice, however, is only presumed if trial counsel actively represented conflicting interests and an actual conflict of interest adversely affected trial counsel's performance. *Id.* Such a showing of an actual conflict satisfies both prongs of the *Strickland* standard, but in the absence of an actual conflict, there can be no ineffective assistance of counsel.

In support of Eddington's argument that trial counsel's joint representation created an actual conflict, Eddington points to numerous, diffuse facts including that his parents were paying for his defense; trial counsel expressed concern that the State might claim Eddington had aided and abetted his mother's witness intimidation; his presentence investigation report detailed his mother's conduct giving rise to her charge; the prosecutors communicated about the status of Eddington's case and his mother's case; his mother attended his sentencing hearing despite the existence of a "no contact order" prohibiting her from being near his ex-wife, who also attended the hearing; and his mother's charge was only dismissed after he pled guilty. Eddington argues the inferences from these facts clearly establish that his and his mother's cases were "linked," making his guilty plea a condition of the dismissal of his mother's charge and adversely impacting his representation.

We disagree. The district court correctly concluded that Eddington had failed to show an actual conflict of interest by a preponderance of the evidence. Among other things, the district court correctly found that there were never any discussions between the prosecutors and trial counsel about Eddington's case being linked to his mother's case; there were never any plea offers made linking the two cases together; there were no discussions between Eddington and his mother to support his claim that their cases were "linked"; and Eddington never stated during sentencing that he was pleading guilty so the prosecution would dismiss his mother's case. Further, there is no evidence trial counsel was biased in favor of Eddington's mother, despite her payment of Eddington's legal fees.

Eddington's argument on appeal places significant focus on the fact that his mother's dismissal occurred *after* his guilty plea. In particular, he challenges as inaccurate the district court's finding that "it was [trial counsel] who requested [Eddington's mother's charge] be dismissed after [Eddington's] sentencing so that the No Contact Order between the [ex-wife] and [the mother] remained in place to avoid [the mother] from further upsetting the [ex-wife] before [Eddington's] sentencing." Eddington disputes this finding and argues "the State, not [trial counsel], strategically scheduled [the mother's] dismissal."

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. Trial counsel testified the no-contact order protected Eddington's mother against his ex-wife making further accusations of intimidation, which protection was important because of the case's emotional nature. As this testimony shows, trial counsel's decision not to challenge the State's rescheduling of the dismissal was not the result of an actual conflict but, rather, of trial counsel's reasonable strategy.

The circumstantial facts Eddington identifies on appeal are inadequate to conclude the district court's findings are clearly erroneous. Based on these findings, the district court correctly ruled there was no actual conflict of interest. Accordingly, the district court did not err in concluding trial counsel was not ineffective because he jointly represented Eddington and his mother.

**B. Trial Counsel Listened to Police Audiotapes**

A common thread in many of Eddington's arguments on appeal is that, but for his trial counsel's failure to listen to the audiotapes of the police interviewing Eddington's ex-wife, the

outcome of his case would have been different. Eddington contends these audiotapes show his ex-wife has "compassionate and supportive feelings" for him, which is "a completely different narrative" than she presented at his sentencing hearing.

Both Eddington and his trial counsel testified at the evidentiary hearing about trial counsel's review of the audiotapes. Eddington testified that, when he inquired whether trial counsel had listened to all the audiotapes, trial counsel responded Eddington's family (who was paying for his defense) "could not afford" for trial counsel to review all the audiotapes. Further, Eddington testified trial counsel had previously told Eddington trial counsel had listened to the audiotape of Eddington's interrogation but "beyond that he didn't say anything else." Meanwhile, trial counsel unequivocally testified that he "listened to all the investigative audios in the case multiple times" and that he took notes while he listened.

The district court concluded that Eddington "has not met his burden of showing that counsel was ineffective because he failed to listen to the audio recordings [of his ex-wife's] police interviews. The preponderance of the evidence is that [trial counsel] did listen to that audio and was prepared to address it at sentencing." The evidence supports this conclusion, which turns on a credibility issue. Evaluating the credibility of the testimony of Eddington and trial counsel; weighing that testimony; and drawing inferences therefrom are functions solely within the district court's province, and we decline to second-guess such matters. *See Dunlap*, 141 Idaho at 56, 106 P.3d at 382. Accordingly, the district court did not err in concluding trial counsel was not ineffective for failing to listen to the audiotapes.

**C. Trial Counsel Did Not Pressure Eddington to Plead Guilty**

Eddington contends trial counsel pressured Eddington to plead guilty. The test for determining the validity of a guilty plea is whether it is a voluntary and intelligent choice among the defendant's available alternative choices. *Lint v. State*, 145 Idaho 472, 481, 180 P.3d 511, 520 (2008). When a defendant pleads guilty based on the advice of counsel, whether the plea is voluntary depends on "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.*

Eddington makes essentially three arguments on appeal in support of his claim that trial counsel pressured Eddington into pleading guilty; none of which is persuasive. First, Eddington asserts trial counsel pressured Eddington to plead guilty because trial counsel had an actual conflict of interest and was biased in favor of Eddington's mother. As discussed above,

however, the evidence does not support that an actual conflict existed; that the State conditioned its dismissal of the charge against Eddington's mother on his guilty plea; or that trial counsel was biased in favor of protecting Eddington's mother.

Second, Eddington contends that the day before the hearing to change his plea to guilty, trial counsel "raise[d] his voice," "yelled" at Eddington, and "was coercing [him] and threatening him with his mother's imprisonment and financial ruin if [he] did not plead guilty." He also contends that he was "shocked," "terrified," and had "no alternative" but to plead guilty. Trial counsel testified to the contrary that he did not recall getting angry with Eddington. The district court also noted the existence of "extensive" recorded conversations between trial counsel and Eddington in which trial counsel explained the importance of Eddington making his own decision about whether to plead guilty.

Based on this evidence, the district court rejected Eddington's assertion that trial counsel "yelled at [Eddington], got angry, told him he had to [plead guilty], and inferred his mother's case would not be dismissed [as] just incredulous" and "simply not credible." Likewise, the district court also rejected Eddington's testimony at the evidentiary hearing that he was lying under oath at the sentencing hearing about the voluntariness of his guilty plea due to pressure from his trial counsel. These findings are credibility findings within the district court's province, are supported by the evidence, and will not be disturbed on appeal.

Finally, Eddington asserts he "would have made a different decision regarding his plea" if he were "aware of the multiple contradictory and compassionate statements" his ex-wife made to the police. This argument, however, is not one Eddington alleged in his petition for relief or argued to the district court. For these reasons, we decline to address the argument. *See State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) (noting longstanding rule not to consider arguments raised for first time on appeal).

Regardless, "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970). "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *Id.* The district court concluded that trial counsel's advice was "competent and reasonable" and that Eddington "ultimately made up his own mind" to plead guilty. We agree; the evidence supports that Eddington's plea was knowing and voluntary.

## D. Trial Counsel Was Not Ineffective for Failing to Object to Testimony of Eddington's Ex-Wife or to Cross-Examine Her

Eddington claims his trial counsel was ineffective for failing to object to Eddington's ex-wife's testimony or to cross-examine her at his sentencing hearing. Eddington does not identify any objections trial counsel should have made or any specific cross-examination. Eddington does, however, reference the audiotapes of his ex-wife's police interviews and his phone calls, emails and texts to her, and he suggests this information would have disputed the State's narrative that he was "an obsessive, controlling, manipulative, stalking individual who was violently abusive."

Generally, whether to object or to cross-examine a witness involves trial counsel's tactical or strategic decisions, which this Court will not second-guess on appeal unless the decisions are a result of inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales*, 151 Idaho at 172, 254 P.3d at 73. In this instance, however, trial counsel expressly acknowledged he mistakenly failed to highlight at Eddington's sentencing hearing the inconsistency between the testimony of Eddington's ex-wife about his abuse and prior information indicating Eddington had never been physically abusive.

Given trial counsel's acknowledgement of the mistake, we assume for purposes of our analysis that trial counsel's representation fell below an objective standard of reasonableness. *See Aragon*, 114 Idaho at 760, 760 P.2d at 1176. Despite this assumption, however, Eddington has failed to establish prejudice. To establish prejudice, Eddington must show a reasonable probability that, but for his trial counsel's mistake, the outcome of the sentencing would have been different. *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (explaining prejudice standard extends to sentencing); *see also Richman v. State*, 138 Idaho 190, 194, 59 P.3d 995, 999 (Ct. App. 2002) (requiring evidence court would have ordered different sentence to show deficient performance prejudiced defendant).

Eddington failed to make this showing. As the district court noted, trial counsel's failure to mention the lack of prior physical abuse does not overshadow the gravity of Eddington's offense and the related facts, including that he held his ex-wife at gunpoint for over an hour, threatening to kill her; contemplated the crime over a course of time; and, before his crime, reviewed "gruesome photos of head wounds" and conducted Internet searches of "gunshot wounds" and of "murdered wives." Relying on these facts, the district court concluded Eddington would have received the same sentence, regardless of the audiotapes of his ex-wife's

police interviews.[1] This conclusion is supported by the evidence, and we agree trial counsel's failure to object to the testimony of Eddington's ex-wife and to cross-examine her did not prejudice Eddington.

## IV.

## CONCLUSION

Eddington did not meet his burden of proving ineffective assistance of counsel. Therefore, the district court's order denying Eddington's petition for post-conviction relief is affirmed.

Judge HUSKEY and Judge LORELLO **CONCUR**.

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[1] Eddington failed to present records at the evidentiary hearing of his phone calls, emails and texts to his ex-wife. As a result, they are not in the appellate record. In their absence, we presume they support the district court's decision. *See State v. Repici*, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992) ("[M]issing portions of the record are presumed to support the action of the district court.").

APPENDIX E

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

RONALD EDDINGTON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-16861

ORDER DISMISSING AFTER EVIDENTIARY HEARING (ON REMAND)

The Petitioner filed a Petition for Post-Conviction Relief pursuant to I.C. §19-4901, *et seq.* (Uniform Post-Conviction Procedure Act (UPCPA)). The Petitioner's verified petition was filed by counsel on September 30, 2015. The State filed an Answer on December 7, 2016. The Idaho Supreme Court remanded portions of allegations for evidentiary hearing in a decision dated May 8, 2017. An evidentiary hearing was held on November 15th and 17th, 2017.

Appearances:

Ellen Smith for Petitioner, the Petitioner was personally present.
Shelley Akamatsu for Respondent.

**PROCEDURAL BACKGROUND**

As noted by Petitioner:

> Mr. Eddington pled guilty and was sentenced by the Honorable Lynn Norton of the Fourth Judicial District . . . to ten (10) years fixed, followed by twelve (12) years indeterminate, for Kidnapping in the Second-Degree and five (5) years fixed for Aggravated Assault to run concurrently. Mr. Eddington was sentenced on March 13, 2014.[1]

[1] Verified Petition for Post-Conviction Relief, filed Sep. 30, 2015, p. 1, (hereinafter "Petition"). The underlying case is Ada County Case No. CR-FE-2013-10953.

Petitioner appealed the sentence but then withdrew that appeal. A Verified Petition for Post-Conviction Relief was filed on September 15, 2015 which originally stated eight bases for relief. The Court granted the Respondent's Motion for Summary Dismissal on June 22, 2016 and dismissed all claims, with a Judgment entered the same day. The Petitioner appealed.

In *Eddington v. State,* 162 Idaho 812, 405 P.3d 597 (Ct. App. 2017), the Court of Appeals affirmed in part, and reversed and remanded in part. The issues remanded for evidentiary hearing included portions of the First Ground for Relief[2] on 1) whether counsel was ineffective and whether there was an actual conflict of interest between Michael Bartlett[3] ("Bartlett) representing both Ronald Eddington, Jr. and Diana Eddington simultaneously on related criminal charges, and 2) if so, whether prejudice was shown by Petitioner; the Third Ground for Relief[4] of whether Bartlett was ineffective because he pressured Ronald Eddington, Jr. to plead guilty because there was a conflict of interest as alleged in the First Cause of Action; and the Fifth[5] and Sixth[6] Grounds for Relief of whether counsel was ineffective because he failed to listen to audio recordings of the ex-wife's police interviews and/or failed to cross-examine or object at sentencing to Eddington's ex-wife's testimony on whether her testimony was contradicted by her police interview.

An evidentiary hearing on these claims was held on Wednesday November 15, 2017 and Friday November 17, 2017.

**LEGAL STANDARDS**

The Uniform Post-Conviction Procedure Act, I.C. §§ 19-4901 through 19-4911, allows individuals convicted and/or sentenced for a crime to petition the Court for relief in the following situations: (1) the sentence is in violation of the constitution; (2) the Court lacks jurisdiction; (3) the sentence exceeds the maximum provided by law; (3) there is evidence of material fact, not previously presented and heard, requiring

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2 Petition, pp. 8-14.
3 Petitioner's counsel during the guilty plea hearing in the underlying criminal case.
4 Petition, pp. 17-22.
5 Petition, pp. 27-38.
6 Petition, pp. 38-44.

vacation of the sentence in the interest of justice; (5) the sentence has expired; (6) the petitioner is innocent, subject to the provisions for DNA testing in the statute; (7) or the sentence is subject to collateral attack upon any ground of alleged error. I.C. § 19-4901(a).

A petition for post-conviction relief is an entirely new proceeding and is civil in nature. It is distinct from the criminal action which led to conviction. *Stuart v. State,* 136 Idaho 490, 494, 36 P.3d 1278, 1282 (2001); *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991). Like a plaintiff in a civil action, a petitioner seeking post-conviction relief must bear the burden of proving the allegations upon which the petition for post-conviction relief is based by a preponderance of the evidence. I.C.R. 57(c); *Grube v. State,* 134 Idaho 24, 27, 995 P.2d 794, 797 (2000).

It is the Petitioner's responsibility to present admissible evidence at an evidentiary hearing. Unless introduced into evidence at the hearing, verified petitions and affidavits do not constitute evidence. *Loveland v. State*, 141 Idaho 933,936, 120 P.3d 751, 754 (Ct. App. 2005). A Petitioner is required to prove his allegations at the hearing by a preponderance of the evidence and the standard for avoiding summary dismissal, in which the district court is required to accept the petitioner's allegations as true, is not applicable at an evidentiary hearing. *Id*; *see also Willie v. State*, 149 Idaho 647, 649, 239 P.3d 445, 447 (Ct. App. 2010).

