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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,)
)
 Petitioner-Appellant,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

NO. 35055

COPY

APPELLANT'S REPLY BRIEF

(Capital Case)

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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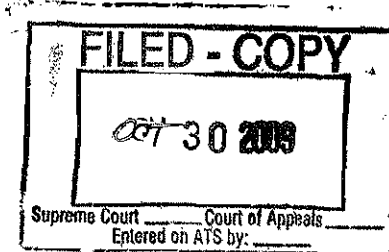


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STATEMENT OF CASE

Nature Of The Case

This is a permissive appeal arising from two interlocutory orders entered by the district court during Erick Hall's capital post-conviction proceedings: 1) the district court's order prohibiting post-conviction contact with the jurors who deliberated in the underlying criminal case; and 2) the district court's order denying Mr. Hall's motion for a court-ordered deposition of his trial counsels' investigator, Glenn Elam.

Statement Of The Facts And Course Of The Proceedings

With the exception of a few additions and corrections to the State's recitation of facts, Mr. Hall relies on the relevant facts and course of proceedings as set forth in his opening brief. (Appellant's Brief, pp.1-4.)

The Order Prohibiting Juror Contact

The State suggests that the issue of jury contact arose in the context of post-conviction discovery litigation. (Respondent's Brief, p.3 ("While Hall's discovery motions were being litigated, an informal telephone conference was held January 6, 2006, regarding the release of juror questionnaire forms").) However, the issue actually arose in the context of a stipulated motion for the disclosure of completed jury questionnaires, not discovery. (Appellant's Brief, pp.1-4.) Indeed, Mr. Hall filed a separate motion for discovery that had not yet been litigated and did not involve either a request for jury questionnaires or jury contact. (R. 35055 Vol. I, pp.78-109.) It is misleading for the State to link the litigation of matters of discovery with the litigation of matters involving jury contact. Indeed, the State relies on this mischaracterization as

support for the district court's order which extended an element of the post-conviction discovery standard to matters involving jury contact.

Addressing the district court's analysis of Mr. Hall's request for jury contact, the State correctly notes that the district court repeatedly expressed concerns regarding potential harassment of the jurors. (Respondent's Brief, pp.3-5.) Notably missing from the State's recitation of facts, however, is the fact that the district court repeatedly stated its perception of the propriety of post-verdict juror interviews had been shaped by a negative experience it had with an allegedly unethical rogue investigator sometime in 1995 or 1996, an investigator unassociated with Mr. Hall, his case, his post-conviction counsel, or the State Appellate Public Defender. (Tr. 6/15/07, p.21, L.5 – p.25, L.3; Tr. 8/08/07, p.123, L.8 – p.128, L.23.) Moreover, the State fails to note that the district court never found, or even alleged, that Mr. Hall's post-conviction counsel or their agents had engaged in any improper or unethical conduct.

The Order Denying The Deposition Of Mr. Hall's Investigator

The State implies that Mr. Hall conceded his request to depose trial counsel's investigator, Glenn Elam, was not relevant to claims raised in his petition. (Respondent's Brief, p.2 ("Hall conceded some of his initial discovery requests were not "specifically" related to claims in his Amended Petition (UPCPA, exhibit 10, pp.3-4, 13, 16-18), but renewed his request to depose Elam (id., p.20)")) The State implies that Mr. Hall conceded in his discovery memorandum that his request to depose Mr. Elam was not relevant to claims in his petition; such an implication is false. While Mr. Hall did concede that a limited number of his discovery requests were not specifically related to claims raised in his petition, those discovery requests are not the subject of this appeal.

Significantly, the State omits the fact that Mr. Hall identified multiple claims related to his motion to depose Mr. Elam. (R. 35055, Exhibit 10, pp.20-21.)¹ Thus, contrary to the State's mischaracterization of the record, Mr. Hall identified specific claims to which Mr. Elam's testimony would be relevant and necessary.

¹ The referenced claims appear in volume 2 of the record on appeal at page 306 ("Trial counsel rendered ineffective assistance of counsel in failing to adequately investigate and present evidence of an alternate perpetrator of the murder and co-perpetrator of the rape."), and page 312 (same).

ISSUES

1. Whether the district court's order forbidding any communications with jurors unless Mr. Hall can first demonstrate that such communications are necessary to protect his substantial rights, violates his rights under the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?
2. Whether the district court abused its discretion by forbidding Mr. Hall's attorneys and their agents from contacting jurors?
3. Whether the district court abused its discretion by denying Mr. Hall's motion for a court-ordered deposition of his trial counsels' investigator where the investigator could provide information relevant to his post-conviction claims but was unwilling to voluntarily provide an affidavit?

The State "wishes to rephrase" the issues. (Respondent's Brief, p.6.) The State rephrases the issues as a pretext for arguing the issues, e.g., that Mr. Hall requested "unbridled" interviews with jurors. (Respondent's Brief, p.6.) However, a request for "unbridled" interviews is not an issue on appeal. (Appellant's Brief, pp.12-15 (identifying the "safeguards" already in place to prevent unbridled interviews in conjunction with Mr. Hall's "proposed list of general topics and specific questions for jurors who were willing to discuss their service . . .").) Further, by rephrasing the issues, the State omits in its entirety Mr. Hall's first issue, despite conceding elsewhere that Mr. Hall's constitutional claims were properly preserved below and raised on appeal. (Respondent's Brief, pp.19-26.) Finally, the State actually rearranges the order of the issues, making it unnecessarily difficult to track the parties' positions on the issues.

