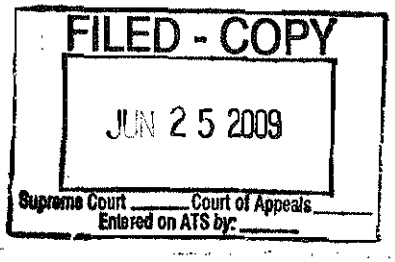
6-25-2009

Hall v. State Appellant's Brief Dckt. 35055

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,	)	
	)	
Petitioner-Appellant,	)	NO. 35055
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	(Capital Case)



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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STATEMENT OF THE CASE

Nature of the Case

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

Statement of the Facts and Course of Proceedings

A jury found Erick Virgil Hall guilty of Murder in the First Degree, Rape, and Kidnapping in the First Degree, in Ada County Case No. H0300518. (R. 31528 Vol. IV, pp.661-671.)[1] Following the special sentencing hearing held pursuant to I.C. § 19-2515, the same jury found imposition of the penalty of death on Mr. Hall would not be unjust. (R. 31528 Vol. I, p. 48;167.) The judgment and sentence of death were pronounced on January 18, 2005, by the Honorable Thomas F. Neville, District Judge of the Fourth Judicial District of the State of Idaho, in Ada County, Boise, Idaho. (R. 31528 Vol. IV, pp.655-660.)

On March 1, 2005, Mr. Hall filed a timely petition for post-conviction relief pursuant to I.C. § 19-2719, which initiated these capital post-conviction proceedings. (R. 35055 Vol. I, pp.9-34.) During the course of post-conviction proceedings, the district court entered two separate orders at issue in this appeal: (1) an order prohibiting juror

[1] Mr. Hall respectfully requests this Court to take judicial notice of the record in the underlying criminal case, Supreme Court No. 31528.

contact, and (2) an order denying a motion to depose Glenn Elam, the investigator for Mr. Hall's trial counsel.

The Order Prohibiting Juror Contact

On October 31, 2005, Mr. Hall and the State stipulated to the release of completed jury questionnaires, which had been provided to the parties to assist with jury selection in the underlying criminal case. (R. 35055 Vol. I, pp.71-73.) On January 6, 2006, a telephonic hearing was held regarding the stipulation during which the district court permitted the release of the jury questionnaires. In the course of discussing the questionnaires, the district court prohibited post-conviction counsel from contacting jurors without prior court approval. (R. 35055 Vol. VIII, p.1609; Tr. 4/09/09, p.7, L.3 – p.24, L.17.)

On January 20, 2006, Mr. Hall filed a motion asking the district court to reconsider its prohibition on juror contact. (R. 35055 Vol. I, pp. 112-114.) On February 15, 2006, at the conclusion of the hearing on Mr. Hall's motion, the district court prohibited Mr. Hall's counsel from contacting jurors, but stated it would entertain future motions on the matter. (Tr. 2/15/06, p.44, L.3 – p.45, L.15.)

On June 1, 2007, Mr. Hall filed a motion for juror contact and a memorandum in support thereof, setting forth the legal grounds for his motion, the reasons he believed the jurors had information relevant to his post-conviction claims, the procedures his investigator would follow when contacting jurors, and the questions he intended to ask of those who chose to cooperate. (R. 35055 Vol. V, pp.961-963; R. Vol. VIII, p.1573 (Certificate of Exhibits, Exhibit 12.).) In its response, the State conceded the district court could not prohibit all juror contact, and presented a proposed procedure for

limiting, but not prohibiting, juror contact. (R. 35055 Vol. V, pp.968-984.) The district court held a hearing on August 8, 2007, and denied the motion. (Tr. 8/08/07, p.123, L.8 – p.145, L.21.) On September 13, 2007, the district court memorialized its order denying Mr. Hall's motion for juror contact. (R. 35055 Vol. VI, pp.1020-1023.)

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

On January 5, 2006, Mr. Hall filed a motion for discovery in which he requested leave to depose his trial counsel and their investigator, Glenn Elam. (R. 35055 Vol. I, p.101.) At the hearing on Mr. Hall's motion, the district court granted Mr. Hall's request to depose trial counsel but denied, without prejudice, his request to depose Mr. Elam. (Tr. 7/05/06, p.177, L.19 – p.181, L.21.)

On December 29, 2006, after the completion of trial counsels' depositions, Mr. Hall filed a supplemental memorandum in support of, *inter alia,* a renewed motion to depose Mr. Elam, identifying multiple claims to which Mr. Elam's testimony was relevant. (R. 35055 Vol. VIII, p.1573 (Exhibit 10, pp.20-21.).) On January 16, 2007, the district court denied Mr. Hall's renewed request to depose Mr. Elam. (R. 35055, Vol. V, p.884; Tr. 1/16/07, p.35, L.4 – p.36, L.2.)

On June 1, 2007, Mr. Hall filed a sealed supplemental motion for discovery.[2] (R. 35055 Vol. VIII, p.1572 (Exhibit 2).) On August 8, 2007, the district court again denied the request to depose Glenn Elam, suggesting that an affidavit from Mr. Hall's current counsel may be a better alternative. (Tr. 8/08/07, p.65, L.20 – p.66, L.5.)

[2] The hearing on the motion was not sealed. Because the parties have not yet agreed to unseal the motion for purposes of this appeal, Mr. Hall cites solely to the transcript of the hearing on the motion.

On September 17, 2007, the district court entered a written order denying Mr. Hall's request to depose Mr. Elam, stating that "[n]o showing has been made by the petitioner that [the] deposition is necessary to protect his substantial rights." (R. 35055 Vol. VI, p.1046.)

The Order Denying Mr. Hall's Motion For Permissive Appeal

On August 23, 2007, Mr. Hall filed a motion for permission to appeal with the district court. (R. 35055 Vol. V, pp.996-1006.) Mr. Hall included an affidavit from his investigator, Michael Shaw, in which Mr. Shaw described the content of multiple interviews with Glenn Elam and his unsuccessful attempts to obtain an affidavit from Mr. Elam. (R. 35055 Vol. VIII, p.1573 (Exhibit 13, Appendix 11, pp.1-3.).)

On November 15, 2007, the district court held a hearing on Mr. Hall's motion for permission to appeal, during which the court expounded upon its reasons for denying the deposition of Mr. Elam. (Tr. 11/15/07, p.17, L.16 – p.21, L.23.)

On November 29, 2007, Mr. Hall filed a motion for permission to appeal with this Court. (R. 35055 Vol. VIII, pp.1570-1571.) On January 18, 2008, the district court entered its written order denying Mr. Hall's motion for permission to appeal. (R. 35055 Vol. VIII, pp.1527-1528.) Subsequently, this Court entered an order granting Mr. Hall permission to appeal and Mr. Hall filed a timely notice of appeal. (R. 35055 Vol. VIII, pp.1565-1568.) Mr. Hall has not requested any extensions of time for purposes of filing this Appellant's Brief.

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?

ARGUMENT

I.