The elements of a claim of ineffective assistance of counsel are (1) that petitioner's trial counsel was deficient; and (2) that such deficiency prejudiced petitioner's case. *Goodwin v. State*, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2003); *Pratt v. State*, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000). Related to ineffective assistance of counsel, the applicant must show, first, that the attorney's representation fell below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668 (1984); *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Second, the applicant must demonstrate that he was prejudiced by his or her attorney's deficient performance. *Strickland v. Washington* at 691-692; *Aragon v. State* at 760-761. "Strategic and tactical decisions will not be second-guessed or serve as basis for post-conviction relief under a claim of ineffective assistance of counsel unless that decision is shown to have resulted from inadequate

preparation, ignorance of the relevant law or other shortcomings capable of objective review." *State v. Osborne,* 130 Idaho 365, 372-373, 941 P.2d 337, 344-345 (citing *Giles v. State,* 125 Idaho 921, 924, 877 P.2d 365, 368 (1994)). When faced with a tactical decision, the court utilizes the "strong presumption" that the decision fell within the acceptable range of choices available to trial counsel. *Hairston v. State,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999). To prove that such deficiency prejudiced Petitioner's case requires a showing of a "reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." *Aragon,* 114 Idaho at 761, 760 P.2d at 1177.

The district court is vested with the discretion of making factual findings, and must rely on substantial evidence in the record, although the evidence may be conflicting. *Martinez,* 125 Idaho at 846, 875 P.2d at 943; *Holmes v. State,* 104 Idaho 312, 314, 658 P.2d 983, 985 (Ct. App. 1983). "[A]n applicant's conclusory allegations, unsubstantiated by any admissible evidence, need not be accepted as true." *Roman v. State,* 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

**EVIDENCE PRESENTED AT THE HEARING**

The Petitioner did not offer the verified petition as evidence during the hearing and only offered one signed, sworn affidavit (Ex. 9 "Affidavit of Diana Eddington"). Unless introduced into evidence at the hearing, verified petitions and affidavits do not constitute evidence. *Loveland v. State*, 141 Idaho 933,936, 120 P.3d 751, 754 (Ct. App. 2005). The Idaho Court of Appeals specifically declined to overrule or extend *Loveland* in *Willie v. State*, 149 Idaho 647, 239 P.3d 445 (Ct. App. 2010). Since verified petitions and affidavits do not automatically become evidence at the evidentiary hearing, the Court is not to consider the allegations or any other affidavit just because it is a filed pleading.

The court heard the testimony of Ronald Eddington Jr., Diana Eddington, Tracy Eddington, and Michael Bartlett presented at the evidentiary hearing. The parties entered into a stipulation of certain facts filed in the record on November 15, 2017 and also stipulated to the admission of certain exhibits. The other exhibits were also admitted during the hearing. The Court has considered only the admitted exhibits.

There were many Eddingtons discussed at the evidentiary hearing so the Court will clarify for purposes of this decision. The Court will use "Ronald Eddington" to refer to the Defendant/Petitioner although his legal name appears to be Ronald Eddington, Jr. Ronald Eddington's father is also named Ronald Eddington so the Court will use "Ron Sr." to refer to the Petitioner/Defendant's father. Diana Eddington is the Petitioner/Defendant's mother. Carrie Eddington is the Petitioner/Defendant's ex-wife and she was also the ex-wife at the time of the crime, plea and sentencing. Carrie Eddington was the victim of the Petitioner's crime. Tracy Eddington is the Petitioner/Defendant's current wife and she was also married to the Petitioner/Defendant at the time of the crime, plea and sentencing.

**FINDINGS OF FACT**

On August 9, 2013, the Petitioner broke into his ex-wife's (Carrie Eddington's) house in Ada County, Idaho, held her at gunpoint for an hour, and threatened to kill both himself and her. During this time, Petitioner told Carrrie he had thought about killing her throughout the prior three years. As a result, Petitioner was charged by Indictment with four crimes (Respondent's Exhibit 1) including Count I, Kidnapping in the Second Degree; Count II Burglary; Count III, Aggravated Assault; and Count IV, a sentencing enhancement for Use of a Deadly Weapon in the Commission of a Crime.

On August 10, 2013, the Petitioner's current wife, Tracy Eddington, called Petitioner's mother, Diana Eddington, to tell her the Petitioner had been arrested. Diana Eddington lived in Idaho Falls and was in Idaho Falls sleeping at time the crime was committed in Ada County. Diana Eddington said she became aware in August through telephone calls with Petitioner that Petitioner admitted to police his involvement in the crime. Those jail calls were recorded. The Petitioner was originally represented by another counsel but the Petitioner's family was unhappy with that representation so they got references and selected Michael Bartlett as new counsel.

The Petitioner testified he hired Michael Bartlett to represent him in CRFE-2013-10953 on October 16, 2013. Bartlett testified he is a criminal defense attorney that graduated ninth in his class at University of Idaho Law School, graduating in 1996, and passing the Idaho bar examination the first time. Bartlett clerked for Judge Lansing on the Idaho Court of Appeals for two years, and then has practiced "99.9 percent" in criminal

defense work for almost twenty years with Nevin, Benjamin, McCain, and Bartlett, including teaching criminal defense at some continuing legal education seminars. Diana Eddington testified that she and her husband signed a written agreement for representation of the Petitioner by Bartlett (Petitioner's Exhibit B). Diana and the Petitioner both testified that the Petitioner was Bartlett's client, although Ron Sr. and Diana received the bills and paid the attorney fees. The Petitioner also signed this representation agreement on October 18, 2013.

On October 21, 2013, Diana Eddington was charged with Witness Tampering/Intimidating a Witness arising from an email written to Carrie on or about September 18, 2013. This was Ada County Case No. CRFE-2013-14859. The Court considered all of Petitioner's Exhibit X (which is also Respondent's Exhibit 2) which is the e-mail written by Diana to Carrie. But specifically, the Court notes which includes,

> ....
> Jail is a terrifying place.... The lack of enough food to eat, the confinement with men who are unstable and frightening at best, the total loss of privacy or any sort of control over anything in your life, never seeing daylight, constant fear for your safety and your life puts you into a whole other unknown world. Sharing a cell with three other men where you confined for 30 hours at a time every two days without access to any kind of distraction or hope is unbearable. And Ronnie knows he could be there for months prior to his sentencing. And then what? Off to prison for years?
>
> We know the decision about [the Petitioner's] future is in your hands, Carrie. We know you will do what is best for you and the children. This frightening event will be put to rest in your mind in time but the children have to live the humiliation of having their father in prison for the rest of their lives. How do they explain that to people? How does [your 12-year-old son] Riley tell his buddies where the father he adores is living? Our greatest wish would be that the charges would be dropped and he could get the psychological help he needs....

Diana testified that she told Bartlett that she did not intend to cause any harm by sending the e-mail and that she had no idea anyone would see the letter as harmful or negative toward Carrie. She felt she was just sharing her feelings and had no idea it could be considered witness intimidation.

Diana learned of the charge by receiving a bondsman's card in the mail. She called Michael Bartlett and he offered to represent her so she hired him. Mr. Bartlett

testified he believed it was Respondent's Exhibit 2 that was the basis of Diana's charge and, most likely, the sentence of "Our greatest wish would be that the charges would be dropped and he could get the psychological help he needs." that led to Diana's charge. Bartlett testified that he immediately told Diana that he was never in a position to promise any disposition but that that the State's case against Diana looked very weak and unfounded and should be dismissed quickly. According to Diana Eddington's affidavit, Mr. Bartlett stated he would do whatever he could to get the charges against Diana dismissed. Bartlett testified his reaction to seeing the charge was that it was incredibly week and unfounded, and that he was shocked she was charged at all.

Diana Eddington lived in Idaho Falls at the time of the crime and all the way through the Petitioner's sentencing. Mr. Bartlett's advice was for Diana to turn herself in to the Ada County Jail. So, on October 31, 2013, Diana and Ron Sr. drove to Ada County and she turned herself in at the Ada County Jail on the charge. She testified that she, Bartlett, Ron Sr., Tracy, and a bondsman met at the Jail and Bartlett went through Diana's e-mail to Carrie line-by-line and concluded it wasn't intimidation. Diana's testimony was that Bartlett said from the first time he talked with her about the charge that he could easily get Diana's charge dismissed because there was no evidence that she was trying to hurt Carrie. Diana testified that Bartlett never told her there was any other way to get her case dismissed; it was only because there was not enough evidence for the State to prove the charge. Tracy Eddington's testimony about the October 31, 2013 meeting was also that Bartlett said Diana's charge was unfounded, did not meet the criteria for that offense, and that he would do everything he could to get the charge dismissed. Petitioner's Exhibit V shows Diana posted bond on November 1, 2013 and Diana testified she then returned to Idaho Falls.

Diana's testimony was that Mr. Bartlett did not say anything to her about a potential conflict and that she did not sign any written waiver of any conflict. Bartlett did not find an engagement letter for Diana in his file so said he did not believe one was signed because he probably thought the representation would be brief. Diana testified that she asked Ron Sr. not to tell Ron about her charge because she did not want to add to Ron's stress. Diana testified that Bartlett said he had to tell Ron about the charge. The Petitioner's testimony was that he found out about his mother's charge on October 31, 2013

when Barlett visited him at the jail and told Petitioner about it. Petitioner stated Bartlett brought a copy of the e-mail and they reviewed it together. Petitioner testified that Bartlett said he offered to represent Diana, that the charge was unfounded, not to worry about it, and that the charge would probably be dismissed. Petitioner did not state at the evidentiary hearing that he stated any objection to Bartlett or anyone else to Bartlett's representation of both he and Diana.

Bartlett later asked Diana to write an e-mail addressing the payment of her fees and Petitioner's Exhibit FF is a December 29, 2013 email from Diana to Bartlett stating Bartlett had Diana's permission to use the retainer paid for Petitioner to also pay for Diana's legal charges. In Petitioner's Exhibit DD, a bill from Bartlett, Bartlett billed $46 on October 14, 2013 for reviewing a letter from Diana to Carrie and a voicemail from Tracy. Diana stated she thought the date was in error since it was before her arrest but she never brought it to Bartlett's attention. Bartlett billed 1.4 hours on October 30, 2013 for reviewing information which included information about Diana's case and billed 2.7 hours on October 31, 2013 for conversations with Diana and her self-surrender at the jail which also included a conference with Ron. Bartlett prepared his notice of appearance for Diana's case on November 12, 2013.

Bartlett acknowledged Rule of Professional Conduct 1.7(a) (Respondent's Exhibit 21) addresses concurrent conflicts but he testified that he did not view his representation of Diana and Ron as a conflict. Rule 1.7 provides "a lawyer shall not represent a client fi the representation involes a concurrent conflict of interest" and subsection (a) defines a concurrent conflict of interest to exist if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships."

Bartlett represented Diana at her arraignment hearing on November 26, 2013. Petitioner's Exhibit II is a No Contact Order for Diana Eddington with Carrie Eddington entered the same day. Although Diana testified she never saw it, the face of the document has a signature of Diana Eddington dated 11/26/13 and states she was served that day. Diana recalled a second telephonic hearing around

December 20, 2013 when Bartlett told Diana that Deputy Prosecutor Dan Dinger was going to drop the charge against her. Diana's testimony was that the preliminary hearing was continued but Dinger said he would not drop Diana's charge until Ron had pled guilty. Diana did not recall returning to Boise until her son's sentencing. Diana testified it was her understanding that her charge was supposed to be dismissed the day after Ron's guilty plea, although it was not dismissed that day. Instead, the preliminary hearing was again moved until after Ron's sentencing hearing and dismissed on March 18, 2014, the day after Ron was sentenced. Bartlett testified he was not concerned about Diana's pending charge because he was confident it would be dismissed. He testified he had never had a prosecutor say they would dismiss a case and then not dismiss it. Bartlett testified that in Petitioner's Exhibit N, it was Bartlett who wanted the Diana's preliminary hearing continued to the day after Ron's guilty plea because he was concerned that there wouldn't be a no contact order between Diana and Carrie if Diana's case was dismissed. He was concerned that, without the no contact order, Diana would talk with Carrie and Diana would get into additional trouble because it was Bartlett's perception that Carrie had used the no contact order to distance herself from Diana and the situation, and that Carrie had a willingness to accuse others and contact the police. Bartlett felt the no contact order was a "very good thing" that protected Ron and Diana, as well as the victim, since any contact with Carrie could reflect negatively or Diana or Ron. Bartlett viewed the later dismissal date would protect Diana from doing something detrimental during that intervening time. Bartlett actually mentioned his concern to the Court at the guilty plea hearing, Petitioner's Exhibit H, contains the prosecutor's statement that she had been reviewing the Petitioner's jail calls, and then Bartlett states, "...the State has charged his mother with the crime of intimidating a witness, and I'm concerned that they will claim that he is aiding and abetting that crime." After that, the Court stated it was unclear whether this intimidating a witness charge was part of the plea agreement with Ron Eddington so the Court gave counsel approximately twenty minutes to discuss the issue with counsel. The Court asked counsel if there was a plea agreement as to any potential charge and Faulkner stated the parties had agreed that if there was any intimidation from the date of the plea hearing forward, it would violate the plea agreement but any previous conduct of Mr. Eddington would not be considered the violate the plea agreement and would just be "fodder for argument in sentencing." Eddington then acknowledged on the record that was the

plea agreement, he was not required to accept a plea agreement, and that he was not required to change his previously-entered not guilty plea.

On cross-examination, Diana Eddington acknowledged that Ron never told her that he felt he had to enter a guilty plea to get Diana's case dismissed; never asked Diana to enter a guilty plea so that he could have a more favorable disposition of his case; and never said that Ron had to enter a guilty plea otherwise he felt his mother's case would not be dismissed. In Respondent's Exhibit 9, Diana's Affidavit signed September 28, 2015, Diana testified Bartlett repeatedly informed her that her charges against her were unfounded and that he would get them dismissed.

Bartlett testified that Whitney Faulkner, the deputy prosecutor in Ron's case, e-mailed a plea offer (Respondent's Exhibit 3) with a Settlement Offer sheet attached on December 9, 2013. Bartlett testified that there was never any discussion between him and Dinger or Faulkner about a resolution in Ronald Eddington's case being tied to Diana's case. He testified that there is such a thing as a joint offer for co-defendants in the same case where one co-defendant is more culpable than the other. Those offers are rare but are typically termed as, "If the other co-defendant pleads to X, then the State offers this to you...." Bartlett testified those offers must be made in writing. Bartlett testified that the State did not make any written offer in Ronald Eddington's case that contained any contingency related to Diana. Bartlett testified that no offer was ever made that these cases were linked, joint or concurrent offers between Ron and Diana's cases.