For all these reasons, the State's restatement of the "issues" constitutes an abuse of the Court's rules governing the content and arrangement of a Respondent's Brief, and at a minimum, is argumentative and confusing. *See* I.A.R. 35(b). Accordingly, Mr. Hall hereinafter will continue to follow the arrangement and statement of the issues on appeal as set forth in his Appellant's Brief.

ARGUMENT

I.

The District Court's Order Forbidding Any Communications With Jurors Unless Mr. Hall Can First Demonstrate That Such Communications Are Necessary To Protect His Substantial Rights, Violates Mr. Hall's Rights Guaranteed By The First, Fifth, Eighth, And Fourteenth Amendments To The United States Constitution

A. Introduction And Standard Of Review

Without any evidence of unprofessional conduct by either party, the district court took the unprecedented measure of creating a rule governing jury contact in capital post-conviction proceedings. Mr. Hall argues that the district court's order imposed a prior restraint in violation of the First Amendment, impeded Mr. Hall's post-conviction investigation in violation of the Fifth and Fourteenth Amendments, and eliminated an important procedural safeguard against the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment.

While the State addresses each of Mr. Hall's constitutional claims, the State asserts that this Court should apply an abuse of discretion standard of review. (Respondent's Brief, p.18.) Presumably the State misstates the standard of review because it merges Mr. Hall's first two issues, which involve different standards of review. However, Mr. Hall maintains that the correct standard of review when assessing the constitutionality of the district court's order is *de novo*. See *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998) ("Where this Court considers a claim that a statute is unconstitutional, we review the trial court's ruling *de novo* since it involves purely a question of law.").

B. The District Court's Order Forbidding Any Communications With Jurors Unless Mr. Hall Can First Demonstrate That Such Communications Are Necessary To Protect His Substantial Rights, Violates Mr. Hall's Rights Guaranteed By The First, Fifth, Eighth, And Fourteenth Amendments To The United States Constitution

1. The District Court's Order Constitutes An Unconstitutional Prior Restraint In Violation Of Mr. Hall's First Amendment Rights

The State seems to claim that the district court's actions do not constitute a "prior restraint" on speech, and that the standard for assessing the constitutionality of restrictions on attorney speech set forth in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991), does not apply to post-verdict attorney speech. (Respondent's Brief, pp.19-20.) The State provides no relevant authority for this claim. Indeed, most of the cases cited by the State pre-date *Gentile*, and even those cases recognize that attorney speech, whether occurring before or after a verdict, is entitled to First Amendment protections. (Respondent's Brief, pp.20-21 (citing *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019 (5th Cir. 1984)).) Indeed, these cases do little more than hold what the Supreme Court subsequently recognized in *Gentile*, i.e., that the media is generally given greater First Amendment protection than attorneys, a far cry however from providing no protection at all. Notably, the primary case relied upon by the State released after *Gentile*, applied the *Gentile* analysis to post-verdict communications between a lawyer and jurors. (Respondent's Brief, p.20 (citing *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 431 (Tex. 1998).))

The State relies on *Haeberle v. Texas Int'l Airlines*, *supra*, in part, for the proposition that "courts must take such steps by rule and regulation that will protect its processes from prejudicial outside influences." (Respondent's Brief, p.20.) Mr. Hall

asserts that the additional “steps” taken by the district court were unnecessary and unconstitutional. Indeed, as previously demonstrated, this Court has already taken at least three steps to protect jurors from harmful and prejudicial outside influences. (*See* Appellant’s Brief, p.9 (“This Court has created and adopted a series of rules and instructions designed to afford the flexibility required to further the State’s interests including the Idaho Rules of Professional Conduct, the Idaho Rules of Evidence, and the Idaho Criminal Jury Instructions.”); pp.12-15 (addressing the specific rules and regulations already in place under Idaho law).) The State completely fails to address any of the safeguards already set in place by this Court. Indeed, the State makes no reference at all to the Idaho Rules of Professional Conduct and only a single reference to the Idaho Criminal Jury Instructions.

The State asserts that the district court created an appropriate additional rule for governing a lawyer’s post-verdict communications with jurors. Under the district court’s rule, before initiating any contact with jurors, capital post-conviction counsel must first demonstrate to the presiding court that juror interviews are necessary to protect the petitioner’s substantial rights. While this rule is reminiscent of the standards governing post-conviction discovery, it is actually much more onerous.

Post-conviction discovery is generally discretionary; however, if a petitioner can demonstrate that discovery is necessary to protect his substantial interests, then discovery is mandatory. *See Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001). The district court applied the standard for mandating the disclosure of requested discovery to requests for permission to contact jurors. However, even the cases cited by the State do not require such a substantial showing, instead generally adopting a “good cause” standard.

See State v. Marshall, 690 A.2d 1, 97 (N.J. 1997) (“The compelling public interest in protecting jurors and their deliberations amply justifies the restriction on contacting them without good cause.”); *Gagliano v. Ford Motor Co.*, 551 F.Supp. 1077, 1079 (D. Kansas 1982) (“Lawyers . . . shall refrain from approaching jurors who have completed a case, unless authorized by the Court. Such authorization will be considered only upon formal application to the Court and hearing at which just cause shall be shown.”). Similarly, the State cites *United States v. Cleveland*, 1997 WL 412466 (E.D. La. 1997). While the *Cleveland* case does not explicitly identify the standard in that federal district for justifying post-verdict jury contact, by footnote, the court cited the relevant local rules. *Id.* at * 1 n.2. The current version of those rules provide, in relevant part, that, “[n]o party or their attorney shall, personally or through another person, contact, interview, examine or question any juror or alternate or any relative, friend or associate thereof, except on leave of court granted upon good cause shown.” Uniform Local Rules in the Eastern, Middle, and Western Districts of Louisiana, LR 47.5M & W (Adopted March 26, 2001).