The District Court's Order Forbidding Any Communications With Jurors Unless Mr. Hall Can First Demonstrate That Any 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

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. By doing so, the district court imposed a prior restraint in violation of the First Amendment, impeded Mr. Hall's post-conviction investigation in violation of the Fifth and Fourteenth Amendment, and eliminated an important procedural safeguard against the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment.

B. Standard Of Review

This Court has not clearly articulated the standard of review for the district court's order at issue in this case. However, Mr. Hall submits the appropriate standard of review is *de novo* since the issue involves a question of law. *Cf. 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.")

C. 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 Under 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 First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. AMEND. I.[3] In the First Amendment context, "[t]he term 'prior restraint' is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted) (emphasis in original). In this case, the district court's order constitutes a prior restraint because it forbids Mr. Hall's attorneys, and their agents, from communicating with the discharged jurors without first demonstrating such communication is necessary to protect Mr. Hall's substantial rights.

Where First Amendment interests are at stake, the 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

[3] The First Amendment is applicable to the states through the Fourteenth Amendment. *See Texas v. Johnson*, 491 U.S. 397, 416 n.10 (1989).

proceeding." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). In applying this standard, a reviewing court engages in a balancing of the State's interest in regulating the targeted speech, and the attorney's interest in free speech. The balancing process involves a four-step analysis: 1) identification of the attorney's interest in the targeted speech; 2) identification of the State's interest in regulating the attorney's speech; 3) whether the attorney's speech has a "substantial likelihood of materially prejudicing the proceeding[;]" and 4) whether the regulation is "narrowly tailed" to achieve the State's interest. *Id.* at 1075-76.

a. The Attorney's Interest In The Targeted Speech

Mr. Hall has a constitutional right to meaningful post-conviction proceedings. *See, e.g., State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992) (recognizing that capital post-conviction proceedings serve to protect a condemned person's federal and state right to due process); *Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999) ("failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process"). Pursuant to Idaho law, Mr. Hall essentially has one opportunity to raise all challenges to his conviction and sentence. *See,* I.C. § 19-2719(4)-(6); *McKinney v. State,* 133 Idaho 695, 700-01, 992 P.2d 144, 149-50 (1999). Mr. Hall's failure to assert a claim in his original petition is deemed to be a waiver of any claims that were known, or should have been known, at that time. *State v. Rhoades,* 120 Idaho 795, 807, 820 P.2d 665, 677 (1991). Thus, Mr. Hall has a substantial interest in communicating with the jurors in his case, as such communication is necessary to protect his right to meaningful post-conviction proceedings. *See infra* Argument I.C.2. In order to protect Mr. Hall's right to

meaningful post-conviction proceedings, Mr. Hall's attorneys have a duty to investigate potential juror misconduct and bias where there is reason to believe that the verdict may be subject to legal challenge. *See, e.g.,* ABA Criminal Justice Section Standards, Defense Function, Standard 4-7.3(c)("After discharge of the jury from further consideration of the case, . . . [i]f defense counsel believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.").

b. The State's Interest In Regulating The Attorney's Speech

Mr. Hall concedes the State has a legitimate interest in protecting discharged jurors from harassment, and in preserving both the freedom of juror deliberations and the finality of verdicts. *Cf. Tanner v. United States,* 483 U.S. 107, 137 (1987) (Marshall, J., concurring in part and dissenting in part). However, pursuit of these interests should not undermine other substantial State interests, including the interest in promoting justice and public confidence in the judicial process. Accordingly, rules adopted to achieve the State's interests should be flexible enough to accommodate any countervailing interests. *See McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) ("It would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice. This might occur in the gravest and most important cases . . . .") (internal quotes omitted)).

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. (*See infra* Argument I.C.1.c (addressing rules and instructions in detail).) In

the course of interpreting these rules, especially the Rules of Evidence, this Court, as well as the Court of Appeals, has avoided a rigid interpretation of the rules, recognizing such application may, in some instances, be counterproductive. For example, in *Roll v. City of Middleton,* 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989), the Court of Appeals considered the appropriate standard of prejudice necessary for a new trial. In rejecting an "actual prejudice test," the court stated that "the extreme rigor" of such a test "would severely restrict the availability of relief for [juror] misconduct, thereby diminishing public confidence in the jury system and eroding the fundamental principle that a verdict must be based upon the evidence developed at the trial." *Id.* at 837, 771 P.2d at 58. Similarly, this Court has refused to rigidly interpret I.R.E. 606 (b) so as to completely foreclose the admissibility of juror affidavits in the context of a constitutional violation, even if the affidavits would be inadmissible under the plain language of the rule. *State v. DeGrat,* 128 Idaho 352, 355, 913 P.2d 568, 571 (1996) (recognizing circumstances in which a "constitutional exception" might apply to the exclusionary provisions of the rule). Indeed, experience teaches that freedom of speech, even if such speech is deemed inadmissible as a matter of law, can further the State's interest in improving the judicial system. For example, as demonstrated in *Watson v. Navistar Int'l Transp. Corp.,* 121 Idaho 643, 671, 827 P.2d 656, 684 (1992) (Bakes, C.J., concurring specially), and *Lehmkuhl v. Bolland,* 114 Idaho 503, 511, 757 P.2d 1222, 1230 (Ct. App. 1988) (Burnett, J., specially concurring), juror affidavits that were deemed inadmissible led to improvements in the judicial system by revealing flaws in jury instructions to be corrected in future proceedings.

Notably, 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 permitted post-trial interviews of jurors and even authorized the defense to hire an investigator for that purpose. Indeed, the admissibility of juror affidavits from such interviews is a matter that Idaho district courts, as well as appellate courts, have historically addressed without diminishing the sanctity of juror deliberations, or otherwise undermining the public's confidence in the judicial system. *See, e.g., Roberts v. State*, 132 Idaho 494, 495-496, 975 P.2d 782, 783-784 (1999) (excluding affidavits of jurors interviewed during post-conviction investigation); *State v. Turner*, 136 Idaho 629, 635, 38 P.3d 1285, 1291 (Ct. App. 2001) (noting that investigator contacted and interviewed jurors post-trial in attempt to support motion for new trial); *State v. Webster*, 123 Idaho 233, 846 P.2d 235 (Ct. App. 1993) (mentioning that four jurors were contacted post-trial); *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992) (recognizing that a party "has no way of knowing whether a verdict was [impermissible] until some of the jurors are interviewed.").

In conclusion, Mr. Hall concedes the State has an interest in regulating attorney speech. However, the State has an equally important interest in promoting justice and public confidence in the judicial process which can be frustrated by over-regulating attorney speech. Thus, when reviewing the prior restraint imposed by the district court, Mr. Hall submits the Court should continue its practice of weighing **all** of the interests at stake, in light of the experience and practice in Idaho courts.

c. The Targeted Speech Does Not Present A Substantial Likelihood Of Materially Prejudicing The Proceeding

The district court's order targets all communications Mr. Hall's attorneys might have with jurors, without regard for whether the communications have a "substantial likelihood of materially prejudicing" the proceedings. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1075-76 (1991) (holding attorney's pretrial statements to the press were protected speech because they did not present a "substantial likelihood of materially prejudicing" the legal process). In fact, the district court never explicitly addressed whether Mr. Hall's proposed communications presented a substantial likelihood of materially prejudicing the proceedings. (R. 35055 Vol. VI, pp.1020-1023.)