It was the Petitioner's testimony that Bartlett inferred on January 14, 2014 in a conversation at the jail the night before Petitioner's plea hearing that Petitioner had to plead guilty or Diana's case would not be dismissed. Petitioner stated that Bartlett wanted to complete the guilty plea form, Respondent's Exhibit 32. Petitioner's initial testimony was that the Petitioner only initialed the form and the rest was filled out by Bartlett. Petitioner testified he told Bartlett that entering a guilty plea "felt wrong" and that he didn't want to enter a guilty plea. Petitioner's testimony was that Bartlett then became very upset and yelled at the Petitioner, something to the effect of, "Take responsibility and sign damn thing." When Petitioner refused, Petitioner testified Bartlett was angry and yelled some more, saying something like, "call your parents and tell them you need $20,000 for a trial." Petitioner then testified Bartlett said, "Your

mom's case is going to be dismissed the day after this thing." Petitioner testified that he wasn't aware of that prior to Bartlett's statement and that he felt that Bartlett alluded that her case was somehow intermixed with the Petitioner's case. Petitioner then said he wanted more clarification of the facts but that Bartlett said he had not listened to all of the audios because Petitioner's family could not afford it. Petitioner testified he next told Bartlett that he was going to enter a plea but then tell the judge that he did not actually do the crime to which Bartlett, "exploded again," got mad, then stood pointing his finger saying, "you will say exactly what I tell you." Petitioner stated he felt Bartlett was alluding to his mom's case again. Petitioner described himself as flustered by exchange.

Bartlett's recollection of this visit differs greatly from Ron's recollection. Bartlett stated he did not recall whether he talked about his mother's case although it was likely they did. Bartlett said Ron conveyed some doubts, concerns or fears about a guilty plea, which was understandable. Bartlett said he told Ron that additional payment would be necessary for a trial, although Bartlett did not recall giving the cost of $20,000. He recalled he just said trial was more expensive although he had already taken the time to review all of the discovery thoroughly at significant cost. Petitioner's Exhibit DD, billing records, show Bartlett had billed 56 hours in preparation for Ron's case as of this date (which excludes 10.4 hours which was clearly attributable to Diana's representation). Bartlett testified that he did not always bill all of his time. Bartlett testified that he went through the discovery thoroughly and discussed it with Mr. Eddington. Billing records show that meeting with Ron and Bartlett lasted 2.8 hours. But Bartlett testified the Defendant never said he had changed his mind and never said he did not want to plead guilty. Bartlett testified that how the Defendant pleaded was the Defendant's choice. Bartlett testified he did not force the Petitioner to plead guilty.

Petitioner's course of recorded phone calls shed light on Eddington's decision to enter a guilty plea and lend credibility to Bartlett's version above. Petitioner's Exhibit V shows Bartlett met with Ron at the jail for 11.4 hours plus the time on 10/31/13 between October 2, 2013 and January 15, 2014. Petitioner acknowledged that Bartlett never lost his temper or yelled on the phone. Petitioner testified he was aware that the plea offer was that Petitioner was to plead guilty to Counts 1 and 3, then the State would

dismiss the other two charges, with open sentencing up to the maximum punishment for the two charges he pled to. Then, the State would request a psychological evaluation of the Defendant by Dr. Robert Engle. In the December 11, 2013 phone call, Bartlett told the Petitioner that Bartlett thought the defense strategy should be to "force their hand" by going to the status conference the next day and telling the State that the Defendant was "not taking their deal." Bartlett discussed his perception that Dr. Engle was not as defense-friendly as other evaluators.

In another call, the Petitioner and Bartlett discussed the plea offer to which Petitioner says, "wow, kidnapping, that's bad." Bartlett follows up with, "So, I have permission to go forward?" and Petitioner responds, "yeah, I guess." Upon hearing that tentative response, Bartlett actually told Petitioner to think more about whether to plead because Bartlett didn't want the Petitioner to guess. Bartlett tells the Petitioner that he thinks pleading out is the right thing to do but that Bartlett wants the Petitioner to have more time to think about it. There was no discussion about Diana's case on any calls recorded to this point. Petitioner did not enter a plea at the status conference on December 12, 2013.

After the status conference, Respondent's Exhibit 24 is a call on December 12, 2013 where Petitioner acknowledged to his mother that he had gone to court but was going to wait to enter a plea. Petitioner stated he felt the plea offer was "really awful." Diana asked if they gave a plea offer and Petitioner responded, "Well, if you call it that." He stated in this call that he did not think he was going to plead to it because it didn't "make much difference timewise." He acknowledged he had received the offer a couple of days earlier, again reiterated the offer was "awful," stated he had discussed it with Bartlett, and Bartlett had said Carrie did not want to drop any charges. "I know what they are offering—it's just awful, what they are offering is essentially nothing." Petitioner stated he was unsure if he should just go to trial but that he couldn't comprehend them putting him away for year and years and years. Petitioner stated he did not see how he could plead guilty to kidnapping but that Bartlett explained the legal reason (with the explanation cut off in the recorded call).

In another recorded call, Petitioner asked Bartlett what he felt was the best option for Petitioner and Bartlett advised the Petitioner it was to plead to the two charges with open recommendations, and then discussed the difference in evaluations between Dr. Engle and Dr. Johnston.

Respondent's Exhibit 25 was a call recorded on Friday, December 13, 2013, between Petitioner and Tracy. Petitioner told Tracy that he had talked with Bartlett and was going to ponder the offer over weekend and then decide on Monday. On the same day, in Respondent's Exhibit 26, Petitioner told Diana he was going to talk with Bartlett over the weekend to let him know Petitioner's thoughts and to "discuss how long the rope I want to hang from is." There was still no discussion with Diana about her case.

Bartlett testified about the timing and content of the telephone calls. Bartlett testified the offer in Respondent's Exhibit 3 was going to be revoked on Friday, December 13, 2013. Still, Bartlett testified that he did not respond to the Prosecutor by Friday because Ron needed time to consider whether to enter a plea; whether to counteroffer; and Ron needed to know how he felt about the evaluation required if he entered a plea agreement. Bartlett testified his client needed to be confident in his decision and that his client wasn't so he advised Eddington to take more time to think about his decision.

Petitioner testified that in a conversation on December 16, 2013, Petitioner told Bartlett that he would agree to plead to Second Degree Kidnapping and Aggravated Assault because his plea was due if he was going to take advantage of the State's offer. Petitioner acknowledged he discussed the plea offer for four or five days in recorded phone calls with Bartlett. Petitioner said he reluctantly agreed to plead because Bartlett had not come to see him and it wasn't binding. Petitioner acknowledged he had time to think about whether to enter a plea.

Petitioner spoke with Bartlett on two recorded calls on December 16, 2013. In the first call, Bartlett asked Petitioner what he wanted to do and Petitioner responded he would "go with" Bartlett's expertise meaning he would plead to two charges instead of four. Bartlett responded that he would set a meeting with Dr. Johnston and discussed the presentence evaluation process and requesting additional time before sentencing. Bartlett states in the call to Petitioner, "I think this is the best we are going to get, there is not a lot of incentive to play ball, this is a slam dunk case." Then, in the second call, Petitioner expresses his feeling that he wouldn't be in jail if he'd actually shot Carrie, explaining he was really depressed when he made that statement. Petitioner testified he had previously discussed an "Ambien defense" with Bartlett and stated in this call, "I've never hurt anyone so I wasn't going to hurt her—I was whacked out on Ambien." Bartlett expressed concern with Petitioner using the

statement "whacked out on Ambien," stating the Petitioner didn't want to blame the events on medication and that the Petitioner had to take responsibility during the presentence process. Bartlett cautioned the Petitioner to not to use that language loosely so that an evaluator could consider it as not taking responsibility. Bartlett expressed his view that this was not a drug-induced crime because the evidence looked like the Petitioner operated very efficiently. Bartlett again said it was important to accept responsibility.

Bartlett discussed his defense strategy in this case during his testimony at the evidentiary hearing. He stated the Defendant had confessed which drastically limits counsel's ability to defend at trial unless there were 1) constitutional issues to limit admissible evidence, or 2) issues that cause the confession to lack credibility. Bartlett's summary of the confession was that Petitioner confessed he went to Carrie Eddington's home, taking his firearm with him, with the intent to intimidate her into making different custody decisions, although without an intent to harm her. Afterward, Petitioner returned home, took more Ambien, and then went back to bed. Bartlett discussed his assessment of the use of Ambien as a defense in this case and that Ambien can cause people to act in somnolent state or sleepwalking. He testified that, in his experience, people who used Ambien usually acted confused, disjointed, and couldn't accomplish detailed tasks. Bartlett testified that he considered using this strategy but did not feel it was a very effective defense strategy in this case because the Petitioner had to get out of bed without waking his wife, get into closet, take his firearm and load it, then drive his car to Carrie's, get into Carrie's house using a garage code, where Petitioner then had a one-hour-long conversation where Carrie did not notice any issues with Petitioner's behavior. Then, Petitioner drove back to his house, unloaded the gun and put it back into the closet, and finally got back into bed. Bartlett testified all this was unlikely on a drug that causes someone to sleep. Therefore, Bartlett felt that even though Tracy and the Petitioner had suggested using the "Ambien defense" at trial or sentencing, that strategy would be ineffective in gaining an acquittal at trial or a lesser sentence.

Bartlett testified he reviewed all of the discovery he was provided except for some of the jail calls, relaying the jail calls of his client provided in discovery were extensive. The billing records support this. He testified he reviewed the downloads from the cell phone and the computer (which included a substantial number of gruesome crime photos of head wounds,

particularly of women, for a substantial period of time—and his client's statement that Ron had intentionally looked at these photos), all of the audios of police interviews which was about nine hours, photos, and over 1,000 pages of documents. Bartlett testified he listened to Carrie's statement to the police several times. Carrie had told police that Ron had told her that night that he'd been thinking about this crime for three years. Although Ron said he could not remember that night, Ron told police that what Carrie said was true and accurate.

Bartlett testified he listened multiple times to all of the police interview audios, including the one with Carrie Eddington, and he took notes as he listened. He testified that his assessment was that the evidence to support the aggravated assault and burglary charges was "incredibly strong" while the evidence to support the kidnapping charge was weaker because Ron did not make Carrie move at all—she was always in the bedroom—but there was still a risk of conviction on that charge. Bartlett testified he viewed this as a sentencing case with a strategy of getting the best deal possible by removing two of the charges to limit the possible sentence recommendation of the State.

Respondent's Exhibit 27 is a phone call from the Petitioner to his mother on January 14, 2014—the same day Petitioner testified that he was threatened by Bartlett during their conversation at the jail. Petitioner calmy asked his mother about the cost of his defense and how much more it would cost, assuring her he would pay his parents back. Diana replied, "We're not starving to death and it will be a while before we do." Petitioner told his mom that Tracy's dad is well off so his parents would get their money back. Diana assured the Petitioner, "Don't worry, we just want this settled for you in the best way. In our old age you'll take care of us." There was no mention of Diana's case during this call and no mention of going to trial, changing his mind about entering a guilty plea, being coerced or pressured into a plea by Bartlett, or any angry exchange with Bartlett.

Bartlett testified that it was Monday when the Defendant decided to enter a guilty plea, that Bartlett and the Defendant had talked through the issues, and that the Defendant made up his mind to enter a guilty plea before Bartlett talked with Whitney Faulkner about accepting a plea deal. After Petitioner relayed his desire to Bartlett, it was then that Bartlett contacted Whitney Faulkner and then Dr. Johnston. Bartlett contacted Whitney Faulkner by e-mail in Petitioner's Exhibit S, requesting that his client not be required to use Dr. Engle

for the psychological evaluation. Faulkner did not want evaluation by Dr. Beaver. So, both counsel agreed the Defendant could be evaluated by Dr. Johnston or Dr. Engle. Bartlett e-mailed Whitney Faulkner on Monday saying Ron Eddington was willing to accept the State's offer. This e-mail is Petitioner's Exhibit HH, which shows Whitney Faulkner forwarded Bartlett's response at 12:01 am on December 17, 2017 to Kate Curtis and Dan Dinger. Bartlett testified that his strategy with this plea was to create time to get a favorable evaluation by Dr. Johnston, but then he would still have the opportunity to get another evaluation if that one turned out poorly. Bartlett also wanted time to prepare favorable presentence materials, hoping a favorable evaluation and materials would persuade the prosecutor to have different view of his client.

While initially the Petitioner had said Bartlett brought the guilty plea form all filled out except initials, he later testified that on Respondent's Exhibit 32, the guilty plea form, Bartlett told him what to write so Petitioner actually wrote it verbatim including, "all other charges will be dismissed. I will plea [sic] guilty to these charges (above) and undergo psycologic [sic] evaluation by Dr. Michael Johnston with a domestic violence component." In response to question number 53, Petitioner acknowledged he swore under penalty of perjury that the information was true and correct and signed the form. Although the Petitioner swore to and signed the form that said it was a knowing, intelligent and voluntary plea, Petitioner testified he was threatened and felt like he had no choice but to enter a guilty plea. He testified at the evidentiary hearing that he essentially lied at the guilty plea hearing and did not want to plead to the charges. He testified that no one threatened him with bodily harm but that he felt coerced into entering a guilty plea and like he had no alternative for his mom. He acknowledged he signed the guilty plea form on January 15, 2014, that he answered it was a free and voluntary plea in answer to number 43, that there were no other promises that influenced his decision to plead guilty in answer to number 14, that he agreed to the psychological evaluation as part of plea agreement in number 31, and that he understood no one could force him to plead guilty and it was his voluntary choice in answer to question number 42, and he was pleading guilty because he committed the crimes in number 44. Petitioner testified he saw the guilty plea form and plea agreement given to court, he testified he had read every word of guilty plea form,

heard the terms of written plea agreement on the record, and stated those were terms. He said nothing during this hearing about his mother's case and acknowledged he entered a guilty plea under oath. He also testified that he never told the judge that he did not want to plead guilty. The guilty plea hearing transcript was admitted as Petitioner's Exhibit H.

After the plea hearing, on January 17, 2014 Petitioner had a call with his mother (Respondent's Exhibit 28). Petitioner asks if she heard from Bartlett about a court date that day. His mother responded that Bartlett said they shouldn't talk about it so she couldn't tell him. Petitioner then asks, "Did they dismiss it?" and his mother responds, "Not yet." The Petitioner's response is just, "Okay." Diana reiterates that Bartlett has been adamant about not talking about things. Petitioner asks if his mother has another court date and she responds, "Yes." Petitioner asks, "You have to go?" and his mother responds "No" and then that Petitioner can give Bartlett a call, followed by "They are listening to these phone calls." Petitioner states, "They've made promises." Petitioner testified he asked his mother about her case because he wanted to know if her case was dismissed because Bartlett had informed Petitioner Diana's case would be dismissed the day after the Petitioner's guilty plea. The next day, Diana's preliminary hearing was again set over until after Petitioner's sentencing hearing. The earlier preliminary hearing notice had noted that Diana was not required to be present on January 16, 2014. Diana testified that she could not remember whether she travelled to Boise for the guilty plea hearing.

Finally, the Petitioner's testimony about Bartlett's anger, threats and yelling on January 14, 2014 is simply not credible given the extensive conversations recorded between Petitioner and Bartlett and Bartlett's extensive explanation about the importance of Petitioner making his own decision whether to enter a plea. The guilty plea hearing and guilty plea form also show by a preponderance of the evidence that there was no covert plea agreement linking dismissal of Diana's case with Ron's guilty plea. While the Petitioner testified at the evidentiary hearing that he was lying at the plea hearing and that his testimony at the evidentiary hearing was more credible, the Court finds by a review of all of the evidence that the Petitioner's testimony at the guilty plea hearing was the truth as supported by the record and that Petitioner's testimony at the evidentiary hearing was not credible.