The State asserts that the district court’s order will further the State’s interest in “preventing post-verdict juror harassment,” and that, without such order, the incidence of post-verdict juror interviews “will become common knowledge among jurors” and thus “affect jurors’ behavior in deliberations.” (Respondent’s Brief, p.22.) However, as noted previously, there is no evidence at all that Mr. Hall’s counsel, or their agents, would harass the jurors. Indeed, Mr. Hall’s counsel has an ethical obligation to avoid harassment of jurors. In addition, as previously demonstrated, the Court’s jury instructions in conjunction with the Idaho Rules of Evidence further minimize the risk of

any harassment. (Appellant's Brief, pp. 12-15.) Moreover, there is no evidence that Idaho's experience of allowing post-verdict juror interviews over the past several decades has in any way undermined the criminal justice system or adversely affected Idahoans willingness to serve as jurors. Indeed, in the absence of a rule or statute forbidding juror contact, Idaho district courts have generally permitted post-verdict communications with jurors without incident, and in some cases, have encouraged the investigation of potential juror claims. For example, in *State v. Rhoades*, 121 Idaho 63, 922 P.2d 960 (1991), the district court actually authorized the defense to hire an investigator for the purpose of conducting juror interviews. In short, the admissibility of juror affidavits from such interviews is a matter that Idaho district courts, as well as Idaho appellate courts, have historically addressed without diminishing the sanctity of juror deliberations, or otherwise undermining the public's confidence in the judicial system.

The State also again appears to claim that attorney speech is not protected by the First Amendment. (Respondent's Brief, p.23 ("Hall's reliance on Gentile is misplaced; the Court did not conclude the attorney's pre-trial statements were protected speech.").) In effect, the State equates attorney speech with obscenity, when in fact, *Gentile* stands for the very proposition relied upon by Mr. Hall, i.e., that attorney speech is protected speech and prior restraints on such speech are unconstitutional under the First Amendment unless the speech at issue presents a "substantial likelihood of material prejudice." *Gentile*, 501 U.S. at 1075. Mr. Hall's analysis of *Gentile* is not unique. Indeed, the *Benton* opinion, extensively relied upon by the State provides that, "[u]nder the rationale of *Gentile*, the 'substantial likelihood of material prejudice' standard is

sufficient protection for attorneys' speech in [the post-verdict] context." *Benton*, 980 S.W.2d at 431. As recently summarized by the Fifth Circuit Court of Appeals,

In *Gentile*, the Supreme Court discussed ABA Model Rule of Professional Conduct 3.6 (1981), which prohibits attorneys from making extrajudicial statements that a reasonable person would expect to be spread through public communication if the lawyer knows or should know that making the statement was substantially likely to materially prejudice an adjudicative proceeding. 111 S.Ct. at 2725. The Court indicated that this regulation of attorney speech, as adopted by Nevada, was permissible as it can be "[i]nterpreted in a proper and narrow manner" so as to "punish only speech that creates a danger of imminent and substantial harm." *Id.* . . . Thus, the Supreme Court has held that attorney speech may be subject to diminished First Amendment protection when it is regulated in furtherance of a substantial governmental interest. *Id.* at 2745.

Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743, 755-56 (5th Cir. 2008). Indeed, the Fifth Circuit's application *Gentile* in *Hersh*, demonstrates that the district court's rule violates the First Amendment. In *Hersh*, the court held that a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act that prohibited attorneys from advising their clients to incur debt in contemplation of bankruptcy did not violate an attorney's First Amendment rights since it was narrowly construed to prohibit attorneys from giving such advice only if the attorney is advising the client to engage in conduct that would be an abuse or improper manipulation of the bankruptcy system. *Id.* at 763. In Mr. Hall's case, the district court crafted a rule that cannot be narrowly construed to prohibit only attorney speech that would be an abuse or manipulation of jurors or the criminal justice system; such rules already exist, but were effectively supplanted by the district court's rule.

The State reaches the illogical conclusion that simply because the district court articulated some of the policies in favor of limiting juror contact, the district court's order was necessarily constitutional. (Respondent's Brief, p.23 ("The question was not whether Hall's attorneys acted 'unprofessionally if left to their own devices' . . . but the policies

associated with preventing post-verdict juror interviews as articulated above.”.) The State’s analysis, however, only constitutes half of the constitutional analysis. Where First Amendment interests are at stake, this Court has a duty to conduct a searching, independent factual review of the full record. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (“[A]n appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964))). In the context of attorney speech, a prior restraint will pass constitutional muster only if the targeted speech presents a “substantial likelihood of materially prejudicing an adjudicative proceeding.” *Gentile*, 501 U.S. at 1075. Rules restricting lawyer speech must only “impose narrow and necessary limitations on lawyers’ speech.” *Id.* Indeed, the policies supporting the government’s interests in restricting unbridled speech must be weighed. (Appellant’s Brief, pp.7-19.) As required by *Gentile*, the First Amendment analysis must consider whether the prior restraint imposes narrow and necessary limitations on the speech at issue in the course of furthering those policies.