Mr. Hall submitted a proposed list of general topics and specific questions for jurors who were willing to discuss their service, which he supported with citations to the record and applicable law. (R. 35055, Vol. VIII, p.1573 (Certificate of Exhibits, Exhibit 12.).) In rejecting Mr. Hall's request, the district court's order implicitly assumes that Mr. Hall's attorneys will act unprofessionally if left to their own devices. (*See infra* Argument II.) However, until established otherwise, all Idaho attorneys are presumed to be capable of exercising professional discretion. As stated in the Idaho Rules of Professional Conduct:

> [M]any difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. **These principles include the lawyer's obligations, as an advocate, to zealously protect and pursue a client's legitimate interests within the bounds of the law and, as an officer of the court, to preserve the integrity of the legal system's search for the truth while maintaining a professional, courteous and civil attitude toward all persons involved in the process.** . . . Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their

> relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (2004) (emphasis added).

Even if the district court were justified in assuming ill intent or overzealousness on the part of Mr. Hall's attorneys, this Court has already adopted three safeguards designed, in part, to minimize the likelihood of any potential prejudice to the proceedings. These safeguards are reflected in the Idaho Criminal Jury Instructions, the Idaho Rules of Professional Conduct, and the Idaho Rules of Evidence.

First, this Court has promulgated Idaho Criminal Jury Instruction (ICJI) number 232, which 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.

ICJI No. 232 (emphasis added). This instruction recognizes the permissibility of post-verdict juror contact, while reducing the risk of juror harassment by empowering jurors to decide for themselves whether to talk to the attorneys.

A second safeguard adopted by this Court is contained in the Idaho Rules of Professional Conduct (IRPC). In relevant part, Rule 3.5 provides that, "A lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment." IRPC 3.5(c). The relevant commentary to this rule states that:

> A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

IRPC 3.5, Commentary, ¶ 3. Thus, this rule recognizes the permissibility of juror contact, while minimizing the risk of juror harassment and manipulation, by setting forth specific rules that Idaho attorneys must observe when communicating with discharged jurors.

A third safeguard adopted by this Court is contained in Rule 606(b) of the Idaho Rules of Evidence.

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes . . . .

I.R.E. 606 (b). Pursuant to this rule, a juror's affidavit generally cannot be used to impeach the jury verdict, subject to at least four exceptions. The first three are contained in the rule itself, which provides:

> [A] juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

I.R.E. 606(b). The plain language of this rule assumes juror interviews are permissible, but simply restricts the admissibility of the fruits of such interviews.

The fourth "exception" is essentially a recognition by this Court that not everything a juror has to say falls within the scope of Rule 606(b). As this Court has stated:

> The role of I.R.E. 606(b) is to guide a court in determining what evidence may be considered by the court to impeach a verdict. That rule, however, does not have application to information brought forth which challenges other conduct of jurors during the trial, apart from their deliberations.

Levinger v. Mercy Medical Center, 139 Idaho 192, 197, 75 P.3d 1202, 1207 (2003) (holding that a juror's affidavit demonstrating dishonesty during voir dire was admissible because dishonesty during voir dire occurs prior to deliberations). This "exception" recognizes that some errors may be addressed by juror affidavits if adequate safeguards, such as a meaningful voir dire, were not observed during the trial process. *See State v. DeGrat,* 128 Idaho 352, 355, 913 P.2d 568, 571 (1996).

Thus, I.R.E. 606(b), and the cases interpreting it, implicitly recognize the propriety of conducting juror interviews. Indeed, experience and common sense demonstrate that juror contact may be the only means of identifying claims for which juror affidavits are admissible to support.

Moreover, in all cases where a litigant has an interest in contacting jurors, this Court has already adopted at least three independent safeguards which effectively minimize the likelihood of juror harassment, manipulation, and unwarranted intrusion into the jury's deliberative process. For these reasons, Mr. Hall's proposed

communications with jurors did not present a substantial likelihood of prejudicing the post-conviction proceedings.

d. The District Court's Order Is Not Narrowly Tailored To Achieve The State's Interest

The rule in *Gentile* permitting restrictions on an attorney's ability to make pretrial statements to the press was narrowly tailored, i.e., written to apply only to such speech that was substantially likely to have a materially prejudicial effect on the proceedings. *Gentile*, 501 U.S. at 1076. In contrast, the district court's order prohibiting juror contact in this case is not narrowly tailored because it prohibits constitutionally protected communications designed to assist Mr. Hall in identifying and supporting legitimate claims for post-conviction relief. (*See supra* Argument I.C.1.(a) and (c).) By its breadth and burden, the district court's order effectively precludes Mr. Hall from conducting any meaningful investigation of juror misconduct claims, or for that matter, any other claims that could be supported by juror affidavits.

The district court reasoned that because the jury was instructed to consider only the evidence presented at trial, any post verdict communications with jurors regarding potential claims of juror misconduct, or bias, were unnecessary. (R. 35055 Vol. VI, pp.1020-1023.) Presuming the jury followed the district court's instructions may be relevant in determining whether a juror's affidavit is admissible, *State v. DeGrat,* 128 Idaho 352, 355, 913 P.2d 568, 571 (1996), but applying this presumption to justify an order precluding juror contact, goes too far. The fact is that juror misconduct does occur, despite thorough jury instructions and admonishments.[4] Even in the absence of juror

[4] The most common types of juror misconduct involve juror exposure to matters not properly admitted into evidence. *See, e.g., United States v. Maree & Brooks*, 934 F.2d

misconduct, juror interviews might reveal information that leads to other potential claims for post-conviction relief.[5]

Mr. Hall submits his attorney's speech is already effectively regulated through the Idaho Rules of Professional Conduct, in conjunction with other rules of the Court. However, even if the current framework is deemed insufficient to achieve the State's interests, the district court's order is not narrowly tailored for First Amendment purposes to address the State's interests. For instance, the district court failed to consider any reasonable time, place, and manner restrictions, including but not necessarily limited to the following: 1) requiring that notice be given to the opposing party of the attorney's intent to contact jurors; 2) requiring that written documentation be provided to jurors identifying the attorneys or their agents, advising jurors of their right to refuse to communicate, or to terminate communications at any time, and reminding jurors to respect the privacy of other jurors; 3) requiring that juror interviews be recorded; and 4) requiring that any juror affidavits be filed under seal to provide the district court an opportunity to assess its admissibility before disclosing its contents to the public.