Diana e-mailed Respondent's Exhibit 12 to Bartlett on December 9, 2013 which was a list of names and addresses for letters of support that Bartlett requested. Bartlett sent letters to these explaining his request for support letters. Diana testified that she wrote Petitioner's Exhibit U dated February 16, 2014 and would have testified if asked since she attended the sentencing hearing. It was Diana's testimony that she later saw that letter with a portion at the bottom crossed out. The portion crossed out states,

> The effect of Ron's actions last August on these children has been heart breaking ~~and made worse after Carrie charged me with a felony after I wrote her an email asking for compassion for Ron and the children. She has a restraining order against me, and, from fear of further retaliation; I have not contacted my grandchildren, causing them additional confusion and grief. Carrie has not allowed her children to see or communicate with the newborn baby sister born on January 24.~~ If they were to have their father whom they love and adore taken away from them for a lengthy period of time also, I can't imagine the further damage to their lives....

(strike through in admitted exhibit). Diana testified that Bartlett said it was crossed out because it could influence the outcome of Diana's case so was not submitted to the court with the other support letters. Diana said Bartlett just said it would be "detrimental to me" but did not explain further and did not mention Ron's case.

Bartlett addressed Petitioner's Exhibit U, saying that it was absolutely intentional that he did not submit Diana's letter to the Court. Bartlett testified that his representation of Diana did not limit his ability to represent Ron. He testified that Diana's letter was inappropriate for submission as originally written because it talked about the effect of the case on the children without recognizing the Court could attribute the poor effects on the children to Ron's behavior. It also contained a phrase about Carrie charging Diana with a felony and having a no contact order as blaming the victim or showing that the whole situation was made worse by Carrie. Bartlett testified he always asked anyone writing a letter of support to leave out any statement that seemed to blame the victim. Bartlett said that, in his experience, when someone close to a defendant blames the victim, the judge thinks that attitude mirrors my client's thoughts and is ultimately unhelpful. So, he prefers letters of support that focus on good qualities. He testified having Diana testify at Petitioner's sentencing hearing was never a consideration in Bartlett's mind because he felt that it was a "particularly poor strategic decision" to let a parent, especially a mother, take the stand because a parent could very easily get walked into providing information that would be harmful to Ron. Bartlett testified that mothers don't accept

responsibility for their children's crimes and that judges expect parents to love their children and want positive outcomes. Bartlett testified that, in his experience, parents testifying at sentencing provided a big danger with limited benefit. Therefore, he never considered having Diana Eddington testify at sentencing.

Related to the presentation of evidence at the sentencing hearing, the Petitioner testified that he wasn't sure if Bartlett listened to all of the audios because he just remembered only seeing or hearing about police reports from Bartlett, except he recalled listening to his own interrogation. Petitioner testified he asked Bartlett to get copies of Ron's phone records and e-mails so that they could refute Carrie's statements that Ron had called or texted excessively which Ron felt made him appear as an obsessed stalker at the sentencing hearing. These records were not presented to the Court at the sentencing although they were included with the Petitioner's Rule 35 request for reconsideration of the sentence which was then denied.

Respondent's Exhibit 36 was Officer Dixon's police report which stated that Ron would send a few emails or texts a day to Carrie and not the extraordinary amount the officer had previously been told. This report is Bates stamped 000020 and 000021 in the presentence materials the Court received, Petitioner's Exhibit JJ. Bartlett said he did not view daily calls or texts as a problem since Ron and Carrie were co-parenting children. Counsel directed the court's attention to the computer download and the materials in the presentence report stating that Bartlett did not find the allegation of excessive emailing or texting supported by the presentence materials. Bartlett testified that the crux of the sentencing was not about stalking, but rather about what happened in bedroom that night. Stipulation number 2 by the parties was that Carrie agreed on the audio recording of her law enforcement interview that Ron had not been abusive before. The written police report did not contain that statement but it also did not contain any information stating Ron had been abusive in the past.

Bartlett testified he reviewed all of the discovery he was provided except for some of the jail calls because the number of jail calls for his client was extensive. Bartlett testified he reviewed multiple times all of the audios of police interviews including listening to Carrie's statement to the police several times and making notes. He testified he reviewed over 1,000 pages of document including all of the police reports and downloads. Bartlett testified he had received an advance copy of Dr. Johnston's evaluation and had the opportunity to provide a

review before the final version was submitted to the Court. He reviewed the presentence report well in advance of the sentencing as well. Billing records in Petitioner's Exhibit DD show Bartlett expended 37.2 hours after the guilty plea to prepare for the sentencing hearing (which excludes time representing Diana and discussing post-conviction options).

Bartlett testified that he developed a sentencing hearing strategy including do not attack the victim because he felt any attack on Carrie would be attributed to his client which almost always "backfires." He testified his approach at sentencing was to ignore the actual crime and make the hearing about the client, not the victim. Bartlett also testified it was a strategic decision not to focus on the frequency of e-mails and texts between Ron and Carrie because Bartlett felt a legitimate point was that this was a traumatic event in the victim's life causing the victim to see her and Ron's history together differently after this event—in a viewpoint that was inaccurate, and inconsistent with the custody cases where things went well for Ron. Bartlett said his strategy was to acknowledge that anger influenced Carrie and her family's view, but that the Court's focus should be on the crime as an isolated event and that, with treatment, the Petitioner would not be a risk to the community.

Bartlett testified that he reviewed all of the presentence materials which included Carrie's victim impact statement well in advance of the sentencing and prepared notes, Respondent's Exhibit 17. Bartlett stated that he knew Carrie had made the audio statement about no prior abuse by Ron and that Bartlett knew that she also had never made any allegations of physical abuse in the divorce or custody cases, either, even though she would have had the opportunity and motivation to make such allegations. He knew that her victim impact statement, Petitioner's Exhibit F, said that Ron had thrown things, even grabbed and pushed Carrie, although described as minor compared to the emotional abuse. Bartlett testified that he had intended to address this inconsistency during the sentencing hearing and had included it in bold in his sentencing argument outline. However, Bartlett testified that he got caught up in the sentencing argument and he failed to make that point in a clear way in the sentencing hearing. He testified that it was not because of lack of preparation but rather it was a clear mistake. Bartlett was cross-examined on the issue and testified that he would be happy to be found ineffective because, if this mistake played any role in this case, Eddington should get a lower sentence. He testified he was not worried about his reputation. Bartlett actually did state during the sentencing argument in Petitioner's Exhibit H, page 87, "I would

note that he had 40/60 custody of these children after multiple court proceedings. If a magistrate judge believed that he was so out of control, so manipulative, so controlling and so bad, why did he still have that much custody?" The Petitioner in his allocution addressed the Court stating, "I have never in my life physically harmed anyone."

Tracy Eddington testified that Michael Bartlett spoke with her after Ron's sentencing and was shocked that the sentence was so harsh. She said she talked with Bartlett about opportunities to get the sentence reduced and Bartlett suggested an appeal or a post-conviction claim alleging that Bartlett was ineffective and that Bartlett stated he would be willing to "fall on his sword" in this case. Tracy testified that she did not like Barlett's representation of her husband. Bartlett had relayed to Tracy that the prosecutor's perception of her was as a "silly little woman was being controlled," in part because she was pregnant with his child at the time, and because Ron had an affair with a different woman but Tracy did not leave. Tracy testified that if she had testified at the sentencing, she would have explained Ron's alcoholism, the mental health aspects of what went on with Ron including his signs of depression, and that they had started counseling together. Bartlett testified he had reviewed a letter from Tracy explaining all of this and offering other information prior to the sentencing and the billing records show Bartlett reviewed a great deal of information from Tracy. Tracy Eddington testified it was her belief that Bartlett had not reviewed all of the evidence in the case so she obtained all of the letters, texts, audios, and documents and reviewed all of them after the sentencing.

Bartlett testified he knew Carrie was going to make a victim statement and that she did not testify as a witness. His plan was to listen and respect the victim since the rules and the Constitution allow a victim to make a statement and there is not a great deal of legal latitude to object. Bartlett testified he could always comment on a victim impact statement which was a strategically better approach.

Bartlett testified that he never presents parents to testify at sentencings because 1) they are always proponents of their child so the weight of their testimony is insignificant, 2) they love their children so they are more emotional and less rational so is frequently difficult to figure out how to respond on stand , and 3) a letter can be controlled, evaluated in advance, and is not subject to cross examination. These letters can be evaluated in advance to be sure

they do not say anything inadvertently harmful. Diana was not called as a witness for these reasons and, although Tracy really wanted to testify, Bartlett felt it was a "horrible" idea for the same reasons and because the State would have used their testimony to its advantage to make Ron look manipulative.

Before pronouncing sentence, the Court specifically noted she had read the entire presentence report carefully and considered everything in that report in arriving at a sentence. The prosecutor asked for fifteen years fixed and ten indeterminate for the Kidnapping Second and an additional five years indeterminate, consecutive, for the Aggravated Assault. This would have been a sentence of fifteen years fixed, fifteen years indeterminate for a thirty-year unified sentence. The Court ultimately did not follow that recommendation, rather sentencing the Defendant to concurrent sentences resulting in a total unified sentence of ten years fixed, twelve years indeterminate for a total unified sentence of twenty-two years. This was eight years total less than requested by the State and five years fixed less than requested.

**FIRST GROUND FOR RELIEF**

**A. First Ground for Relief:[7] 1) whether counsel was ineffective and whether there was an actual conflict of interest between Bartlett representing both Ronald Eddington, Jr. and Diana Eddington simultaneously on related criminal charges, and 2) if so, whether Petitioner was prejudiced;**

Petitioner contends trial counsel was ineffective because he "concurrently" represented Petitioner and Diana Eddington in related criminal matters, without obtaining informed written consent from either party.[8] Petitioner claims this conflict of interest prejudiced Petitioner in plea bargaining negotiations and the sentencing phase of the underlying criminal case.[9]

The Idaho Court of Appeals has stated

> "Although *Strickland*[10] generally governs ineffective assistance of counsel claims, 'conflicts of interest arising from joint representation have been excepted from the general requirement that actual prejudice be shown.' This rule flows from the constitutional right to conflict-free counsel. But the presumption of prejudice is a narrow exception to *Strickland* and the mere

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7 Petition, pp. 8-14.

8 Verified Petition for Post-Conviction Relief, filed Sep. 30, 2015, p. 8.

9 Id.

10 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> potential of a conflict is insufficient. For this reason, joint representation alone is an insufficient showing because it is not per se ineffective assistance of counsel nor is it a per se actual conflict. Rather, '(t)he conflict itself must be shown' and the defendant must demonstrate 'that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'"

*Barnes v. State*, 2013 WL 5290424, *3 (Id. Ct. App. 2013), although it is an unpublished decision, this decision is a correct summary of Idaho's law on conflicts and cites *State v. Guzman*, 126 Idaho 368, 371, 883 P.2d 726, 729 (Ct. App. 1994); *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). The Defendant never raised any objection to the court claiming a conflict of interest by Bartlett. When a defendant did not object to the conflict, the defendant's conviction will only be reversed if he can prove an actual conflict of interest adversely affected his lawyer's performance. *State v. Severson,* 147 Idaho 694, 215 P.3d 414 (2009), citing *Cuyler v. Sullivan*, 446 U.S. at 348.

This is a situation where a mother and son were charged with crimes in separate cases that were somewhat related. This is not a situation where trial counsel was engaged in joint representation of co-defendants. The evidence at the hearing was that Bartlett's representation of Diana had no material effect on Bartlett's representation of Ron since Bartlett believed from the start that Diana's charge was unfounded and would ultimately be dismissed, 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 Diana further upsetting the victim before the Petitioner's sentencing. The Petitioner has failed to show facts by a preponderance of the evidence to support a conclusion that this was joint representation of co-defendants or concurrent representation that materially affected Bartlett's representation of Ronald Eddington.

The Petitioner has failed to show by a preponderance of the evidence that an actual conflict of interest existed under *Giles v. State*, 125 Idaho 921, 923, 877 P.2d 365, 367 (1994). First, Petitioner is the only one who says that he thought his guilty plea would have an impact on whether his mother's case was dismissed and the

Petitioner's statement to that effect is just not supported by the other evidence in the case, including Petitioner's contemporaneously recorded jail calls with counsel and his mother. The evidence is that neither deputy prosecutor Faulkner or Dinger ever suggested that a guilty plea by Ron was a condition to getting Diana's case dismissed in either Ron's or Diana's case. Diana never told Ron that his guilty plea was required to get her case dismissed. Bartlett had always firmly advised Diana that her charge was unfounded and that he would get her case dismissed for insufficient proof. Finally, the Petitioner's testimony about Bartlett's anger, threats and yelling on January 14, 2014 is simply not credible given the extensive conversations recorded between Petitioner and Bartlett and Bartlett's extensive explanation about the importance of Petitioner making his own decision whether to enter a plea. The guilty plea hearing and guilty plea form also show by a preponderance of the evidence that there was no covert plea agreement linking dismissal of Diana's case with Ron's guilty plea. While the Petitioner testified at the evidentiary hearing that he was lying at the plea hearing and that his testimony at the evidentiary hearing was more credible, the Court finds by a review of all of the evidence that the Petitioner's testimony at the guilty plea hearing was the truth as supported by the record and that Petitioner's testimony at the evidentiary hearing was not credible.

Additionally, the Petitioner's and Diana's assertions that Bartlett failed to offer Diana's letter or call Diana at sentencing was because of the actual conflict in representation is also not supported by the evidence. The preponderance of the evidence shows that Bartlett had clear and strategic reasons for not providing Diana's letter of support to the Court and not calling a mother as a witness in the sentencing phase of a non-capital case. Bartlett's strategy was sound and will not be second-guessed by this Court based upon all the evidence presented at the hearing.

The Petitioner has not shown by a preponderance of the evidence that an actual conflict existed. Petitioner has not met his burden of proof to show that Bartlett's representation of both of Diana and Ron precluded effective representation of Mr. Eddington during his guilty plea or subsequent sentencing. He has failed to show that Bartlett rendered ineffective assistance due to an actual conflict of interest. He has also failed to show that Bartlett's representation violated the Idaho Rules of Professional

Conduct.[11]

The Petitioner completed a guilty plea advisory form which he swore in open court was correctly answered by him and the truth. In this form, he specified that there were no other promises, rewards, favorable treatment or leniency other than the plea agreement. The Petitioner's claim of coercion is also contradicted by the guilty plea proceeding itself. Although there was a discussion that Petitioner would not be charged with aiding and abetting Diana Eddington's charge of intimidating a witness, nothing was ever said in the prior phone calls, in any of the e-mails between the prosecution and counsel, or during this hearing about any requirement that Petitioner plead guilty in order for Diana Eddington's charge to be dismissed.