2. The District Court’s Order Violates Mr. Hall’s Due Process Right To Meaningful Post-Conviction Proceedings

The State assumes for the sake of argument that Mr. Hall is constitutionally entitled to “meaningful post-conviction proceedings.” (Respondent’s Brief, p.24.) The remainder of the State’s response is essentially non-responsive, focusing on what post-conviction proceedings are not, as opposed to what post-conviction proceedings are. (Respondent’s Brief, pp.24-25.) Contrary to the State’s suggestion, Mr. Hall’s claim

does not rest on any premise that post-conviction proceedings are broader than that recognized by this Court or the United States Supreme Court. Significantly, the State does not contest the fact that claims involving juror misconduct or other claims stemming from affidavits provided by jurors, are appropriately raised in post-conviction proceedings. However, the district court's order effectively prevents Mr. Hall from identifying, raising, and supporting such claims.

3. The District Court's Order Violates Mr. Hall's Right To Meaningful Post-Conviction Proceedings In A Capital Case As Guaranteed By The Due Process Clauses And The Eighth Amendment To The U.S. Constitution

Relying on *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000), the State asserts that this Court should not consider the constitutional stakes at risk between non-capital and capital cases when assessing whether the district court's rule violates the Eighth Amendment. *Fields* is inapposite for three reasons. First, *Fields* dealt with a discovery issue; this Court has never equated jury contact issues with discovery issues. Second, *Fields* arose in the context of a successive petition; this Court has upheld the statute placing far greater obstacles on a petitioner's ability to raise claims in successive petitions than in original petitions. Of course, Mr. Hall's case is pending in an original post-conviction proceeding. Third, *Fields* actually demonstrates why the district court's standard is not appropriate in the context of post-verdict juror interviews. As stated by the Court:

Through additional discovery, Fields sought to develop the conflict of interest issue, as well as evidence in mitigation.

.....

The information Fields sought was unlikely to be contained in the prosecutor's files. Furthermore, the potential evidence would be generated more probably through the continuing efforts of Fields and his representatives. The district court's denial of the discovery request does

not prevent further investigation on Fields' behalf, and more importantly, does not deny Fields any substantial rights. The district court's decision not to grant additional discovery is hereby affirmed.

Fields, 135 Idaho at 291, 17 P.3d at 235. Here, the information Mr. Hall seeks is likely to be possessed by the jurors; the information will not, more probably, be generated through continued investigation; and the district court's order effectively prevents any further meaningful investigation.

C. Conclusion

The district court created a rule severely restricting juror contact where juror contact had previously been self-regulated by the legal profession through the Idaho Rules of Professional Conduct, the Idaho Criminal Jury Instructions, the Idaho Rules of Evidence, and case law. It impugns the integrity of the Idaho legal profession to presume, as the district court did, that post-conviction counsel will violate their obligations to the profession. By crafting an unprecedented and unwarranted order, the district court unnecessarily infringed on Mr. Hall's rights to free speech, to meaningful post-conviction proceedings, and to the additional safeguards afforded capital defendants. Accordingly, Mr. Hall respectfully requests this Court vacate the district court's order prohibiting juror contact.

II.

The District Court Abused Its Discretion By Forbidding Mr. Hall's Attorneys And Their Agents From Contacting Any Of The Jurors

A. Introduction

In his Appellant's Brief, Mr. Hall asserts that the district court lacked the authority to enter an order prohibiting his counsel from contacting any of the jurors.

Assuming arguendo that the district court had the authority to enter its order, Mr. Hall asserts that he met the standard established by the district court. In response, the State claims the district court had inherent authority to enter its order, and did not abuse its discretion by prohibiting jury contact.

B. The District Court Lacked The Authority To Enter Its Order

The State asserts that Mr. Hall assumed in his opening brief that the district court had inherent authority to limit jury contact. (Respondent's Brief, p.26.) While Mr. Hall argued in the alternative, *assuming arguendo* that the district court had inherent authority, Mr. Hall also maintained that the court lacked authority to enter its order. For instance, Mr. Hall presented the following argument:

Mr. Hall submits that absent any evidence his attorneys or their agents committed (or intended to commit) misconduct, the district court exceeded its authority by entering its order. . . . Under Idaho law, it is the sole province of the Idaho Supreme Court to create rules governing the practice and procedure in all Idaho courts, including the Idaho Rules of Evidence. IDAHO CONST. ART. V, § 2; Idaho Code § 1-212. Such rules cannot be interpreted by inferior courts to "abridge, enlarge or modify the substantive rights of any litigant." I.C. § 1-213.

(Appellant's Brief, p.25.) The district court's order abridged or otherwise modified Mr. Hall's right to investigate, raise, and support potential claims for post-conviction relief by placing additional restrictions, and ultimately a complete prohibition, on his counsels' ability to interview jurors.

Moreover, *assuming arguendo* that the district court has inherent authority to impose restrictions, or an absolute prohibition, on jury contact, Mr. Hall submits that the district court, under the circumstances of this case, was not entitled to invoke such authority. Indeed, this Court has recognized that even in cases where trial courts

generally possess inherent authority to act, proper invocation of such authority is dependent upon the particular circumstances of the case. For instance, in *State v. Rogers*, 143 Idaho 320, 144 P.3d 25 (2006), this Court affirmed a trial court's inherent authority to assess sanctions for bad faith conduct against all parties appearing before it. However, this Court held that under the circumstances of that case, the trial court was not entitled to invoke such authority. Specifically, the Court held that the trial court "did not act consistently with the applicable legal standards" for invoking such authority, i.e., ordering sanctions, because the attorney did not engage in improper conduct. *Id.* at 322-23, 144 P.3d at 27-28. Similarly, the district court in Mr. Hall's case "did not act consistently with the applicable legal standards" for invoking such authority, i.e., ordering restrictions on jury contact, because Mr. Hall's attorneys did not engage in improper conduct. Mr. Hall's attorneys had not violated any court order or rule, most notably Rule 3.5(c) of the Idaho Rules of Professional Conduct, or Rule 606(b) of the Idaho Rules of Evidence. Indeed, Mr. Hall's attorneys acted consistently with those rules as well as this Court's proposed jury instructions.