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196 (9th Cir. 1991) (reversing conviction because juror discussed the case with friends who said that people like the defendant should be incarcerated); *Stockton v. Virginia,* 852 F.2d 740 (4th Cir. 1988) (reversing a death sentence because sequestered jurors were told, by the owner of the restaurant where they were taken for lunch, to "fry that son of a bitch."); *United States v. Kum Seng Seo,* 300 F.2d 623 (3rd Cir. 1962) (reversing conviction because juror introduced news accounts of defendant's high bail and drugs found in the defendant's room).

[5] For instance, jurors might provide information regarding irregularities or inadequacies during voir dire. If a juror was not asked about relevant background matters or exposure to pretrial publicity, this information may develop into an ineffective assistance of counsel claim, rather than a jury misconduct claim. Jurors can also provide information about potentially prejudicial events in the courtroom, such as whether they observed the defendant in shackles or prison garb.

In conclusion, considering Mr. Hall's interests, the State's interests, the improbability that the targeted speech will materially prejudice the proceedings, and the over breadth of the order, the district court's order cannot pass constitutional muster under the First Amendment.

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

Mr. Hall has a due process right to meaningful post-conviction proceedings. *See Evitts v. Lucey*, 469 U.S. 387, 401(1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause."); *State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992) (recognizing that capital post-conviction proceedings serve to protect a condemned person's federal and state right to due process); *Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999) ("failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process"); *see generally* I.C. § 19-4901 et seq., and I.C. § 19-2719. As noted in Claim I.C. (7)(a), *supra*, incorporated here by reference, Mr. Hall's attorneys have an obligation to conduct an independent and thorough investigation to protect his right to meaningful post-conviction proceedings. Mr. Hall did not require and did not request the district court's intervention to conduct juror interviews. Rather, the district court *sua sponte* interfered with Mr. Hall's independent investigation and, by entering its order, effectively prevented him from conducting a meaningful post-conviction investigation.

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

Because this is a capital case, Mr. Hall is entitled to heightened, not lessened, procedural safeguards. *See Hoffman v. Arave*, 236 F.3d 523, 539-540 (9th Cir. 2001) (recognizing the "long line of cases requiring heightened procedural safeguards in capital cases"); *Lankford v. Idaho*, 500 U.S. 110, 125-27, (1991) (weighing the "special importance of fair procedure in the capital sentencing context"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (discussing heightened protections in capital cases); *Beck v. Alabama*, 447 U.S. 625 (1980) (noting the Court's "often stated" principle that "there is a significant constitutional difference between the death penalty and lesser punishments"); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding that "the penalty of death is qualitatively different from a sentence of imprisonment").

The ability to conduct a meaningful post-conviction investigation, including the ability to communicate with jurors, provides an additional safeguard against the arbitrary and capricious imposition of the death penalty. Indeed, considering Mr. Hall's case was one of the first capital jury sentencing cases in Idaho, the importance of obtaining juror feedback about their experience is substantial. The district court's order effectively abolished this important safeguard without sufficient justification. *See supra* Claim IC (1)(b). For these reasons, Mr. Hall respectfully submits the district court's order violates the Due Process and Eighth Amendment right to heightened protections in capital cases.

D. Conclusion

The district court inserted itself into the area of juror contact, an area that has largely been self-regulated by the legal profession through the Idaho Rules of Professional Conduct, court rules, and case law. It impugns the integrity of the Idaho legal profession to presume attorneys and their agents will act in violation of their ethical duties; such a presumption is not warranted by experience. Moreover, by crafting its unprecedented 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. For all of these reasons, Mr. Hall respectfully requests this Court vacate the district court's order prohibiting juror contact, and remand his case for further proceedings that will allow his attorneys to conduct a meaningful post-conviction investigation on his behalf.

II.

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

A. Introduction

The district court interfered with Mr. Hall's independent investigation for potential post-conviction claims, and the gathering of evidence to support such claims, by *sua sponte* prohibiting his counsel from contacting any of the jurors from the underlying case without prior court approval. When Mr. Hall obeyed the district court's directive and filed a motion to permit juror contact, the district court improperly treated the motion as a request for discovery. As noted above, the district court's conduct is unprecedented and unconstitutional. Assuming *arguendo* the district court had the authority to enter its

order, Mr. Hall met the standard established by the court. Accordingly, the district court abused its discretion in denying any juror contact.

B. Standard Of Review

As noted above, the district court lacked authority to enter the order. Assuming *arguendo* the district court had authority to enter the order, the order should be reviewed under an abuse of discretion standard. When reviewing a discretionary decision, this Court determines "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

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

On October 27, 2004, the jurors in the underlying capital case concluded their service with the entry of their special verdicts at the conclusion of the penalty phase of Mr. Hall's trial. (R. 31528 Vol. IV, pp.609-12.) Upon completion of their service, the district court discharged the jurors, instructing them as follows:

> The question may arise as to whether you may discuss this case with anyone else. For your guidance the Court instructs you that *whether you talk to anyone 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 speak to anyone about the case 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 that their deliberations were to be confidential, therefore you should limit your contact, if any, to your own perception and feelings. If anyone persists in discussing this case over your objection, or becomes critical of your service, either before or after any discussion has begun please report that to me.

(Tr. 31528, p. 5526, Ls.2-19(emphasis added).)[6]

After the initiation of the post-conviction proceedings, the parties entered a stipulation for the release of completed juror questionnaires from the underlying criminal case. (R. 35055 Vol. I, pp.71-73.) A telephonic hearing was held regarding the stipulation, during which the district court permitted the release of the jury questionnaires. In the course of discussing the questionnaires, the district court *sua sponte* prohibited post-conviction counsel from contacting jurors without prior court approval. (R. 35055 Vol. VIII, p.1609; Tr. 4/09/09, p.7, L.3 – p.24, L.17.)[7]

Two weeks later, Mr. Hall moved the district court to reconsider its prohibition on juror contact. (R. 35055 Vol. I, pp. 112-114.) At the hearing on Mr. Hall's motion, the district court prohibited Mr. Hall's counsel from contacting jurors, but stated it would entertain future motions. (Tr. 2/15/06, p.44, L.3 – p.45, L.15.)

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[6] Notably, the district court's instruction deviated from this Court's pattern instruction set forth in ICJI No. 232, by omitting reference to post-verdict discussions with attorneys. (*See supra* Argument I.C.(1)(c) (quoting ICJI No. 232 in its entirety).) This Court has entered an Order regarding the use of ICJI, providing in relevant part that:

> It is recommended that whenever these revised Idaho Criminal Jury Instructions contain an instruction applicable to a case and the trial judge determines that the jury should be instructed on that subject, the judge should use the instruction contained in the revised Idaho Criminal Jury Instructions, unless the judge finds that a different instruction would more adequately, accurately or clearly state the law.

See Order dated October 25, 2005, at. http://www.isc.idaho.gov/cji_order1005.htm (last accessed on June 19, 2009).