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 Petitioner and Petitioner's mother. Petitioner has failed to show by a preponderance of the evidence that dismissal of charges against Petitioner's mother was in any way conditioned upon Petitioner pleading guilty to the charges against him. And Petitioner has failed to show that Bartlett's representation of Petitioner fell below an objective standard of reasonableness. Since the first prong of *Strickland v. Washington* has not been met, the First Ground for Relief must be dismissed.

But even if the first prong was met, the Petitioner has also 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 basis for post-conviction relief under a claim of ineffective assistance of counsel unless that decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. The court utilizes the "strong presumption" that counsel's decision fell within the acceptable range of choices available to trial counsel. Petitioner has failed to show that removing Diana

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[11] But even if there was a violation of those rules, it still would not demonstrate that counsel provided ineffective assistance. *See, e.g., United States v. Ailemen*, 43 Fed. Appx. 77, 83 (9th Cir. 2002) ("[E]ven if the attorneys violated rules of professional conduct, their conduct did not preclude effective representation of their client."). Under such circumstances, the remedy is a referral to the Idaho State Bar, as opposed to post-conviction relief.

Eddington's support letter from those proffered to the Court was not strategic—especially given the specific language of the letter stricken through. In fact, the evidence before the Court was that Petitioner's counsel had a very clear and reasonable strategy and was well prepared to present a coherent sentencing case to the Court. Additionally, the evidence before the Court is that Diana Eddington's letter would have negatively impacted the Court's perception of Diana and her son as not truly understanding the gravity of Ron's offense and it impact on the victim and her children. Removing this letter avoided prejudice to the Petitioner because the positive aspects of the letter of a mother would have been outweighed by these comments that show obvious continued tension between the victim and Diana. Petitioner also failed to show that Petitioner was prejudiced by not calling Diana as a sentencing witness. Petitioner has failed to show that there was a reasonable probability that that the outcome of Petitioner's sentencing would have been different if Diana Eddington's letter had been included or if she had taken the stand to testify to the same information. Bartlett's assessment that such testimony carried much greater risk than benefit was reasonable and correct.

Having failed to meet the burden of proof at the evidentiary hearing, the Petitioner has shown no right to relief and the First Ground for Relief is DISMISSED.

**B. Third Ground for Relief:[12] Whether Bartlett was ineffective because he pressured Ronald Eddington Jr. to plead guilty because there was a conflict of interest as alleged in the First Cause of Action;**

> [T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* . . . test is nothing more than a restatement of the standard of attorney competence . . . The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

*Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

The Court incorporates its analysis in Section A above and its conclusion that the

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[12] Petition, pp. 17-22.

Petitioner failed to show an actual conflict existed. The Petitioner's assertion that Petitioner entered a guilty plea only because Bartlett yelled at him, got angry, told him he had to, and inferred his mother's case would not be dismissed is just incredulous given the extensive conversations recorded in this case.

Petitioner was indicted for Count I. Kidnapping in the Second Degree; Count II Burglary; Count III. Aggravated Assault; and Count IV. Use of a Deadly Weapon in the Commission of a Crime. The Petitioner testified he knew of the plea agreement and that he entered a plea to Counts 1 and 3, to get dismissal of the other two charges along with their possible consecutive sentences of an additional ten years for burglary and/or an additional fifteen year enhancement for using a deadly weapon in the commission of a crime. The plea bargain ultimately resulted in Petitioner receiving a fixed sentence of ten years, followed by an indeterminate twelve-year sentence. Petitioner's assertion that there is a reasonable probability that he would have rejected the plea deal and insisted on going to trial is also not credible. Bartlett's assessment of the case of a high likelihood of conviction on all of the charges, given the Petitioner's confession and all of the evidence presented at the evidentiary hearing, was certainly not unreasonable and reflects Bartlett's knowledge of the law, investigation and preparation in this case, and experience with judges and juries.

Petitioner's assertions that he was not fully apprised of the consequences of the plea bargain and his current dissatisfaction with the services of his attorney are also directly contradicted by his sworn declarations in open court. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). The Petitioner's assertion that he was lying at the guilty plea hearing but truthful at the evidentiary hearing carries little weight with the Court. In his Guilty Plea Advisory Form, Petitioner acknowledged that he understood the kidnapping charge alone had a maximum potential fixed sentence of twenty-five years. Petitioner also, among other things, affirmed that his guilty plea was the result of a plea agreement, that he understood the terms of that agreement, and that he understood he would be pleading guilty to the kidnapping and aggravated assault charges while the other two counts against him would be dismissed. He also affirmed that he understood that the Court was not bound by either the plea agreement or any

sentencing recommendation. He also acknowledged that he was not given any other promises which influenced his decision to plead guilty, that he had sufficient time to discuss his case with his attorney, that he had told his attorney everything he knew about the crime, and that there was not anything he had requested his attorney to do that had not been done. He also said that he understood that no one, including his attorney, could force him to plead guilty and that he was pleading guilty freely and voluntarily and because he had committed the acts alleged in the indictment. Petitioner also acknowledged that other than the plea agreement, no one had promised him any special sentence, reward, favorable treatment or leniency and that only the judge could "promise what sentence you will actually receive." He also acknowledged that he was satisfied with the services of his attorney.

Petitioner also reaffirmed in court under oath that he was fully aware of the consequences of entering his guilty plea and that he had sufficient time to speak with his attorney. He stated that he had understood the terms of the plea agreement and that it was acceptable to him. Petitioner also stated, under oath, that he had read every word in the guilty plea advisory form and that he had answered all of the questions truthfully. He also stated, under oath, that he understood that the Court was not bound by terms of the plea agreement. Petitioner stated, under oath, that he went into the victim's house "in the middle of the night and confined her into her bedroom . . . against her will . . . and threatened to shoot her with a gun."

Based on these facts, Petitioner has failed to show by a preponderance of the evidence that he was threatened or coerced by Bartlett into entering a guilty plea so that his mother's case would be dismissed.

The Court is free to arrive at the most probable inferences to be drawn by the evidentiary facts. In reviewing all of the evidence, this Court concludes counsel predicted how the facts, as he understood them, would be viewed by a court and whether the State could convince a jury of the Defendant's guilt although this can never be answered with certitude. Counsel reviewed the evidence, provided competent advice to the Petitioner about the risks of conviction and the pros and cons of entering a plea rather than going to trial, and bought extra time for the Petitioner to weigh his options and get additional advice from counsel. The preponderance of the evidence

shows counsel's advice was competent and reasonable, and that the Petitioner considered such advice and ultimately made up his own mind to enter a guilty plea under the terms of the plea agreement. Petitioner recognized that the plea agreement was not as favorable as he would have liked, the crimes he was charged with were serious, and that the plea agreement was for up to the maximum sentence for each crime to which he entered a plea. The Petitioner's revision of the conversations with counsel appears to be based more in his disappointment with the sentence than the reality of an uninformed and involuntary plea.

Therefore, the Third Ground for Relief is also DISMISSED.

**C. Fifth[13] and Sixth[14] Grounds for Relief: Whether counsel was ineffective because he failed to listen to audio recordings of the ex-wife's police interviews and/or failed to cross-examine or object to Eddington's ex-wife's testimony at the sentencing hearing**

Determining whether an attorney's preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Thomas v. State,* 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008). To prevail on a claim that counsel's performance was deficient for failing to interview witnesses, a petitioner must establish that the inadequacies complained of would have made a difference in the outcome of trial, and not just that counsel would have discovered weaknesses in the State's case. *Id.*

Based upon the admissible evidence at the evidentiary hearing, the Petitioner has not met his burden of showing by a preponderance of the evidence that counsel's investigation or sentencing strategy were inadequate. First, Petitioner's testimony that Bartlett may not have reviewed all of the audio interviews with police is not supported by a preponderance of the evidence. While counsel admits he did not listen to every jail call, the Petitioner did not present any evidence of how the failure to listen to every jail call was deficient. Bartlett's testimony and sentencing notes show that Bartlett listened to all of the investigative audios, including Carrie Eddington's. Bartlett was obviously

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13 Petition, pp. 27-38.

14 Petition, pp. 38-44.

familiar with each statement Carrie had made and how they differed with previous statements, and was obviously prepared to bring up these issues at sentencing. His testimony demonstrated he had a reasonable sentencing strategy that avoided highlighting the actual crime that the Petitioner committed and try to lessen the anger and animosity of the victim and her family to refocus the court attention on lack of criminal history, past pro-social behavior, lack of previous abuse and his role as a good father, that this was an isolated incident, and that the Petitioner was amenable to treatment which would lessen his risk to the community. Petitioner has not met his burden of showing that counsel was ineffective because he failed to listen to the audio recordings of Carrie Eddington's police interviews. The preponderance of the evidence is that Bartlett did listen to that audio and was prepared to address it at sentencing.

Additionally, Petitioner has also not shown by a preponderance of the evidence that Bartlett failed to cross-examine Carrie Eddington at the sentencing hearing since she only presented a victim impact statement and, as such, was not subject to cross examination. The Petitioner has also not stated a basis for any objection to Carrie Eddington's statement to the court or to any information contained in the police reports. Bartlett testified the decision not to call Carrie as a witness to question her about the inconsistency between her statement and the audio was strategic because he could address it with the court without drawing negative attention to all of the bad things his client that Carrie would repeat for the Court. What was shown at the hearing was that counsel made one mistake during the argument—he forgot to point out that Carrie's victim impact statement was inconsistent with the audio recording where she stated there was no prior abuse, and the custody and divorce proceedings. This was not due to lack of preparation or knowledge. Petitioner's counsel had prepared to present the point, it was just inadvertently overlooked in his notes at the sentencing. However, *Strickland v. Washington* does not require perfection by counsel. It requires an objective standard of reasonableness. While counsel failed to mention the inconsistency during his argument, counsel's overall performance in preparation for the sentencing, in developing a strategy and materials to present to the Court, and in arguing the sentencing has been shown by a preponderance of the evidence to meet the objective standard of reasonableness for counsel to be effective. Counsel made the

point that Ron had gained a significant amount of custody in the custody proceedings in spite of Carrie's statement about all the negative issues with the Defendant. "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State,* 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). Counsel's argument was effective in have the Court not agree with the State's sentencing recommendation, not give consecutive sentences, and not give the maximum sentence available for the Kidnapping Second. So, the Court would dismiss the Fifth and Sixth Grounds of Relief for these reasons.

In the alternative, even if this mistake in failing to mention the one inconsistency or to object to the victim impact statement fell below an objective standard of reasonableness under *Strickland v. Washington,* the Petitioner has failed to show the second prong by a preponderance of the evidence that he was prejudiced by this mistake and the Court would have given a different sentence if Petitioner's counsel had mentioned Carries allegations of throwing things, pushing and grabbing her were refuted by her audio statement to the police. The Court stated she read all of the presentence materials and the previous abuse was not documented in the police reports with the presentence materials. The failure to mention the lack of previous physical abuse does not overshadow the gravity of the offense the Petitioner committed by holding his ex-wife at gunpoint for over an hour and contemplating whether to kill her and himself. It does not overshadow the gruesome photos of head wounds viewed over a course of time by the Defendant and his corresponding statement to the victim that he had contemplated this crime over a course of time. It does not overshadow the computer internet searches which included "Murdered Wives," "Gunshots," "Gunshots to the Head" (from Dixon's testimony at the sentencing hearing) and "murdered women, murder victims, and dead from gunshots (all last viewed on 12/06/2012)" as noted in Dr. Johnston's report. When questioned about these pictures, the Petitioner stated to Dr. Johnston that he had frequently engaged in these internet searches in the month leading up to the crime, "including viewing scens of murder and suicide through the Internet search. He stated viewing these pictures through Internet searches was a way for him to process his feelings, and was also a method for him to relieve stress and

emotional pain." (Johnston's report in PIS at EE214) Dr. Johnston's report also stated, "The examinee denied a history of exposure to prior violence, in addition to denying a history of fighting, or engaging family members, acquaintances, or strangers in aggressive behavior." (Johnston's report in PSI at EE213). While the court considered Dr. Johnston's evaluation that the Petitioner had moderate or moderate-to-low risk to reoffend and was moderately amenable to treatment, Dr. Johnston's evaluation was absolutely correct in stating that the most severe level of harm if the Defendant reoffended would be death. (Johnston's report in PSI at EE219).

All of the information in the presentence report, its supporting documentation and the Petitioner's psychological evaluation lead the Court to find by a preponderance of the evidence that even if Petitioner's counsel would have mentioned that Carrie had previously told police that there was no prior physical abuse, the Petitioner would have received the same sentence given the gravity of this offense and the fact that any lesser sentence would have lessened the seriousness of the crime when weighed with the Toohill factors. The Court's primary goal in sentencing was to protect society, incluidng Carrie Eddington and everyone else that the Petitioner had domestic relations with. Therefore, Bartlett's performance did not prejudice the Defendant at sentencing giving the overwhelming evidence, including Defendant's admission, that he entered his ex-wife's house in the middle at of the night, and held her at gunpoint for about an hour, threatening to kill both himself and her, and routinely flicking and clicking a loaded handgun with her in the room. The Petitioner failed to show by a preponderance of the evidence that counsel's performance at sentencing was so deficient that it would warrant a resentencing. In fact, given all of the evidence and having heard Petitioner's arguments about those deficiencies, the Court having considered the audio interview of Carrie Eddington, along with all of the other sentencing evidence presented at the hearing, this Court finds Barlett's sentencing strategy and argument was very competent under the circumstances. The Court finds its sentence would have been no different with this additional information.

Having failed to meet his burden of proof at the evidentiary hearing, the Petitioner has shown no right to relief and the Fifth and Sixth Grounds for Relief are DISMISSED.

## IV. CONCLUSION

Based on the foregoing analysis, the Petition for Post-Conviction Relief is DISMISSED.

ORDERED Signed: 1/22/2018 02:03 PM

Lynn G. Norton
District Judge

## CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, I e-mailed (served) a true and correct copy of the above document to the following:

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CHRISTOPHER D. RICH
Clerk of the Court

Deputy Clerk Signed: 1/22/2018 02:36 PM

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO

APPENDIX F

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

| | |
|---|---|
| RONALD SCOTT EDDINGTON,<br><br>Petitioner,<br><br>vs.<br><br>JOSH TEWALT, IDOC Director,<br><br>Respondent. | CASE NO. 1:19-cv-00291-REB<br><br>NOTICE OF LODGING |

COMES NOW, Respondent, Josh Tewalt, IDOC Director, by and through his attorney, Mark W. Olson, Deputy Attorney General, Capital Litigation Unit, and hereby lodges state court records pursuant to Rule 5 of the Rules Governing 28 U.S.C. § 2254 Cases. All state court documents remain available for inspection upon the request of the

Court. Respondent reserves the right to augment the record if the need arises during the course of these proceedings.