The State concedes that Mr. Hall's proposed contact was not improper. (Respondent's Brief, p.29 ("[T]he state concedes there was no evidence establishing Hall's attorneys or agents were involved in or intended to commit misconduct").) Notably, the State relies on this Court's promulgation of proposed jury instructions as support for its contention that the district court properly invoked its inherent authority.

The relevant instruction provides as follows:

The question may arise as to whether you may discuss this case with the attorneys or with anyone else. For your guidance, the Court instructs you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you wish to, but

you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to, you may tell them as much or as little as you like, but you should be careful to respect the privacy and feelings of your fellow jurors. Remember that they understood their deliberations to be confidential. Therefore, you should limit your comments to your own perceptions and feelings. **If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, please report it to me.**

(*See* Respondent's Brief, p.28 (quoting Idaho Criminal Jury Instruction 232) (emphasis added).) Thus, the Court's jury instructions provide for the district court's invocation of inherent authority "if anyone harasses the jurors". Indeed, Mr. Hall concedes that if a juror reports an instance of misconduct, then a district court may take action placing reasonable restrictions on any further contact, which in some circumstances, may warrant a complete prohibition on any further contact.

The State claims that the district court properly invoked its inherent authority to create a rule, based in part on the discovery rule, requiring attorneys to demonstrate that jury contact is necessary to protect the petitioner's substantial rights. (Respondent's Brief, p.29.) To support its contention that the district court adopted an appropriate rule, the State mischaracterizes the record by stating that Mr. Hall brought a motion for discovery. (Respondent's Brief, p.29 ("Hall's contention that he 'did not ask the court to order jury interviews through discovery' . . . is untrue. . . . that is exactly what he did by filing his Motion for Jury Contact.")) The State makes this claim despite conceding that the district court prohibited Mr. Hall from contacting jurors without first bringing a motion. (Respondent's Brief, p.3 ("[I]t was clear the court did not want Hall's attorneys contacting jurors 'without coming back with a specific motion.'"); p.4 (noting that the district court informed Mr. Hall that he "need[ed] prior express permission from the Court" before contacting any of the jurors).) Further, the State makes this claim despite

conceding that Mr. Hall consistently maintained that the district court had no authority to prohibit jury contact. (Respondent's Brief, p.5 (quoting Mr. Hall's counsel as stating, "[T]here's no support in law. Again, there's nothing prohibiting us from contacting these people.")) Finally, as noted above, Mr. Hall filed a separate motion for discovery that did not include a request for juror interviews. In short, while conceding that the district court's prior rulings are "interesting and important background," the State ignores both when characterizing Mr. Hall's motion for jury contact.

The State claims that the district court did not abuse its discretion in applying its chosen standard. The State relies in part on cases it previously cited to support its contention that "courts have properly exercised their right to protect jurors from **unwanted post-trial harassment.**" (Respondent's Brief, pp.29-30 (emphasis added).) There are two problems with the State's claim. First, it has not been established that the jurors in this case objected to any communications with Mr. Hall's attorneys, or that any attempt to contact them constituted harassment. Second, not a single case cited by the State adopted the rule or standard imposed by the district court. As noted above, the majority of the cases relied upon by the State have adopted a lower standard for permitting jury contact; in the respective jurisdictions, attorneys need only demonstrate good or just cause for contacting jurors.

The State relies heavily on *Townsel v. Superior Court*, 979 P.2d 963 (Cal. 1999), asserting that the case is "remarkably similar" to the case at bar. (Respondent's Brief, p.31.) While the procedural history is similar, a careful reading of *Townsel* demonstrates that California has adopted a rule requiring a showing of "good cause," a rule more

stringent than unrestricted access but much less stringent than the rule adopted by the district court in Mr. Hall's case. As explained by the *Townsel* court:

We must still decide whether respondent abused its discretion in ordering appellate counsel to have no contact with the jurors without first showing "good cause" or "probable cause" for such contact and receiving court approval. **In the circumstances of this trial we conclude the trial court acted within its discretion.**

To begin with, this was a capital trial, and defendant was found guilty and sentenced to suffer the death penalty. Further, it appears that defendant was convicted of murdering one victim because she was a witness to a previous crime . . . and that he was also convicted of attempting to prevent or dissuade a witness. Each of these circumstances raises serious concerns about juror safety. . . .

In addition, several years-almost a decade-have now passed since the jury returned its verdict. This long period of repose will have heightened the jurors' sense of privacy regarding Townsel's trial, likely making any present contact by appellate counsel both startling and more intrusive. . . .

Townsel, 979 P.2d at 970-71 (footnotes omitted). While Mr. Hall was convicted of capital murder, there was no allegation that he presented a threat to witnesses. In addition, because Idaho capital post-conviction proceedings are initiated almost immediately following a death sentence, in Mr. Hall's case there was not a significant passage of time that could conceivably heighten a juror's sense of privacy or diminish a juror's recollection.