[7] As reflected during the hearing on Mr. Hall's objection to the record, there is some conflict regarding the nature and scope of the discussions during the January 6, 2006 hearing. Mr. Hall asserts that absent an affirmative waiver of the recording requirement, the district court erred in failing to record the proceedings. To the extent the State or the Court relies on the January 6, 2006 hearing to affirm the district court's rulings on the jury contact issue, Mr. Hall asserts he has been denied his right to a meaningful appeal due to the district court's failure to record that hearing.

On June 1, 2007, Mr. Hall filed a motion for juror contact and a memorandum in support thereof, which included the legal grounds for his motion, the reasons he believed the jurors had information relevant to his post-conviction claims, the procedures his investigator would follow when contacting jurors, and the questions he intended to ask of those who chose to cooperate. (R. 35055 Vol. V, pp.961-963; R. 35055 Vol. VIII, p.1573 (Certificate of Exhibits, Exhibit 12.).)

On June 15, 2007, the parties addressed the recent filings and the district court heard the motion for juror contact on August 8, 2007. (Tr. 6/15/07, p.4, Ln.9 – p.5, Ln.7.) During the hearing, the district court gave some insight into its analysis of the issue.

> I had an experience in a case I presided over, a rape case, early in my time as a District Judge, probably the '95, '96 time frame, where counsel sent out a private investigator named Peter Smith who showed up on people's doorsteps unannounced. And I – madam clerk received two or three phone calls from rather upset individuals, citizens, who had served as jurors in that case, including the jury foreman, as I recall, who was a fellow in his mid-fifties. He was no wallflower. He was a senior bank executive, as I recall. And they were genuinely upset and surprised and dismayed to have this happen. It kind of reinforced my view that it is important to protect the privacy of jurors who serve on difficult cases and that absent some extraordinary reason – and I don't think death penalty cases automatically qualify as extraordinary reason – that this Court should go to reasonable lengths to ensure that their expectation in the courts when I send them away is met. We are not talking about fragile widows or fragile old men in nursing homes who are upset when after their service, they go into a nursing home and they are disturbed by this. We are talking about people in – at the top of their game, at the prime of their life, in their highest earnings capacity. I'm thinking of the banking executive who served as the foreman – being genuinely upset by this. And it was beyond rude. It was a very unpleasant surprise and upsetting, disturbing to the point where this individual called and others did the same thing. Now I will not tell you that I have high regard for Peter Smith. I have said that he is sleazy. I've said that on the record in multiple cases and it's true. It's my view, based on what he did in that case and others. He is profane. He is unprofessional. He's sleazy. No other way to say it. So he was involved in that case. So maybe by virtue of his participation in that case we got a reaction that was unusually strong, compared with

> maybe what somebody else would get who volunteered in response to a letter from the Court.
>
> . . . .
>
> You are told all of that and you walk out of here as a citizen juror and you think you've served and it might have been the first time in your life and it was a major imposition in your life in terms of time and energy away from your family, your professional life, whatever. And then you get a – someone showing up on your doorstep and boy, you know, it was a very unpleasant surprise and very disappointing to them and then, because of that, ultimately to me. So that's the background against which you are urging me to allow this process, Mr. Ackley. I do not presume because your client has – the petitioner in this case is the subject of a death penalty verdict that he automatically qualifies for this kind of contact. In my view, it's firm that he does not automatically by virtue of that. So kind of just to let you know, I've been around longer than some judges and less than others. I think that Judge Bail has been around here active longer than I have. So this is just based on my experience. Other judges may see this differently and they are certainly free to and I would defer to their view – views in this area. But this is what my experience has been and this is part of the reason why I am admittedly somewhat protective of jurors who have served.

(Tr. 6/15/07, p.21, L.5 – p.25, L.3.)

At this hearing, Mr. Hall further expounded on the procedures he would utilize when contacting jurors and submitted an example of a letter his investigator would provide to any of the jurors contacted. (R. 35055 Vol. VIII, p.1573 (Exhibit 16.).) The district court addressed Mr. Hall's motion and arguments, and once again referenced his negative experiences with an unethical investigator. (Tr. 8/08/07, p.123, L.8 – p.128, L.23.) At the conclusion of the hearing, the district court orally denied Mr. Hall's motion and, a month later, memorialized the denial in a written order. (Tr. 8/08/07, p.145, L.8 – p.145, L.21.) In denying Mr. Hall's motion, the district court found Mr. Hall had failed to demonstrate juror contact was necessary to protect his substantial rights. The district court erred by adopting what is essentially a discovery standard for juror contact.

Mr. Hall did not ask the court to order jury interviews through discovery or otherwise facilitate his contact with jurors. Thus, the district court's reliance on its authority to govern discovery is misplaced. Moreover, 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. Indeed, it appears the district court was not relying on the experience in Mr. Hall's case, but on its own experience with an unethical investigator in a completely different case. Finally, Mr. Hall submits the district court violated Idaho law by effectively interpreting I.R.E. 606(b) in a manner not supported by existing law, and by creating a new rule, which abridged Mr. Hall's rights under the plain language of the rule and impeded his substantive right to conduct an independent and thorough post-conviction investigation. 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.

D. Conclusion

The district court's prohibition on juror contact without prior court approval interfered with Mr. Hall's independent post-conviction investigation. Moreover, when Mr. Hall obeyed the district court's order and filed a motion to permit juror contact, the district court improperly treated the motion as a request for discovery. Assuming *arguendo* the district court had the authority to enter such an order, Mr. Hall submits he met the standard established by the court. Accordingly, the district court abused its

discretion in denying Mr. Hall's request for juror contact and he respectfully requests that the district court's order be vacated and the case remanded for further investigation.

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

The district court abused its discretion in denying Mr. Hall's motion to depose his trial counsels' investigator, Glenn Elam. Mr. Hall provided a statement of claims in his petition to which Mr. Elam's testimony was relevant and necessary to establish the scope of the investigation conducted in relationship to these claims. Under the circumstances of this case, Mr. Hall submits the requested discovery was mandatory. Alternatively, Mr. Hall submits that the district court abused its discretion in denying his request for Mr. Elam's deposition because the Court's denial was based on misapplication of the relevant law and facts.

B. Standard Of Review

Post-conviction discovery is left to the discretion of the district court unless the petitioner can show that discovery is necessary to protect his substantial rights. *Raudebaugh v. State,* 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) ("Unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery."); *Aeschliman v. State,* 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999). Accordingly, the district court's order denying Mr. Hall's motion for discovery is reviewed for an abuse of discretion.

C. 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

Mr. Hall has a constitutional right to meaningful post-conviction proceedings. *See, e.g., State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992) (recognizing capital post-conviction proceedings protect a condemned person's federal and state right to due process); *Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999) ("failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process"). This right is hollow if there is not a meaningful opportunity to develop a factual basis for all post-conviction claims. In some cases, petitioners must resort to court-ordered discovery to develop factual support for their claims. Mr. Hall identifies here the complete history of his attempts to obtain court ordered discovery, beginning with his motion for discovery filed nearly three and a half years ago.