The following records and documents are hereby submitted to the Court:

**A. State District Court Records (Trial), *State of Idaho v. Ronald Scott Eddington*, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086**

1. ICourt Portal Entry, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Accessed June 3, 2020. (22 pages).

2. Clerk's Record on Appeal, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086 (135 pages).

3. Reporter's transcript of change of plea hearing, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086; January 16, 2014 (23 pages).

4. Presentence Investigation Report and supporting materials, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086; (262 pages) **(lodged under seal)**.

5. Reporter's transcript of sentencing hearing, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086; March 13, 2014 (26 pages).

6. Trial Court Order Denying Motion for Reduction of Sentence, State of Idaho v. Ronald Scott Eddington, Ada County District Court Case No. CR-FE-2013-10953, Idaho Supreme Court Docket No. 42086; entered August 20, 2014 (5 pages).

**B. State District Court Records (Direct Appeal), *State of Idaho v. Ronald Scott Eddington*, Idaho Supreme Court Docket No. 42086**

1. Appellant's Notice of Voluntary Dismissal, State of Idaho v. Ronald Scott Eddington, Idaho Supreme Court Docket No. 42086, dated October 6, 2014 (1 page).

2. Appellant's Motion to Voluntarily Dismiss, State of Idaho v. Ronald Scott Eddington, Idaho Supreme Court Docket No. 42086, dated October 6, 2014 (2 pages).

3. Idaho Supreme Court Order Granting Motion to Dismiss, State of Idaho v. Ronald Scott Eddington, Idaho Supreme Court Docket No. 42086, entered October 6, 2014 (1 page).

4. Remittitur, State of Idaho v. Ronald Scott Eddington, Idaho Supreme Court Docket No. 42086, entered October 7, 2014 (1 page).

**C. State District Court Records (Post-Conviction), *Ronald Scott Eddington v. State of Idaho*, Ada County Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353**

1. Clerk's Record on Appeal, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353 (360 pages).

2. Reporter's Transcript of hearing motion to conduct limited discovery, and hearing on motion for disqualification of the State of Idaho's handling attorney, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353; December 3 and 17, 2015. (37 pages).

**D. State District Court Records (Initial Post-Conviction Appeal), *Ronald Scott Eddington v. State of Idaho*, Idaho Supreme Court Docket No. 44353**

1. Appellant's brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 44353, dated October 28, 2016 (50 pages).

2. Respondent's brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 44353, dated January 18, 2017 (12 pages, not including appendix).

3. Reply brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 44353, dated February 7, 2017 (9 pages).

4. Idaho Supreme Court Order Granting Motion to Augment, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 44353, dated January 19, 2017 (1 page).

5. 2017 Idaho Court of Appeals Published Opinion No. 25, Ronald Scott Eddington v. State of Idaho, Idaho Court of Appeals Docket No. 44353, dated May 8, 2017 (13 pages).

6. Remittitur, Ronald Scott Eddington v. State of Idaho, Idaho Court of Appeals Docket No. 44353, entered June 1, 2017 (1 page).

**E. State District Court Records (Post-Conviction Following Remand), *Ronald Scott Eddington v. State of Idaho*, Ada County Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 45803**

1. Limited Clerk's Record on Appeal, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353 (293 pages).

2. Reporter's Transcript of day 1 of probation violation evidentiary hearing, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353; November 15, 2017. (308 pages).

3. Reporter's Transcript of day 2 of probation violation evidentiary hearing, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353; November 17, 2017. (93 pages).

4. Post-Conviction Exhibits, Part 1, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353 (pages 1-300) **(lodged under seal)**.

5. Post-Conviction Exhibits, Part 2, Ronald Scott Eddington v. State of Idaho; Ada County District Court Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 44353 (pages 301-end.) **(lodged under seal)**.

**F. State District Court Records (Post-Conviction Appeal Following Remand), *Ronald Scott Eddington v. State of Idaho*, Ada County Case No. CV-PC-2015-16861, Idaho Supreme Court Docket No. 45803**

1. Appellant's brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated August 28, 2018 (50 pages).

2. Respondent's brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated December 17, 2018 (14 pages, not including appendix).

3. Reply brief, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated January 2, 2019 (12 pages).

4. Idaho Supreme Court Order Augmenting Appeal, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, entered March 16, 2018 (1 page).

5. 2019 Idaho Court of Appeals Unpublished Opinion, Ronald Scott Eddington v. State of Idaho, Idaho Court of Appeals Docket No. 45803, entered May 17, 2019 (9 pages).

6. Appellant's Petition for Review (on briefs already submitted), Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated May 29, 2019 (1 page).

7. Idaho Supreme Court Order Denying Petition for Review, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated July 18, 2019 (1 page).

8. Remittitur, Ronald Scott Eddington v. State of Idaho, Idaho Supreme Court Docket No. 45803, dated July 18, 2019 (1 page).

DATED this 11th day of June, 2020.

/s/
MARK W. OLSON
Deputy Attorney General
Capital Litigation Unit

APPENDIX G.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF IDAHO**

| | |
|---|---|
| Ronald Scott Eddington,<br>Petitioner,<br>v.<br><br>John Tewalt, IDOC Director,<br>Respondent. | Case No. 1:19-cv-00291-REB<br><br>PETITION FOR WRIT OF HABEAS CORPUS<br>(28 U.S.C. §2254) |

**REPLY BRIEF IN SUPPORT OF WRIT OF HABEAS CORPUS**


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## STANDARD OF REVIEW

The phrase "clearly established federal law" in §2254 (d)(1) refers to the "governing legal principle or principles" previously articulated by the Supreme Court. Lockyer v. Andrade, 538 U.S. 63, 71, 72 (2003). Only Supreme Court precedent may constitute "clearly established Federal law," but courts may look to circuit law "to ascertain whether...the particular point in issue is clearly established by Supreme Court precedent." Marshall v. Rodgers, 569 U.S. 58, 64 (2013).

Section §2254 (d)(1) applies to state court adjudication based on purely legal rulings and mixed questions of law and fact. Davis v. Woodford, 384 F.3d 628, 637 (9th Cir. 2003). A state court decision is "contrary to" clearly established law if the decision "contradicts the governing law set forth in [the Supreme Court's] cases." Williams v. Taylor, 529 U.S. 404-05 (2000). This includes use of the wrong legal rule or analytical framework. "The addition, deletion, or alteration of a factor in a test established by the Supreme Court also constitutes a failure to apply controlling Supreme Court law under the 'contrary to' clause of the AEDPA." Benn v. Lambert, 283 F.3d 1040, 1051 n. 5 (9th Cir. 2002). See e.g., Williams, 529 U.S. at 391-393-95 (Virginia Supreme Court's ineffective assistance of counsel analysis "contrary to" Strickland because it added a third

prong unauthorized by Strickland); Crittenden v. Ayers, 624 F.3d 943, 954 (9th Cir. 2010) (California Supreme Court's Batson analysis "contrary to" federal law because it set a higher bar for a prima facia case of discrimination than established in Batson itself.); Frantz v. Hazey, 533 F.3d 334-35(9th Cir. 2008) (Arizona court's application of harmless error rule to Faretta violation was contrary to U.S. Supreme Court holding that such error is structural.).

A state court's decision "unreasonably applies" federal law "if the state court identifies the correct rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case." Williams, 529 U.S. at 407-8. State court decisions can be objectively unreasonable when they interpret Supreme Court precedent too restrictively, when they fail to give appropriate consideration and weight to the full body of available evidence, and when they proceed on the basis of factual error. See e.g. Williams, 529 U.S. at 397-98; Wiggins v. Smith, 539 U.S. 388, 909 (2005); Rompilla v. Beard, 545 U.S. 374, 388, 909 (2005); Porter v. McCollum, 558 U.S. 30, 42 (2009).

Relief is also available under AEDPA where the state court predicated its adjudication of a claim on an unreasonable factual determination. Section §2254 (d)(2). Even factual determinations that are generally accorded heightened deference, such as credibility findings, are subject to scrutiny for objective reasonableness under §2254 (d)(2). For example, in Miller El v. Dretke, 545 U.S. 231 (2005), the Supreme Court ordered habeas relief where the Texas court had based its denial of a Batson claim on a factual finding that the prosecutor's asserted race neutral reasons for striking African American jurors were true. Miller EI, 545 U.S. at 240. An unreasonable determination of the facts exists where among other circumstances, the state court made its findings according to a flawed process – for example, under an incorrect legal standard, or when necessary findings were not made at all, or where the state court failed to consider and

weigh relevant evidence that was properly presented to it. See Taylor v. Maddox, 366 F.3d 992, 999, 1001 (9th Cir.), cert. denied 543 U.S. 1038 (2004). A state court factual conclusion can also be substantially unreasonable where it is not fairly supported by the evidence presented in the state proceeding. See e.g. Wiggins, 539 U.S. at 528. (state court's "clear factual error" regarding contents of social service records constitutes unreasonable determination of fact.); Green v. LaMarque, 532 F.3d 1028 (9th Cir. 2008) (state court's finding that the prosecutor's strike was not racially motivated was unreasonable in light of the record before the court.); Bradley v. Duncan, 315 F.3d 1091, 1096-98 (9th Cir. 2002) (state court unreasonably found that evidence of police entrapment was insufficient to require an entrapment instruction.), cert. denied, 540 U.S. 963 (2003).

To prevail in federal proceedings, a petitioner must establish the applicability of one of the §2254 (d) exceptions and also must affirmatively establish the constitutional invalidity of his custody under pre AEDPA standards. Frantz, 533 F.3d at 724. In many cases, §2254 (d) analysis and direct merits evaluation will substantially overlap. Accordingly, "a holding on habeas review that a state court error meets the §2254 (d) standard will often simultaneously constitute a holding that the substantive standard for habeas relief is satisfied as well, so no second inquiry will be necessary." Frantz, 533 F.3d at 736. In such cases relief may be granted without further proceedings. See e.g. Goldyn v. Hayes, 444 F.3d 1062, 1070 (9th Cir. 2001) (finding §2254 (d)(1) unreasonable in the court's conclusion that the state had proved all elements of the crime, and granting petition); Lewis v. Lewis, 321 F.3d 824, 835 (9th Cir. 2003) (finding §2254 (d)(1) unreasonableness in the state court's failure to conduct a constitutionally sufficient inquiry into a defendant's jury selection challenge, and granting petition); Williams v. Ryan, 623 F.3d 1258 (9th

Cir. 2010) (finding §2254 (d)(1) unreasonableness in the state court's refusal to consider drug addiction as a mitigating force at capital sentencing and granting relief).

"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 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) (internal quotation marks and citations omitted). In challenging the substance of the post-conviction court's findings, the Petitioner must establish that a court "could not reasonably conclude that the finding is supported by the record." Hibbler v. Benedetti, 693 F.3d 1146 (9th Cir. 2012) (quoting Taylor v. Maddox, 366 F. 3d 1000 (9th Cir. 2004).

The Idaho Appellate Court essentially agreed with every tenet of the District Court's order. "If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state 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 Barker v. Fleming, 432 F.3d 1085, 1093 (9th Cir. 2005)). The reasons cited by the state courts in determining their conclusions involved significant factual errors. Where a state court based its conclusions on a clear, factual error, even a "partial reliance" on the erroneous finding will demonstrate unreasonableness of the state court's decision. Wiggins, 539 U.S. at 528.

## ARGUMENT

**CLAIM ONE:**

**Petitioner's counsel rendered ineffective assistance of counsel due to an actual conflict of interest between counsel representing both Petitioner and Petitioner's mother simultaneously on related criminal charges.**

Petitioner's attorney, Michael Bartlett (hereinafter "Bartlett"), testified that he requested to hold out Diana Eddington's (hereinafter "Diana") dismissal for the day after Petitioner's change of plea hearing (Ev. Hr. 11/17/17 (Tr., p. 43, Ls. 15-25, p. 44, Ls. 1-8)), and then at Petitioner's plea hearing states his concern to the court of Petitioner's exposure to her charge. (App. Op. Brief, p. 15). Why? That the question seems odd foreshadows the answer. But to explain the question first: A prominent attorney with twenty years of experience alleges that he requested to the state that they accommodate his desire to protect his client with a continued NCO even though continuing the case could expose the client's son to her charge; even sharing this concern with the court. Such a strategy eludes reasonable explanation.

That the Petitioner's prosecutor, the day after Petitioner's plea hearing, took control of Diana's case (Record pp. 241-242), refused to dismiss it, and rescheduled her dismissal for the day after her son's sentencing hearing resoundingly reinforces that Bartlett's strategy was non-existent. Was, in fact, a post hoc rationalization that defies reasonable explanation and even simple logic. Reasonably, what makes all these actor's actions logical is that Bartlett, while being coerced by the state, was protecting Diana's eventual dismissal. In turn, Prosecutors Whitney Faulkner (hereinafter "Faulkner") and Dan Dinger (hereinafter "Dinger") avoided taking Diana's case through a preliminary hearing, promised to dismiss it, yet held it out for months and scheduled it for days directly after Petitioner's hearings. (App. Op. Brief, pp. 12-21).

It would certainly accommodate Bartlett's alleged strategy had he explained his concern to the court that Diana would contact Carrie Eddington (hereinafter "Carrie") without the No Contact Order. (Dist. Ct. Order, p. 9). However, Bartlett did not say this. Nor does his actual statement to the court even elude to this. His actual statement, on the record, "your Honor, the State has charged his mother with the crime of intimidating a witness and I'm concerned that they'll claim

he is aiding and abetting that crime", (Record p. EE 42 Ex. H (Tr., p. 7, Ls. 15-18)), is self-explanatory, and to ascribe a contrary meaning is an unreasonable determination of fact. (Dist. Ct. Order, p. 9). Indeed, it is unreasonable that Bartlett would expose his concern for Petitioner on the record after secretly requesting to hold out Diana's case, then the next day be ok with prolonging this secret strategy another several months. The unreasonableness of this alleged strategy, as well as the unreasonable determination of fact, 28 U.S.C. §2254 (d)(2), regarding Bartlett's statement in court is clear.