After concluding that restrictions were appropriate, the *Townsel* court approved a procedure which deviates significantly from the procedure adopted by the district court in Mr. Hall's case. As stated by the court:

Under these circumstances, respondent did not abuse its discretion in requiring that appellate counsel approach jurors through the court. In this way, the court can act as a neutral third party, serving to apprise the jurors of counsel's interest and to determine, in the first instance, if a juror will consent to an interview with appellate counsel. If any juror refuses to consent, that is the end of the matter. If, however, a juror consents to an

interview, no more need be shown, as section 206, subdivision (a) provides that jurors enjoy “an absolute right to discuss ... the deliberation or verdict with anyone.” **If a juror does consent to an interview, respondent court would abuse its discretion by requiring counsel to make a showing of need or “good cause” greater than the desire to interview the juror for a lawful purpose.** (Cf. § 206, subd. (f) [defense counsel may petition for disclosure of juror identifying information if necessary for “any ... lawful purpose”].) In this circumstance, investigating the possibility of juror misconduct for presentation in a petition for writ of habeas corpus is a lawful purpose.

Id. at 971 (footnotes omitted)(emphasis added).

The State conducts a cursory review of the justifications offered by Mr. Hall to support his request for jury contact, concluding that a cursory review is sufficient to establish that Mr. Hall was merely on a “fishing expedition.” (Respondent’s Brief, p.32.) Contrary to the State’s assertions, Mr. Hall demonstrated that he pursued jury contact for proper and specific purposes, sufficient to establish even the onerous standard adopted by the district court.

Mr. Hall identified several areas of general inquiry for the jurors, including but not limited to, the following: their knowledge of undisclosed witnesses; their awareness of Mr. Hall’s shackles; their exposure to pretrial publicity; and their consideration of exercise of his constitutional right not to testify. (R. 35055, Exhibit 12, pp. 12-17.) The State summarily concludes that Mr. Hall’s general inquiries, in their totality, would lead to harassment and intimidation. (Respondent’s Brief, p.33.) The State’s summary conclusion is difficult to reconcile with its earlier concession that “there was no evidence establishing Hall’s attorneys or agents were involved in or intended to commit misconduct” (Respondent’s Brief, p.29.) Significantly, none of the general inquiries would have implicated the exclusionary provisions of I.R.E. 606(b). In other words, there is no indication that Mr. Hall would have even sought to interview the jurors over

their objections or discuss their deliberations for the purpose of obtaining inadmissible evidence. Thus, the primary policies underlying the rule, i.e., the government interest in protecting jurors from harassment and preserving the sanctity of jury deliberations, were not implicated by Mr. Hall's general inquiries.

Moreover, Mr. Hall identified specific inquiries that were targeted at known irregularities that occurred during the jury selection process and the trial. (R. 35055, Exhibit 12, pp. 12-26.) Even the State concedes that “[Mr.] Hall’s ‘specific’ questions are linked with questions raised during voir dire.” (Respondent’s Brief, p.34.) However, the State claims that Mr. Hall’s proposed inquiries about undisclosed witnesses were not related to claims he raised in his amended petition. (Respondent’s Brief, p.32 (“[E]ven if a juror had ‘knowledge of and relationship to an undisclosed witness,’ Hall completely failed to explain how such a finding was related to his amended petition . . .”).) Of course, the record is clear that prior to entering its order prohibiting juror contact the district court never informed Mr. Hall that it intended to adopt a standard similar to the standard governing post-conviction discovery, i.e., a standard that would require explicit reference to claims raised in the petition. Nevertheless, Mr. Hall explained the relationship between his inquiries and his claims in part as follows:

Juror [83]

....

[Juror 83’s] husband was a Deputy Attorney General assigned to represent the Idaho Department of Corrections.

....

Mr. Hall should also be allowed to specifically inquire whether this juror knew Attorney General Jay Rosenthal. Trial counsel did not notice that Mr. Rosenthal had not been disclosed as a State witness in the jury questionnaire, and acknowledged that [Juror 83] should have been asked

whether she knew Mr. Rosenthal. (9/14/06 Deposition of Amil Myshin, p.271, L.6 – p.272, L.4.) Mr. Rosenthal was a key State witness at sentencing but, as discussed above, was not disclosed as a witness on the jury questionnaires. Mr. Rosenthal, like [Juror 83's] husband, is a Deputy Attorney General for the State of Idaho. Petitioner must be allowed to determine whether [Juror 83] knew Mr. Rosenthal and whether she made credibility determinations based on Mr. Rosenthal's occupation or personal acquaintance.

(R. 35055, Exhibit 12, pp. 19-22.) (Footnote omitted.)

Similarly, Mr. Hall established the relationship between his inquiries about the jurors' awareness, if any, of his shackles in his Final Amended Petition. (R. 35055 Vol. VII, p.1273.) In support of this claim, Mr. Hall stated in relevant part the following:

Mr. Hall wore a "leg brace" during all court appearances. (Tr., p.592.) According to the State, the brace was worn under clothing, but would lock whenever Mr. Hall stood and his leg would remain stiff, unless he pressed a button to the side of the brace that released it. (Tr., p.592, Ls.7-15.) Mr. Hall would have to push the button as he walked. (Tr., p. 593, Ls. 4-6.) This was a new device that the Court had never previously employed. (Tr., p. 592, Ls. 23-24.) The Court made no findings whether the device was detectable and no findings whether the device was necessary.

....