On January 5, 2006, Mr. Hall filed a motion for discovery in which he requested leave to conduct the depositions of his trial counsel and their investigator, Glenn Elam. (R. 35055 Vol. I, p.101.) At the hearing on Mr. Hall's motion, the district court granted the request to depose trial counsel but denied, without prejudice, his request to depose Mr. Elam. (Tr. 7/05/06, p.177, L.19 – p.181, L.21; R. 35055, Vol. V, p.884.)

On December 29, 2006, after completion of trial counsels' depositions, Mr. Hall filed a supplemental memorandum in support of his motion for discovery in which he identified multiple claims to which Mr. Elam's testimony was relevant. (R. 35055 Vol. VIII, p.1573 (Exhibit 10, pp.20-21.).) Most notably, Mr. Hall raised a claim that his trial

counsel failed to investigate an alternate perpetrator or co-perpetrator defense. (R. 35055 Vol. II, p.152.) In his Amended Petition, Mr. Hall asserted the following:

> During these post-conviction proceedings, Petitioner has established that the DNA evidence actually shows that there was more than one perpetrator involved in the crime of rape. (Exhibit 8.) Petitioner has always maintained, and continues to maintain, that he did not kill Ms. Henneman. Petitioner asserts that the secondary contributor to the DNA may have been the actual killer. During the course of this reinvestigation, Petitioner has identified one possible person as the source for the DNA evidence not yet matched. That person, Patrick Hoffert, is deceased.
>
> According to police reports, Lisa Lewis and Peggy Hill told Detective Dave Smith and Scott Birch of the Attorney General's Office that they had seen and spoken with Lynn Henneman near the Greenbelt on the night she was abducted. (Exhibit 9.) Ms. Lewis indicated that Ms. Henneman asked for their assistance on directions to the DoubleTree Inn. According to Ms. Lewis, Petitioner and Patrick Bernard Hoffert then arrived, at which point Petitioner spoke briefly to Ms. Henneman. Ms. Hill reported noticing Ms. Henneman's yellow sapphire ring and recalled that Petitioner left with Ms. Henneman.
>
> The State did not call either Ms. Lewis or Ms. Hill to testify despite that fact that on the surface, their testimony would appear incriminating of Petitioner. The reason the State did not call these witnesses is because there is more to the story. Specifically, the morning after Ms. Henneman's abduction, Patrick Hoffert, the other individual placed with Ms. Henneman the night before, committed suicide. (Exhibit 10.) An investigation was conducted both by the Garden City Police Department and the coroner's office.
>
> Through reinvestigation of this case, Petitioner has obtained the affidavits of Ms. Lewis and Ms. Hill, who confirm the information in the police reports. (Exhibit 11, Exhibit 12.) Further, Ms. Lewis indicates that Deirdre Muncy, Patrick Hoffert's former girlfriend, told her that prior to committing suicide Patrick stated that, "he raped the girl."[8] When Ms. Lewis attempted to bring this information to the attention of the Garden City Police, she was told to mind her own business. Ms. Lewis also indicates that several years later she positively identified the woman she met as Lynn Henneman through a photographic array given to her by Detective Dave Smith of the Boise Police Department. Ms. Hill was also contacted by Detective Smith, but with no follow-up. This information does not appear in trial counsels' files and was not presented at the trial.

[8] Deirdre Muncy denied this assertion, but that alone, does not make the evidence inadmissible or irrelevant at a capital sentencing proceeding, especially in light of the other odd circumstances involving Mr. Hoffert that remain.

> Petitioner cannot fully state this claim as he is still investigating the degree of information known but withheld by the State and further is awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

(R. 35055 Vol. I, pp.190-92.)

Mr. Hall also cited the relevant deposition testimony of his trial counsel as a justification to depose Mr. Elam. (R. 35055 Vol. VIII, p.1573 (Exhibit 10, pp.20-21.).) For instance, lead trial counsel, Amil Myshin, testified he believed Mr. Elam conducted interviews based on the police reports, and therefore assumed Mr. Elam interviewed Peggy Hill and Lisa Lewis. (Tr. 9/14/06, p.8, Ls.16-23; p.69, L.2 – p.72, L.23; p.73, Ls.21 – p.74, L.17.) However, co-counsel, D.C. Carr, testified the defense did not learn about the Hoffert incident until it was too late, i.e., after trial and sentencing had concluded. (Tr. 9/13/06, p.216, L.3 – p.220, L.15.) Elsewhere Mr. Carr testified the defense discussed whether to pursue an alternate perpetrator or co-perpetrator theory based on Patrick Hoffert, suggesting the defense was indeed aware of the possible Hoffert connection prior to trial. (Tr. 9/13/06, p.221, L.16 – p.225, L.10.) Thus, Mr. Carr's testimony was not only internally inconsistent, but also seemingly inconsistent with Mr. Myshin's testimony. Accordingly, Mr. Hall asserted that "[b]ased on the underlying record and the depositions of both Mr. Myshin and Mr. Carr . . . it is imperative he be allowed to depose" their investigator. (R. 35055 Vol. VIII, p.1573 (Exhibit 10, p.20).)

On January 16, 2007, the district court heard Mr. Hall's renewed motion. The transcript from that hearing provides, in relevant part, as follows:

> THE COURT: But the claim is to ineffective assistance of counsel, not of their investigator. The investigators are only helpful to the extent that they bring information -- pro or con to anybody's point of view -- to their principal, to the trial attorney.

> MS. SWENSEN: Mr. Elam, though, would be critical, Your Honor, in establishing many of the factual bases for our ineffective assistance of counsel claims. For example, if we say that trial counsel failed to investigate, it's not enough just to talk to trial counsel if their response is, well, Mr. Elam did that.
>
> . . . .
>
> MR. BOURNE: . . . if they've got questions, **it seems to me that they can put it together into an affidavit that Mr. Elam can sign, if he's cooperative**, and they can ask him questions, and he can say, yes, I spoke to this person, and this person gave me this information, or, no, I didn't speak to this information (sic) and save us three more days of lawyer time – well, I mean, collectively.
>
> . . . .
>
> THE COURT: I'm going to deny the request with respect to the public defender's office investigator. **He has been cooperative. I think it is simply unnecessary to depose him. It would likely result in substantial additional delay, and there are alternatives to it.** To be honest, the sets of investigators that we have in this county, that I'm familiar with -- both for the prosecutor's office and for the public defender's office -- are honorable and competent individuals. . . . Part of what I'm considering is, it is difficult enough for trial counsel to go through a deposition on a case with this much import, if you will, without requiring investigators to do the same thing. And I'm just not -- I think that's a layer and a level to which it is simply not necessary to go. And that's a small part of my thinking, but a part nonetheless.

(Tr. 1/16/07, p.32, L.18 – p.36, L.2 (emphasis added).) Thus, both the State and the district court suggested an affidavit from Mr. Elam, in lieu of a deposition, would be an appropriate alternative, on the assumption that Mr. Elam would be cooperative.