The Idaho Appellate Court in its opinion states, "...trial council's decision not to challenge the state's rescheduling of the dismissal was not the result of an actual conflict but, rather, of trial counsel's reasonable strategy." (Opinion, p. 5). Here, the Appellate Court acknowledges that the state rescheduled Diana's dismissal for the day after Petitioner's sentencing hearing. Why the state would do this is left unexplained. The Appellate Court, by acknowledging this shows the state, of its own accord, did the rescheduling and that Bartlett, who had no part in this action, chose not to challenge Ms. Faulkner on this matter. The Appellate Court states Bartlett's reason for his non-challenge was "counsel's reasonable strategy." Id. This finding is contrary to Strickland. "Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgements on which they were based." Strickland v. Washington, 466 U.S. 681 (1984). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Wiggins, 539 U.S. at 510, 533. Bartlett did not exercise reasonable professional judgement, Strickland, 466 U.S., at 691, if he, in fact, chose, of his own accord, to not challenge the state's rescheduling of Diana's case even though it would leave Petitioner exposed to aiding and abetting her charge. Nor is it reasonable that Bartlett would quietly go along with the state's rescheduling of Diana's dismissal for the day specifically after

Petitioner's sentencing hearing unless he was involved in an actual conflict of interest. Neither the District Court's conclusions nor the Appellate Court's conclusions can be supported as reasonable finding of fact or a reasonable application of federal law to the facts. §2254 (d)(1)(2). On December 17, 2013, Prosecutor Faulkner forwarded Bartlett's plea acceptance email to Diana's prosecutor Dinger. (Record p. EE 143 Ex. HH) (App. Op. Brief, pp. 17-18). As shown, there is no evidence that Dinger ever had any involvement in Petitioner's case. Id. Three days later, the evidence shows, Diana's promised dismissal was rescheduled for January 17, 2014, the "day after her son pleads guilty in district court," by Dinger. (Record p. EE 92 Ex. N). Bartlett testified that he requested this at the December 19, 2013 preliminary hearing for Diana's own protection by continuing her no contact order. Specifically, at the 11/17/17 evidentiary hearing Bartlett is asked by Petitioner's attorney, "And if these cases, Ron and Diana's cases, were completely unrelated, then why would it even be mentioned in that 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 that 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--." (Ev. Hr. 11/17/17 (Tr., pp. 43-44)). However, at the previous evidentiary hearing on 11/15/17, he seems to be uncertain as to why any of this rescheduling even took place. Bartlett is asked, "Why didn't they dismiss that day?" He responds, "I don't know. I can't recall if they had to get a new charging document or whatever the case might be." (Ev. Hr. 11/15/17 (Tr., p. 254, Ls. 8-11)).

As no other explanation was proffered by the state, it's unreasonable that Ms. Faulkner's forwarding of Bartlett's plea acceptance email to Diana's prosecutor on December 17, 2013, had to do with anything other than coordinating with Dinger the rescheduling of Diana's dismissal for "the day after her son pleads guilty in district court." (Record p. EE 92 Ex. N). These facts refute Bartlett's assertion that it was he who initiated the rescheduling of Diana's dismissal on the 19th for after her son's plea hearing. Indeed, as Bartlett showed in his evidentiary hearing testimony, he was unaware that the two prosecutors were or would be communicating between each other about the cases. (Ev. Hr. 11/15/17 (Tr., pp 256-257)). In addition, as his testimony at the 11/15/17 evidentiary hearing underscores, Bartlett did not pay attention to or have any awareness regarding his strategy to keep Diana out of trouble by violating her NCO. (App. Op. Brief, pp. 19-20). And, finally, his statement of concern at Petitioner's plea hearing regarding Petitioner's exposure to Diana's charge renders false his statement at the evidentiary hearing, "And I did not believe it would, in any way, impact Ron's case..." (Ev. Hr. 11/17/17 (Tr., p. 44, Ls. 12)). "It is unlikely that [an attorney] would concede that he continued improperly to act as counsel." Wood vs. Georgia, 450 U.S. 261, 265 n.5, 101 Sp. Ct. 1097, 1100 n.5, 67 L. Ed. 2d 220 (1981). "The existence of an actual conflict 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 vs. Ratella, 21 F.3d 1446, 1452 (9th Cir. 1994). "After the fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid person may be able to convince themselves that they would have used a strategy or tactic anyway when the alternative is the confession of ineffective assistance resulting from ethical limitations." United States vs. Malpiedi, 62 F.3d 465, 470 (2nd Cir. 1995).

Although the state argues that Bartlett had a strategic reason for holding out Diana's case, the record shows that his proffered explanations were developed after the fact. His explanations make no sense, nor can they overcome his statement at the plea hearing (Record p. EE 42 Ex. H (Tr., p. 7, Ls. 15-18)), or the fact that the two prosecutors were coordinating Diana's dismissal on December 17th prior to his alleged decision to hold out Diana's case at the December 19th, 2013 hearing. (Record p. EE 143 Ex. HH). Bartlett's post-hoc rationalization cannot even be said to be the result of a reasoned strategic decision and was not "within the wide range of reasonable, professional assistance." Strickland, 466 U.S. at 689. The evidence in the record points directly to an actual conflict of interest.

Taken as a whole, the Idaho Appellate Court's reliance on a series of unsupportable factual conclusions to excuse counsel's conflict of interest amounts to the type of "'post hoc rationalization' for counsels decision making" the Supreme Court has cautioned against. Harrington v. Richter, 562 U.S. 109 (2011) (quoting Wiggins, 539 U.S. at 526-27). Each of the Idaho courts factual determinations, individually and collectively, further "highlights the unreasonableness of the state courts decision." Wiggins, 539 U.S. at 528.

In its order, the district court indirectly acknowledges that Petitioner proved an actual conflict of interest. The district 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 basis for post-conviction relief under a claim of ineffective assistance of counsel unless that decision is

shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." (Dist. Ct. Order, p. 25).

Although an actual conflict of interest, per Strickland and Cuyler, presumes prejudice, the district court, as the Appellate Court did, applies Idaho's rule regarding post-convictions, citing the federal case United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F. 2d 1197 1201 (1973), which is contrary to Strickland's governing legal principles. Its factual findings have been shown to rest upon multiple clear factual errors that undermine both the District Court's findings and the Idaho Appellate Court's opinion. Petitioner has shown that both state courts findings of the actual conflict of interest were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," §2254 (d)(2), and an unreasonable application of clearly "established Federal Law, as determined by the Supreme Court of the United States," §2254 (d)(1).

Though the source of clearly established federal law must come from the holdings of the United States Supreme Court, circuit precedent may be persuasive authority for determining whether a state court decision is an unreasonable application of Supreme Court precedent. Duhaime v. Ducharme, 200 F. 3d 597, 600-01 (9th Cir. 2000). An actual conflict of interest exists "when during the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." Cuyler v. Sullivan, 46 U.S. 355, 356 (1980). To establish an actual conflict of interest, the petitioner must show (1) that his lawyer was under "an actual conflict of interest", and (2) that this conflict "adversely affected his lawyer's performance." Cuyler, 466 U.S. at 348. To further assist this analysis, to establish an adverse effect, a petitioner must satisfy, by a preponderance of the evidence, a three-part standard. See Mickens v. Taylor, 240 F.3d 361 (4th Cir. 2001) (en banc), aff'd 535 U.S. 162 (2002). He must,

first of all, "identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued." Id. Second, he must establish that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision." Id. In order to satisfy this second prong, "the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances." Id. Lastly, he must show that "the defense counsel's failure to pursue the strategy or tactic is linked to the actual conflict." Id. In establishing these three aspects of this test, the petitioner is not required to show that the strategy or tactic not taken would have been successful, but only that it would have been objectively reasonable. Id.

Bartlett proved he was operating under a conflict of interest at Petitioner's change of plea hearing. (Record p. EE 42 Ex. H (Tr., p. 7, Ls. 15-18)). Bartlett exposed that the holding out of Diana's dismissal for after her son's hearing was in fact in conflict with Petitioner's case and inconsistent with his best interests. Bartlett's statement to the court at the hearing was a confession that there were divergent interests in the two cases and was not in accord with Bartlett's claim that it was he who asked to hold out Diana's dismissal. These facts clearly refute Bartlett's testimony at the evidentiary hearing that "I did not believe it would, in any way, impact Ron's case." (Ev. Hr. 11/17/17 (Tr., pp. 43-44)). In applying the Mickens three-part standard, Bartlett's performance was adversely affected by an actual conflict of interest as a specific and seemingly valid and genuine alternative strategy or tactic was available to Bartlett, but it was inherently in conflict with his duties to Diana. Bartlett was fully aware that Petitioner was at risk with Diana's case waiting to be dismissed the day after Petitioner's plea hearing. Bartlett resolved this conflict in Diana's favor by doing the state's bidding. Bartlett was unable to pursue any other strategy or tactic

regarding Petitioner with Diana's case always waiting to be dismissed after these significant hearings for Petitioner.

Whether successful or not at trial, it was objectively reasonable for Petitioner to choose to reject the state's plea deal. As shown in the record (Record Ex. 22, 23)(App. Op. Brief, pp. 22-23), Bartlett was clearly aware that Petitioner did not want to accept the state's plea. This choice, by Petitioner, to reject the plea on January 15, 2014, was clearly suggested by the circumstances known to Bartlett at the time. (Id.) However, with Diana's case awaiting dismissal the day after Petitioner's plea hearing, Bartlett could not allow his client to proceed with this rejection. (App. Op. Brief, pp. 21-32). Petitioner showed that in order to protect Diana's pending dismissal, Bartlett coerced Petitioner to accept this "initial" plea deal because of his actual conflict of interest. (Id.). Petitioner, in fact, showed that his case was linked with his mother's by Bartlett at the January 15, 2014 jail meeting, which was proved in Petitioner's January 17, 2014 phone conversation with Diana. (Id.)

Bartlett's performance at Petitioner's sentencing hearing was adversely affected by an actual conflict of interest as a specific and seemingly valid and genuine alternative strategy or tactic was available to Bartlett, but it was inherently in conflict with his duties to Diana. Bartlett, as the facts show, was on notice that the state would present a narrative that Petitioner had a long history of being abusive and obsessive with escalating behaviors. (Dist. Ct. Order, p. 9) (App. Op. Brief, p. 41). Presenting to the state and the court evidence refuting the state's narrative at sentencing was objectively reasonable under the facts known to Bartlett at the time. With Diana's case once again awaiting dismissal the next day, Bartlett, again, resolved this conflict in Diana's favor. No defensive argument could be made for Petitioner at sentencing because doing so would have prejudiced Diana's interest in having her case dismissed the next day. Bartlett's performance

at sentencing was a clear product of his actual conflict of interest. (App. Op. Brief, pp. 31-43). These examples above show specific and detailed instances in the record of impairment of Petitioner's interest, and that Bartlett made the choice between possible alternative causes of action always in favor of Diana because he was operating under an actual conflict of interest.

Respondent's answer brief argues, "the Court of Appeals conclusion turned on its deference to the state district court's factual findings, and it's weighing of the relevant facts in the course of its review of the state district court's determination that Eddington ultimately failed to demonstrate a conflict of interest." (Respondent's Answer Brief, pp. 23-24). In addition, Respondent states, "Eddington can not show that the Idaho Court of Appeals rejection of this claim was...based upon an unreasonable factual determination." (Id.) Respondent, however, has chosen to completely ignore the multiple factual errors described in detail above and below, as well as the unreasonable application of the clearly established precedents of Strickland and Cuyler to these facts.

**2. CLAIM TWO:**

**Petitioner's counsel rendered ineffective assistance of counsel because he pressured Petitioner to plead guilty because there was a conflict of interest.**

"If an actual conflict was created that adversely affected counsel's performance, defendant's guilty plea must be set aside." Cuyler, 466 U.S. at 348. The Idaho Appellate Court did not directly acknowledge the factual errors regarding the District Court's erroneous analysis of two phone calls presented at Petitioner's evidentiary hearing. The district court used these recorded phone calls between Petitioner and Diana as factual evidence to support its finding that there was no actual conflict of interest and that Petitioner was not pressured into pleading guilty by Bartlett. The district court's analysis and presentation of these calls constitutes significant factual error and can be shown as such through clear and convincing evidence, §2254 (e)(1).

The District Court used a January 14, 2014 phone call between Petitioner and Diana as a significant basis for its factual conclusions which were supported and affirmed by the Idaho Appellate Court. The district court clearly states that this phone call took place on "the same day Petitioner testified that he was threatened by Bartlett during their conversation at the jail." (Dist. Ct. Order, p 15). The district court states, "There was no mention of...changing his mind about entering a guilty plea, being coerced or pressured into a plea by Bartlett or any angry exchange with Bartlett," Id. However, the clear and convincing evidence, §2254 (e)(1), presented in the state court proceeding shows that while this phone call took place on January 14, 2014, Petitioner's jail meeting with Bartlett regarding his change of plea took place on January 15, 2014. (Record p. 291 State's Exhibit 27) (Ev. Hr. 11/15/17 (Tr. pp. 162-163)). This finding by the district court is an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, §2254 (d)(2), rendering the Idaho Appellate Court's reliance on the district court's factual findings objectively unreasonable.

The Idaho Appellate Court, in its opinion, states, "Among other things, the district court correctly found...there were no discussions between Petitioner and his mother to support his claim that their cases were "linked." (Opinion, p. 5). The district court's rendering of a January 17, 2014, phone call between Petitioner and Diana attempts to portray and emphasize Petitioner's nonchalance regarding the fact that his mother's case was not dismissed. (Dist. Ct. Order, p. 17). However, the full transcript of the call, (Ev. Hr. 1/15/17 (Tr., pp. 171-173)), supports the fact that Petitioner was aware that his mother's case was linked to his plea, that he knew it was to be dismissed on January 17, 2014, and he was confused and anxious as to why it wasn't. Id. (App. Op. Brief, pp. 29-30). Throughout this call, Petitioner's hesitant and limited questioning of his mother relates directly to her initial, and persistent emphasis that Bartlett told her not to discuss

the case. Id. The Idaho Appellate Court and the District Court's factual finding that there were no discussions to support Petitioner's claim that their cases were linked has been shown by clear and convincing evidence, §2254 (e)(1), to be an unreasonable determination of facts in light of the evidence presented in the state court proceeding. §2254 (d)(2). Unreasonable determinations of material facts can occur "where the state court plainly misapprehends or misstates the record in making its findings" or where the state court "has before it yet apparently ignores evidence that supports Petitioner's claim." Taylor, 366 F.3d at 992, 1001.

Respondent, as was done in Petitioner's first claim, completely ignores the factual errors described in detail above. In addition, Respondent argues, "aside from the conflict allegations, Eddington supported claim 2 only with a factual assertion that was contradicted by sworn testimony from his counsel that the state district court found to be credible – a determination that neither the court of appeals nor this Court can second-guess." (Respondent's Answer Brief, p. 29). However, both the United States Supreme Court and the Ninth Circuit Court of Appeals holdings contradict this statement regarding credibility findings. See Miller El, 545 U.S. at 240; Green, 532 F.3d at 1028; Sanders, 21 F.3d at 1446, 1452.

**3. CLAIM THREE:**

**Petitioner's counsel rendered ineffective assistance of counsel because he failed to investigate the discovery in this case; such as failing to listen to the audio recordings of the ex-wife's police interviews and was unprepared to defend his client at sentencing because of his conflict of interest.**

At Petitioner's March 13, 2014 sentencing hearing, Diana's case was again waiting to be dismissed the next day. (Record p. EE 53 Ex. I (Tr., pp. 33-34)). With the Appellate Court's acknowledgement that the state did the rescheduling without input or even a challenge from Bartlett (Opinion, p. 5), the only reasonable explanation for this move by the Petitioner's prosecutor was a continuance of this actual conflict of interest. And, once again, Bartlett resolved

this conflict in Diana's favor. Cuyler, 466 U.S. at 335, 354. With an obvious awareness that there would be no challenge to their sentencing narrative, the state and Carrie freely painted Petitioner as a violently abusive stalker with escalation behaviors. (Record pp. EE 53 Ex. I) (App. Op. Brief, pp. 31-43).