The jurors were able to discern that Mr. Hall was shackled during the guilt phase and penalty phase of his trial. First, the leg device made clicking noises which the jurors would have been able to hear each time he stood up before the court. Second, in order to return to a seated position, Mr. Hall had to press a button on the device, which also would have been noticeable by the jurors. The jury was therefore aware that court authorities considered him a danger to the community, inevitably affecting their perception of Mr. Hall. *Deck*, 125 S.Ct. at 2014 (reasoning that shackling almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community, and shackling almost inevitably affects adversely the jury's perception of the character of the defendant). **Mr. Hall relies on his affidavit, to be submitted, to establish this matter, as the district court's refusal to allow post-conviction counsel to interview jurors precludes Mr. Hall from otherwise fully developing this claim.** (See Tr., 12/8/06, deposition of D.C. Carr, p. 309 (explaining he would have missed any noises made by the leg device because he has "high frequency loss" of hearing).)

(R. 35055 Vol. VII, pp.221-223 (footnote omitted) (emphasis added).)²

C. Conclusion

The district court lacked inherent authority to create a rule that abridged and modified Mr. Hall's right to conduct a meaningful post-conviction investigation consistent with existing Court rules and regulations. *Assuming arguendo* the district court had the inherent authority to regulate juror interviews, under the circumstances of this case, the court was not entitled to invoke that authority. Finally, assuming the court properly invoked its authority, the court abused its discretion in denying Mr. Hall's request for juror contact.

III.

The District Court's Order Denying Mr. Hall's Motion For A Court-Ordered Deposition Of His Trial Counsels' Investigator, Glenn Elam. Constitutes An Abuse Of Discretion Where Mr. Hall Has Demonstrated That A Deposition Is Necessary To Protect His Substantial Rights

A. Introduction

In his opening brief, Mr. Hall claims that the district court erred in denying his motion to depose his trial counsels' investigator, Glenn Elam. Mr. Hall provided evidence demonstrating that Mr. Elam's testimony was necessary to establish the scope of the investigation conducted in relationship to his claims for post-conviction relief. Mr. Hall asserts that he made a sufficient showing to establish that requested deposition was

² Mr. Hall subsequently attached his own affidavit in support of this claim. (R. 35055 Vol. VII, p.1377 (providing in part that, "[t]he [leg] brace made clicking noises; the jurors would have been able to hear these noises every time I stood up.") Accordingly, if Mr. Hall had not previously made the showing necessary to justify post-conviction juror interviews, then he now has for purposes of this appeal and for purposes of any additional factual findings that the district court might make upon remand.

mandatory. Alternatively, Mr. Hall asserts that the district court abused its discretion in denying his request for the deposition based on the court's misapplication of the relevant facts and law. (Appellant's Brief, pp.27-37.)

In its response, the State asserts that the district court did not err by denying Mr. Hall's motion for three reasons: 1) claims Mr. Elam's testimony was only relevant to "a single claim" in his petition; 2) because Mr. Hall deposed trial counsel, he did not need to depose Mr. Elam; and 3) Mr. Hall did not demonstrate that he could not obtain an affidavit of Mr. Elam in lieu of his deposition. (Respondent's Brief, pp.7, 11-15.)

In this reply, Mr. Hall will demonstrate that both of the State's assertions are based on mischaracterizations of the record.

B. The District Court's Order Denying Mr. Hall's Motion For A Court-Ordered Deposition Of His Trial Counsels' Investigator, Glenn Elam, Constitutes An Abuse Of Discretion Where Mr. Hall Has Demonstrated That A Deposition Is Necessary To Protect His Substantial Rights

1. The Deposition Of Glenn Elam Was Necessary To Fully Support Claims Raised In Mr. Hall's Petition For Post-Conviction Relief, Including A Claim That His Trial Counsel Rendered Ineffective Assistance By Failing To Adequately Investigate And Present Evidence Of An Alternate Perpetrator

The State correctly notes that Mr. Hall claims that the district court abused its discretion by denying the deposition of Glenn Elam where such deposition was necessary to fully develop a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). However, according to the State, Mr. Hall never raised such a claim in his petition, and therefore should be precluded from making such an argument on appeal. (Respondent's Brief, p.11 ("But the portion of the amended petition upon which Hall relies – claim D.7 – involves a claim that the state allegedly

withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).”)

The State concludes:

Hall’s attempt to now change the claim from a Brady violation to an ineffective assistance of counsel claim to support his request to depose Elam cannot be countenanced by this Court and demonstrates his true purpose in deposing Elam was to embark on a fishing expedition to raise new claims for his final amended petition.

(Respondent’s Brief, p.11.)

Contrary to the State’s assertion, Mr. Hall did in fact raise a *Strickland* claim based on his trial counsels’ failure to adequately investigate and present evidence of an alternate perpetrator in both his amended and final petitions. (R. 35055 Vol. II, p.152; R. 35055 Vol. VI, pp.1089-96; Vol. VII, p.1347 (“Trial counsel rendered ineffective assistance of counsel during the guilt-innocence phase of trial by failing to conduct an adequate investigation of the possible connection between Lynn Henneman’s murder and Patrick Hoffert’s suicide.”).) Apparently the State is confused by the fact that Mr. Hall also raised a separate but related *Brady* claim. (R. 35055 Vol. I, pp.190-92.) Notably, when stating his *Strickland* claim in his amended petition, rather than restate the overlapping evidence from the earlier *Brady* claim, Mr. Hall simply incorporated by reference the factual development set forth in the earlier claim. (R. 35055 Vol. II, p.152 (“Had trial counsel conducted an adequate investigation, they would have discovered evidence linking Patrick Hoffert to the crime. **See supra, claim D-7, incorporated herein by reference.**”) (emphasis added).) Thus, Mr. Hall is not attempting to raise a *Strickland* claim for the first time on appeal. Consequently, the State’s characterizations about the record and the State’s allegations about post-conviction counsels’ hidden and nefarious agendas are both mistaken and misplaced. (Respondent’s Brief, p.15 (“Hall’s

sole purpose in deposing Elam is to fish for new claims that are not part of his amended or final post-conviction petitions, or simply to increase the costs associated with his post-conviction case”).) Thus, the Court need not countenance anything to hold that the district court abused its discretion by preventing Mr. Hall from deposing Mr. Elam.³