On June 1, 2007, Mr. Hall filed a sealed supplemental motion for discovery.[9] (R. 35055 Vol. VIII, p.1572 (Exhibit 2).) On August 8, 2007, the district court heard Mr. Hall's motion. During that hearing, Mr. Hall's counsel informed the court Mr. Elam

[9] The hearing on the motion was not sealed. Because the parties have not yet agreed to unseal the motion for purposes of this appeal, Mr. Hall cites solely to the transcript of the hearing on the motion.

would not sign an affidavit without the consent of Mr. Myshin, and that, to date, they had not been able to obtain such consent. As a result, Mr. Hall was moving for a court-ordered deposition. (Tr. 8/16/07, p.61, L.19 – p.63, L.10.) The transcript from that hearing provides, in relevant part, as follows:

> MR. ACKLEY: . . . That was our goal, is simply to ask for an affidavit, rather than do a deposition. So it's really kind of come to this.
>
> . . . .
>
> MR. BOURNE: . . . **I think their investigator could supply his own affidavit of what Glenn Elam said**, and that would place in motion my ability to speak to Mr. Elam and confirm that their investigator's affidavit is correct. . . .
>
> THE COURT: Last word?
>
> MR. ACKLEY: Actually, we're fine with that. Our only concern was whether that would be objected to on admissibility grounds. But I'm hearing the State wouldn't have an objection to us attaching that to our -- either submitting it ahead of time or attaching it to our final petition.
>
> . . . .
>
> THE COURT: Okay. I don't know that the State has committed too much, except to say that you have the option, Mr. Ackley, of submitting an affidavit from Mr. Shaw. I'm not sure I heard them say about whether they would be objecting to hearsay with it or not.
>
> MR. ACKLEY: Okay. Well, I just simply wouldn't want to delay this process so that we submit an affidavit from Mr. Shaw and then the State objects to compelling depositions, and then in addition says, "By the way, depositions at this point are just going to delay the case even further." So our preference would be for the Court to order depositions. And if that doesn't compel the cooperation, that would resolve the need for depositions, then at least we have this process moving now rather than having us file an affidavit first and then the State speaking to Mr. Elam or Mr. Myshin about this and us coming back ad saying this is where we are and the State objects to depositions and objects to Mr. Shaw's affidavit. I'm just trying to cut through some of that. That happens way too often and then delay gets blamed on petitioner for that kind of thing. So our motion is really for the depositions. . . .

> THE COURT: . . . I'll deny the motion to compel an affidavit -- I'm sorry, compel a deposition of the Ada County public defender's office investigator, Mr. Glenn Elam. He is – it's obvious he's not a decision-maker on what evidence was introduce or known or not known, known about and not introduced. . . . **And I think an affidavit of Mr. Shaw may be an alternative.**

(Tr. 8/08/07, p.63, L.10 – p.66, L.5 (emphasis added).)

On August 23, 2007, Mr. Hall filed a motion for permission to appeal with the district court. (R. 35055 Vol. V, pp.996-1006.) Mr. Hall included with the motion an affidavit from his investigator, Michael Shaw, in which Mr. Shaw described multiple interviews with Glenn Elam. In relevant part, Mr. Shaw stated the following:

> Mr. Elam said there were some strange facts in the case that stood out in his mind involving a man who lived near the place Lynn Henneman's body was found in Garden City.
>
> Mr. Elam said the man and his wife argued in their trailer around the night the body was discovered, and that when she left that night to go buy beer, he killed himself with a gun. Mr. Elam said the man and his wife were acquaintances of Erick Hall. Mr. Elam told me he never found the wife but had always wanted to interview her.
>
> Mr. Elam also told me he made audio recordings of interviews with a couple of people who told him they saw Lynn Henneman when she was lost in Garden City and asking for directions on the night of her disappearance.
>
> . . . .
>
> I reviewed an August 12, 2004 audio recording Mr. Elam made of a 27.5 minute interview with Lisa Lewis. . . . Ms. Lewis describes the person she saw in Garden City on September 24, 2000 as Lynn Henneman, and says she has no doubts about her identification because she subsequently saw photographs of Ms. Henneman on television when she was reported missing.
>
> Approximately six minutes into the interview, Mr. Elam asks Ms. Lewis why she thinks Mr. Hoffert committed suicide. Ms. Lewis says she heard Deidre Muncie state that Mr. Hoffert had raped a girl. Approximately seventeen minutes into the interview, Ms. Lewis again states Ms. Muncie told her Mr. Hoffert raped a girl, and that Ms. Muncie said this repeatedly.

Mr. Elam indicated in the recording that Ms. Lewis would be subpoenaed to testify at Erick Hall's trial.

. . . .

Mr. Elam said he always thought Mr. Hoffert's suicide was strange in relation to Ms. Henneman's disappearance, but the trial team chose not to use it. Mr. Elam reiterated that he could not find Ms. Muncie, although he had very much wanted to interview her, and asked that I let him know what I found out if I got in touch with her.

When I asked Mr. Elam whether he recalled Ms. Lewis telling him she heard Ms. Muncie say anything about Mr. Hoffert raping a girl, Mr. Elam did not recall the statement. Mr. Elam said if Ms. Lewis had made such a statement to him, it was probably because of a lack of specificity in referring to a 'girl' that caused him not to follow up.

. . . .

On January 24, 2007, I contacted Mr. Elam to ask if he would be willing to sign an affidavit stating the following:

> Mr. Elam interviewed Lisa Lewis on August 12, 2004, and obtained information about Erick Hall, Lynn Henneman, and Patrick Hoffert.
>
> Mr. Elam attempted to locate and interview Deirdre Muncie, but was unsuccessful in doing so.

On February 9, 2007, Mr. Elam contacted me and stated that he could only sign an affidavit if the lead attorney on the case for the Ada County Public Defenders, Amil Myshin, approved such an action.

Mr. Myshin did not respond to my efforts to contact him.

(R. 35055 Vol. VIII, p.1573 (emphasis added) (Exhibit 13, Appendix 11, pp.1-3).)

On September 17, 2007, the district court entered a written order denying Mr. Hall's request to depose Mr. Elam, stating that "[n]o showing has been made by the petitioner that [the] deposition is necessary to protect his substantial rights." (R. 35055 Vol. VI, p.1046.)

A month later, the court held a hearing and denied Mr. Hall's motion for permission to appeal from the bench. During that hearing, the district court expounded upon its reasons for denying the deposition of Mr. Elam, and commented on Mr. Shaw's affidavit.