"In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgements." Strickland, 466 U.S. at 690-691. The consequences of inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness. Rompilla vs. Beard, 545 U.S. 374, 395-96 (2005); Wiggins, 539 U.S. at 510, 533-34. The record of the actual sentencing proceeding underscores the unreasonableness of Bartlett's conduct by clearly showing that his failure to investigate resulted from inattention, neglect, and his conflict of interest, not reasoned strategic judgement. Given that Bartlett was provably aware that the issue of abuse and obsessive stalking were going to be issues at sentencing, (Dist. Ct. Order, p. 9), a reasonably competent attorney acting as a diligent advocate would have introduced the evidence refuting this narrative in admissible form. Because Bartlett knew virtually none of the relevant evidence, however, he committed errors during his closing argument that compounded the prejudice caused by his failure to investigate. In his closing argument at Petitioner's sentencing, Bartlett himself shows that he did not have any awareness of what was on the audio police interviews when he details a phone conversation with psychological evaluator Dr. Johnston. (Record p. EE 53 Ex. I (Tr., p. 91, Ls. 8-13)). Indeed, if Bartlett knew what was on the audios he would have recognized that Dr. Johnston used incorrect information to reach the conclusion that Petitioner was a moderate risk to reoffend. (Record p. EE 145 Ex. JJ) (App. Op. Brief pp. 34-35). In addition, in his closing argument he discusses the phone call, text and email issue that the state alleged supported its

stalking narrative. Here he, again, shows his neglect and complete lack of awareness regarding Petitioner's phone and email records that he knew the state and Carrie were going to reference to support their narrative. Bartlett even bolsters their argument by stating, "Now, I don't know, maybe it happened, I mean I wasn't there either..." (Record p. EE 53 Ex. I (Tr., p. 81, Ls. 14-23)). Significantly, to further underscore that Bartlett did not know what was on the police audio interviews, and contrary to both of the state courts erroneous finding, his sentencing outline makes no mention whatsoever of the audios. Bartlett's failure to include the powerful evidence of the denial of any abuse by Carrie is therefore explicable only if you accede that he had no knowledge of this evidence. (Record Ex. 17) (App. Op. Brief, pp. 33-34). Indeed, throughout the record of the case that was before both state courts there is a complete lack of awareness by Bartlett of anything having to do with the audio interviews. Bartlett does not even bring up the audios in the December 2013 recorded jail conversations with Petitioner where he attempted to convince a very reluctant Petitioner to accept the state's plea deal. (Record Ex. 22-23) (App. Op. Brief, pp. 22-23). A decision not to present evidence can be considered tactical only if counsel is aware of that information and how it could fit into a penalty phase defense. See Mayfield vs. Woodford, 270 F.3d 927 (9th Cir. 2001) ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments.").

"The duty to investigate does not force lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla, 545 U.S. at 374, 383. The audio police interviews and Petitioner's email and phone records did not require Bartlett to scour the globe. They were readily available to counsel for review. Further, these investigations would have been

more than fruitful. First, Bartlett actually had possession of the police audios and their content was extremely powerful regarding the falsity of the state's narrative at sentencing. (App. Op. Brief, p. 38). Second, Bartlett, despite Petitioner's imploring him to acquire his email and phone records, (Ev. Hr. 11/15/15 (Tr., pp. 123-124, pp. 181-182)), explained his strategy regarding this issue at the 11/17/17 evidentiary hearing. Bartlett is asked, "So even in Officer Dixon's report – Detective Dixon's report, it still says that Ron would send a few text messages or emails per day?" Bartlett responds, "Which I didn't see as stalking behavior…he's married, and they have children together. So, I didn't see that as stalking behavior." Petitioner's attorney asks, "Okay. And just because you didn't see that as stalking behavior doesn't mean that the judge may not; correct?" Bartlett then states, "I didn't believe that Judge Norton would see that as stalking behavior. I believed she would read the materials, understand, again, that this was likely some exaggeration of the facts because of the lens through which Carrie was now seeing Ron." (Ev. Hr. 11/17/17 (Tr., p. 41)). This makes no sense and is completely contrary to Strickland. Bartlett presumes to know what the judge would think, therefore excusing him from investigating Petitioner's email and phone records. (Ev. Hr. 11/17/17 (Tr. pp. 13-15)). It also contradicts his testimony where he stated that Carrie was a credible witness who would be believed by the judge. (Ev. Hr. 11/17/17 (Tr., pp. 21-22)). This statement shows that Bartlett's decision was the very antithesis of an informed decision. Strickland, 466 U.S. at 681. "Counsel's investigation must determine trial strategy, not the other way around." Weeden v. Johnson, 854 F.3d 1063, 1070 (9th Cir. 2017) ("Weeden's counsel could not have reasonably concluded that obtaining a psychological examination would conflict with his trial strategy without first knowing what such an examination would reveal."). Petitioner's computer, email accounts and cell phone records were thoroughly reviewed by the Meridian Police and the State. (See Record, p. EE 294, pp. EE 335-336) (See also App. Rep. Brief, pp. 9-10). If

the result of this search had demonstrated a pattern of stalking or harassment, the State would have presented physical evidence to support this claim. However, with the provable knowledge that this was false, both Faulkner and Carrie presented this narrative with no concern of any adversarial challenge from Bartlett because of the actual conflict of interest. Petitioner, as he testified (Ev. Hr. 11/15/17 (Tr., Ev. 123-124, pp. 181-182)), emphasized the email, text and phone call issue to Bartlett that should have alerted competent counsel to investigate further. Petitioner was never informed by Bartlett about any information regarding the audio recordings which further underscores Bartlett's neglect. (Record Ex. 22, 23). And despite Bartlett's uncontested awareness of what the state would present at sentencing, he did not take even the basic steps to investigate this information. "In assessing the reasonableness of an attorney's investigation...a court must consider...whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 549 U.S. at 527. See Strickland, 466 U.S. at 690-91 (holding that defendant's statements to counsel are critical in determining whether further investigation is necessary). As the above statement by Bartlett shows, his decision was neither informed by an adequate investigation nor undergirded by any logical strategic purpose. All of this evidence in the state court proceeding underscores the unreasonableness of the court's factual determinations as well as the application of clearly established federal law to the facts. §2254 (d)(1)(2).

Petitioner asserts that counsel's failure to present this evidence or question Carrie about it is not entitled to a presumption of reasonableness because it was neither informed by a reasonable investigation nor supported by any logical position that such failure would benefit Petitioner's defense. Given that Bartlett's conduct in failing to develop or present this evidence was not informed by any investigation and not supported by reasonable, professional limits upon investigation, there is no decision entitled to a presumption of reasonableness under Strickland,

"strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgement supports the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91. None of the above evidence was presented by Bartlett at sentencing, nor was Carrie questioned about it. As a result, the court was given a picture of Petitioner's relationship to Carrie that bore "no relation" to the picture that would have been presented if counsel had performed competently. Rompilla, 545 U.S. at 374, 392-93. In circumstances like this, where such "classic" mitigation has been omitted, courts have consistently found ineffective assistance of counsel. Hamilton v. Agers, 583 F.3d 1100, 1131 (9th Cir. 2009). As the 9th Circuit stated in Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992), "to fail to present important mitigating evidence in the penalty phase – if there is no risk in doing so – can be as devastating as a failure to present proof of innocence in the guilt phase." However, the facts show there was the risk to Bartlett of the state not dismissing Diana's case.

Choosing a strategy implies the weighing of competing approaches. Bartlett simply did not know about Petitioner's background so he could not have intelligently chosen one strategy over another. Here, Bartlett failed at the outset to investigate thoroughly, rendering later decisions a product of "inattention, not reasoned strategic judgment." Wiggins, 539 U.S. at 526. Only by unreasonably applying Strickland did the Idaho Appellate Court conclude Bartlett's performance was adequate.

In Strickland, the Supreme Court held it was reasonable for counsel to fail to introduce evidence that would "barely have altered the sentencing profile" and would have opened the door to potentially damaging aggravating evidence. Strickland, 466 U.S. at 700. So too in Darden v. Wainwright, counsel's decision to pursue an alternative strategy at sentencing was reasonable

because evidence regarding defendant's background could have opened the door to his prior convictions which had not been admitted in evidence. See Darden, 477 U.S. 168, 186 (1986). That was not the situation confronted by Petitioner's counsel. First, presenting evidence directly from Carrie that Petitioner was never, in any way, abusive or admitting his email and phone records would have altered the states sentencing narrative substantially. Second, it is uncontested that Bartlett knew that the state would introduce this narrative against Petitioner. See Rompilla, 545 U.S. at 390 (finding counsel deficient when counsel knew the prosecution would introduce at the penalty phase defendant's "significant history" of prior violent crimes, but counsel nevertheless failed to review the readily available prior conviction file). It is objectively unreasonable to conclude that an alleged penalty phase strategy is reasonable when it is directly contradicted by the evidence in the record. Despite the double deference for performance, a federal court "may not indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions." Harrington v. Richter, 562 U.S. 86, 109 (2011) (quoting Wiggins, 539 U.S. at 526-27). See also Montgomery v. Uchtman, 426 F.3d 905, 914 (7th Cir. 2005) (explaining that a federal court will not accept a state court's description of a strategic decision that is "so disconnected from the picture painted by the facts in the record that it could only be explained as a post hoc rationalization of counsel's conduct."). Richards v. Quartermann, 566 F.3d 564 (5th Cir. 2009) ("Courts are not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all.").

The state's aggravating narrative of Petitioner was false. Yet, Bartlett, multiple times showed he had no idea that this narrative was false. At Petitioner's sentencing hearing, Bartlett states, "If a magistrate judge believed he was so out of control, so manipulative, so controlling and

so bad, why did he still have that much custody?" (Record p. EE 77 (Tr., p. 87, Ls. 14-16)). This statement shows that counsel had no awareness of Petitioner's actual relationship to Carrie or what she had stated on the police audios, or even in her custody deposition. (Limited Clerk's Record on Appeal, pp. 170-184). A deposition involving custody where bringing these matters up would have benefited her interests resoundingly. (Ev. Hr. 11/15/17 (Tr. p.248, Ls. 22-25, p. 249, Ls. 1-3)). This statement by Bartlett refutes nothing. It's ambiguity regarding Petitioner's alleged out of control behavior does nothing to confirm for the court that this narrative was not true. This statement and the examples stated above show conclusively that counsel was not aware of this information because he did not investigate it. Bartlett presented nothing to counter the prosecutions portrayal of his client. Strickland recognizes that some errors by counsel will have a "pervasive effect...altering the entire evidentiary picture." 466 U.S. at 695-96. Bartlett's errors had such a pervasive effect here, skewing the evidence at the penalty phase and depriving the judge that sentenced Petitioner from hearing critical evidence, or even the truth.

Regarding Bartlett's investigation, the Idaho Appellate Court found that Petitioner failed to show prejudice. Although the facts show Bartlett's performance at sentencing was clearly a product of his conflict of interest, Petitioner clearly showed that he was prejudiced by this deficient performance. To establish that Bartlett's deficient performance prejudiced him, Petitioner must show there is "a reasonable probability that, but for Counsels unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not necessary, however, to show that counsel's deficient conduct "more likely than not altered the outcome in the case." Id.

"Council's duty is not discharged merely by presenting some limited evidence. Rather, a penalty phase ineffective assistance claim depends on the magnitude of the discrepancy between what council did investigate and present and what council could have investigated and presented." Stankewitz vs. Woodford, 365 F.3d 706, 716 (9th Cir. 2004). It is difficult to imagine a more significant discrepancy than that between the portrait painted at the penalty phase of a man who was a physical and emotional abuser and stalker with escalating behaviors, and that of a man who was provably none of those things. This false evidence was substantially material to the issue of punishment and there is a reasonable probability that the weight of the false evidence affected the judge's balancing of the sentencing factors and, hence, her ultimate sentence. In addition, had Bartlett investigated and let it be known he would present this evidence, it's more than likely the state would not have presented their false narrative regarding Petitioner's relationship to Carrie. Bartlett thus shut the door on Petitioner's strongest defenses because he did not even know they existed. Indeed, Petitioner showed how the district court was prejudiced by this narrative. (App. Op. Brief, p. 39).

In addition, the Idaho Appellate Court's conclusion that Petitioner was not prejudiced by counsel's performance at sentencing was contrary to clearly established federal law. §2254 (d)(1). Both the District Court and the Appellate Court concluded that Petitioner would have received the same sentence regardless of what was or wasn't presented. (Opinion, p. 8-9) (Dist. Ct. Order, p. 32). The Supreme Court has clearly established the governing legal standard for assessing the prejudice from counsel's errors. Strickland, 466 U.S. at 693; see also Harrington v. Richter, 562 S. Ct. 791 (2011)("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome..."). Rompilla, 545 U.S. at 74, 393 (The sentencing judge could have heard the correct facts and narrative and still have decided on

the sentence, "that is not the test."). Where a state court "rejects a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different," the state court's decision is "contrary to" clearly established federal law and "a federal court will be unconstrained by §2254 (d)(1)." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). The state court's application of the wrong standard renders its decision "contrary to" clearly established federal law and removes AEDPA as a bar to relief. See Lafler v. Cooper, 132 S. Ct. 1376, 1390 (2012); see also Williams, 529 at 405-06; Amada v. Gonzales, 758 F. 3d 1119, 1137-38 (9th Cir.. 2014).

To say that the omitted evidence would not have changed the sentence imposed (Opinion, 8-9) is not the same as saying that there was no probability that a different sentence would have resulted. Even if the evidence did not, in fact, change Judge Norton's mind, there could still have been a reasonable probability that it would have changed her mind. Rompilla, 545 U.S. at 393. Requiring Petitioner to prove anything more than a reasonable probability was contrary to clearly established Supreme Court precedent. §2254 (d)(I).

Once again, Respondent did not address any of the factual errors cited by Petitioner regarding this claim. Nor did Respondent, as with the two previous claims, attempt to refute any of Petitioner's specific instances proving these errors. Only by pretending that Petitioner's detailed arguments regarding both state courts unreasonable determination of the facts and the unreasonable application of clearly established Federal law don't exist is Respondent able to support the argument that Petitioner should not be granted habeas relief. Respondent's argument is unsupportable and without merit as it is not grounded in reality. The facts in the record before both state courts correlate to nothing as well as an actual conflict of interest and ineffective

assistance of counsel. The state courts contrary conclusions have been shown to be unreasonable, as well as erroneous.

## CONCLUSION

WHEREFORE, Petitioner prays:

1. That the writ be granted.
2. All relief requested be granted.

RESPECTFULLY SUBMITTED_____, 2020.

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