2. The Depositions Of Glenn Elam Was Necessary To Establish The Full Scope Of Trial Counsels’ Investigation Relevant To Mr. Hall’s Claim That Trial Counsel Failed To Adequately Investigate And Present Evidence Of An Alternate Perpetrator

The State claims that the depositions of trial counsel demonstrate that Glenn Elam could not have provided more information about his investigation than was revealed in trial counsels’ depositions. Notably, the State quotes Mr. Hall’s lead trial counsel, Amil Myshin, as stating that Mr. Elam’s interviews of two witnesses, Peggy Hill and Lisa Lewis, revealed nothing more than what had been disclosed in police reports. (Respondent’s Brief, pp.12-13.) However, as demonstrated by the affidavit of Michael Shaw, post-conviction counsels’ investigator, Mr. Elam discovered much more than what Mr. Myshin recalled in his deposition, and much more than what the police reports

³ The State characterizes Mr. Hall’s discovery request as a “fishing expedition” without regard for the facts in the record and attributes the costs and delays associated with this case to post-conviction counsel, without providing a thoughtful analysis of why this case has taken so long to litigate. Indeed, if the district court had granted the requested deposition, then the deposition could have been completed years ago. Likewise, because the State below and now on appeal refuses to recognize the propriety of the requested deposition, this interlocutory appeal has unnecessarily delayed the underlying post-conviction proceedings. Mr. Hall finds no fault with this Court for granting this appeal. Indeed, if the Court had not granted this appeal, then there would have been even greater costs and delay for the case to proceed through a consolidated appeal only to be remanded, at a minimum, for further post-conviction proceedings at some much later future date. Mr. Hall does not attribute the State’s mischaracterizations of the record or its incomplete analysis to bad faith. During these proceedings, the State cited a heavy caseload as support for multiple extensions of its briefing deadline. It is widely

provided. Most notably, Mr. Elam learned through his investigation that Patrick Hoffert had been seen with Lynn Henneman on the day she was raped and murdered, that Mr. Hoffert had committed suicide by a self-inflicted gunshot wound the day after the rape and murder, and that Mr. Hoffert had purportedly claimed to have “raped the girl” immediately before shooting himself. (Appellant’s Brief, pp.28-29.) Significantly, the State fails to note that later in his deposition, Mr. Myshin testified that he was not aware of these additional facts, and that had he known, he “may have changed what [he] did” at trial. (R. 35055, Exhibit 15 containing Exhibit 14 to Mr. Hall’s Final Amended Petition (Tr., 11/16/06 deposition of Amil Myshin, p.413, L.20 – p.415, L.14).)

3. The Deposition Of Glenn Elam Was Necessary Due To Mr. Elam’s Refusal To Sign An Affidavit

The State claims that “there was no allegation that Myshin or Elam were trying to avoid giving or obtaining permission to sign an affidavit or otherwise be[ing] uncooperative.” (Respondent’s Brief, p.14.) This is simply untrue. Indeed, Mr. Hall’s post-conviction counsel informed the district court, and provided a sworn statement from his investigator, that Mr. Elam had refused to sign an affidavit because Mr. Myshin had not provided him consent to do so. (R. 35055, Exhibit 13 containing Appendix 11 to Mr. Hall’s Motion for Permission to Appeal, pp.1-3.) Further, Mr. Hall subsequently attached an amended affidavit from Mr. Shaw to his final amended petition. (See R. 35055 Vol. VI, pp.1055-56, pp.1093-95.) The amended affidavit included all the information provided to the district court in the motion for permissive appeal, filed on August 23, 2007, as well as the following:

recognized that an excessive caseload can undermine the performance of even otherwise

On August 31, 2007, I saw Mr. Myshin outside the Ada County Courthouse and told him that Mr. Elam would not sign an affidavit without his consent. When I asked Mr. Myshin whether he would consent to Mr. Elam giving the State Appellate Public Defender's Office an affidavit in the Hall case, Mr. Myshin stated, "I wish you would leave him alone."

(R. 35055, Exhibit 15 containing Exhibit 36 to Mr. Hall's Final Amended Petition, p.4.)

Accordingly, if Mr. Hall had not previously established the lack of cooperation by Mr. Elam and his trial counsel, then there can be little question now that he has for purposes of this appeal and for purposes of any additional factual findings that the district court might make upon remand.


C. Conclusion

For the reasons stated above, a deposition of Mr. Elam appears to be the only way to obtain all the information necessary to fully support Mr. Hall's claims. Accordingly, Mr. Hall submits that the district court erred in denying his request to depose Mr. Elam.

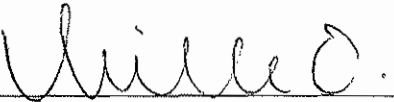
CONCLUSION

Mr. Hall respectfully requests that this Court vacate the district court's orders denying his motion for juror contact and to depose Mr. Elam, and remand this case for further investigation and proceedings.

Dated this 30th day of October, 2009.



MARK J. ACKLEY
Deputy, State Appellate Public Defender



NICOLE OWENS
Deputy, State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 30th day of October, 2009, served a true and correct copy of the forgoing APPELLANT'S REPLY BRIEF as indicated below:

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