> THE COURT: . . . Counsel seem to be saying, in effect, since Mr. Elam won't sign the affidavit we drafted for him, we want to put him through a deposition. Seems to be kind of a -- you know, almost a punishment. . . . But we need diligent trial counsel to be willing -- who are competent, and professional, and diligent, and energetic to be willing to do this work. . . And if -- if we start putting their staff -- staffs and staff members through full blown depositions, I just worry whether, in the long run, anybody is going to be willing to do this work, and I mean on the defense side, of a capital case. And I'm concerned about that. And I'll admit to you that has -- is part of my -- is part of what I've considered, in the whole world of things I've considered. This work is essential. If we drive good, diligent defense lawyers out of the business, because they don't want to be harassed in each and every case, and have all members of their staff harassed with depositions, without any indication of why it's appropriate, we're going to have people left, only people left, who don't have other choices for what they can do for a living . . . . I'm looking at an affidavit of Michael -- Michael J. Shaw, who is an investigator for the State Appellate Public Defender's Office, Capital Litigation Unit. . . . where he says – ["]Mr. Elam contacted me and stated he could only sign an affidavit if the lead attorney on the case, for the Ada County Public Defender, Amil Myshin, approved such action.["] You know, there are conditions to his employment. He's got to work, he's -- he's got to -- got to make a living. . . . And so saying somebody was, quote, not fully cooperative, referring to -- close quote, referring to Mr. Elam, because he won't sign your affidavit . . . I just think that that's hyperbole, that's an overstatement, to say that Mr. Elam has not been fully cooperative. There's been no real evidence, before me, of that.

(Tr. 11/15/07, p.17, L.16 – p.21, L.23.)

To obtain court-ordered discovery, a petitioner must identify specific areas wherein discovery is requested, and explain why those areas are necessary to protect his substantial rights. *Raudebaugh v. State,* 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) ("Unless discovery is necessary to protect an applicant's substantial rights, the district

court is not required to order discovery."); *Aeschliman v. State,* 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999). Mr. Hall submits that under the circumstances of this case, he has made a sufficient showing of relevance and necessity such that his requested discovery was mandatory.

Alternatively, Mr. Hall submits the district court erred in exercising its discretion by misapplying the relevant law and facts. As to the law, in denying Mr. Hall's request for a court-ordered deposition of Mr. Elam, the district court repeatedly emphasized Mr. Elam's role as an investigator, not a lawyer. (Tr. 1/16/07, p.32, Ls.18-19 ("But the claim is to ineffective assistance of counsel, not of their investigator."); Tr. 8/08/07, p.65, L.24 – p.66, L.2 ("it's obvious he's not a decision-maker on what evidence was introduce or known or not known, known about and not introduced.").) The district court failed to appreciate that, as a matter of law, a complete understanding of the scope of counsels' investigation is necessary to assess their performance. *See e.g., Strickland v. Washington,* 466 U.S. 668, 690-691 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Wiggins v. Smith,* 539 U.S. 510, 522-23 (2003) (noting that when assessing counsel's choices, courts should first focus on whether the investigation is itself reasonable). As trial counsels' investigator, Glenn Elam played an integral part in Mr. Hall's representation during the underlying criminal proceedings, and is in the best position to describe the nature and scope of his investigative efforts. Accordingly, an essential component of post-conviction counsels' investigation included interviewing Mr. Elam. *See* Hertz, R., and Liebman, J., Federal Habeas Corpus Practice and Procedure (Fifth Ed.), pp.533-536 n.25 (noting that an investigator is a potential source of information for

claims of "ineffective assistance of counsel with regard to pretrial investigation."). Mr. Hall demonstrated to the district court that trial counsel could not provide either a complete or accurate description of their investigation. Thus, the district court's denial of Mr. Hall's request to depose Mr. Elam prevents Mr. Hall from fully developing his claims. *See Coleman v. Zant*, 708 F.2d 541, 548 (11th Cir. 1983) (relying in part on the denial of depositions at the state post-conviction level in finding that federal habeas petitioner had been denied a full and fair opportunity to develop facts to support his ineffective assistance of counsel claim); *see generally Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) ("Denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim." (citation omitted).)[10]

As to the facts, the district court erroneously found Mr. Elam had been fully cooperative with Mr. Hall's investigation, despite multiple assertions by post-conviction counsel, and even a sworn statement from their investigator, that Mr. Elam had provided relevant and necessary information to further his claims, but had refused to sign an affidavit. (Tr. 11/15/07, p.21, Ls.20-23 ("I just think that that's hyperbole, that's an overstatement, to say that Mr. Elam has not been fully cooperative. There's been no real evidence, before me, of that.").) Moreover, the district court relied on its erroneous, or at least irrelevant belief that if it ordered a deposition of Mr. Elam in this case, then competent defense lawyers and their investigators would not handle future capital cases. (Tr. 11/15/07, p.18, Ls.13-20 ("if we start putting their staff . . . through full blown

[10] Both *Coleman v. Zant* and *Jones v. Wood* addressed the rules governing discovery in federal habeas corpus proceedings.

depositions, I just worry whether, in the long run, anybody is going to be willing to do this work . . . is part of what I've considered, in the whole world of things I've considered.").) Thus, the district court's decision was not consistent with applicable legal standards or a sound factual analysis. For these reasons, Mr. Hall submits the district court abused its discretion.

As a final matter, in his memorandum in support of his motion for discovery, Mr. Hall asserted that because this is a capital case, the district court should liberally allow discovery of all relevant requested information. (R. 35055 Vol. VIII, p.1573 (Exhibit 2, p.7).) It does not appear this Court has ever addressed whether capital cases should be treated any differently than non-capital cases for purposes of post-conviction discovery. In this appeal, Mr. Hall maintains that due to the heightened protections afforded by the Due Process Clause and the Eighth Amendment to capital defendants generally, a district court should exercise its discretion liberally in favor of disclosure when discovery is not otherwise mandatory. *See, e.g., Payne v. Bell,* 89 F. Supp. 2d 967, 971 (W.D. Tenn. 2000) (recognizing that "more liberal discovery is appropriate in capital cases where the stakes for petitioner are so high." (citing *Lockett v. Ohio,* 438 U.S. 586, 604 (1978)).) Mr. Hall submits this Court should adopt a "good cause" standard for discovery in capital cases. Under such a standard, a petitioner "need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition." *Payne,* 89 F.Supp.2d at 970. Alternatively, Mr. Hall asserts because this is a capital case, that fact should at least be considered when district courts exercise their discretion under the *Raudebaugh* standard.

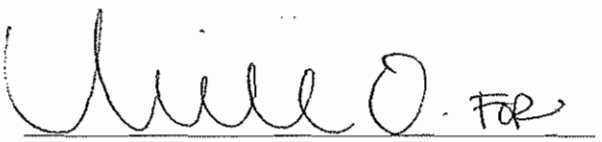
D. Conclusion

Mr. Hall has a substantial interest in supporting his claims for post-conviction relief. In this case, 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, for the reasons stated above, Mr. Hall submits he is entitled to a court ordered deposition of Mr. Elam. Alternatively, Mr. Hall submits that the district court abused its discretion in denying his request to depose Mr. Elam.

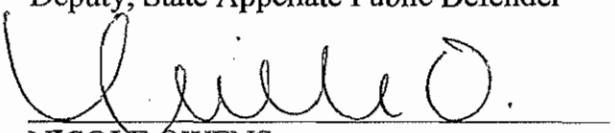
CONCLUSION

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 25th day of June, 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 25th day of June, 2009, served a true and correct copy of the forgoing APPELLANT'S BRIEF as indicated below:

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