9-18-2009

Hall v. State Respondent's Brief Dckt. 35055

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,	)	
	)	
Petitioner-Appellant,	)	NO. 35055
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE THOMAS F. NEVILLE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

L. LAMONT ANDERSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4539

ATTORNEYS FOR
RESPONDENT

MARK ACKLEY
State Appellate
Public Defender's Office
3647 Lake Harbor Lane
Boise, ID 83703
(208) 334-2712

ATTORNEY FOR
PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER

STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Erick Virgil Hall ("Hall") appeals, with permission from the Idaho Supreme Court, from two of the district court's interlocutory orders, including (1) Order Granting in Part and Denying in Part Petitioner's Supplemental Motion for Discovery and (2) Court's Order Denying Petitioner's Motion for Juror Contact.

Statement Of The Facts And Course Of The Proceedings

In 2004, Hall was found guilty by a jury of the first-degree murder, first-degree kidnapping and rape of Lynn Henneman ("Lynn"). (R., pp.581-83.) That same jury also found four statutory aggravating factors and concluded, when weighed against each statutory aggravatoring factor individually, all of the mitigating circumstances were not sufficiently compelling to make imposition of the death penalty unjust. (R., pp.609-12.) Hall was sentenced to death for Lynn's first-degree murder; consecutive unified fixed life sentences were imposed for first-degree kidnapping and rape. (R., pp.661-63.) Judgments were filed January 19, 2005. (Id.) A Notice of Appeal was filed January 21, 2005 (R., pp.685-88), and the State Appellate Public Defender ("SAPD") was appointed to represent Hall on appeal and during post-conviction proceedings (R., pp.689-91).

Hall's initial Petition for Post-Conviction Relief was filed March 1, 2005. (UPCPA, R., pp.9-34.) On January 5, 2006, Hall filed his initial thirty-one page Motion for Discovery containing over 330 separate requests, two appendices and a supporting brief (UPCPA, R., pp.78-109A, exhibits 1 and 2), which included a request to depose "[all] members of the defense team and their agents," including investigator Glenn Elam ("Elam") (UPCPA, R., p.101). At a hearing, Hall conceded it "would be fruitful" to

amend his petition "so that we can, if possible, tie our specific requests to claims that thereafter would be raised." (UPCPA, Tr., 2-6-06, pp.64-65.) The Amended Petition for Post-Conviction Relief was filed April 17, 2006. (UPCPA, R., pp.155-363.)

Hall also filed a motion to issue subpoenas (UPCPA, R., pp.142-53), requesting he be permitted to depose his two trial attorneys, Amil Myshin ("Myshin") and D.C. Carr ("Carr"), Elam and the mitigation specialist, Rosanne Dapsauski ("Dapsauski"), based upon the need "to identify additional claims for post-conviction relief whether such claims involve the ineffective assistance of counsel or judicial, juror, or prosecutorial misconduct" (id., p.146). Without objection from the state (UPCPA, Tr., 7-5-06, pp.156-82), the district court granted Hall's motion to depose his two trial attorneys, but denied the motion without prejudice as to Elam and Dapsauski (UPCPA, R., pp.520-21).

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), even though Hall conceded Elam was being "cooperative with [Hall's] investigator" (UPCPA, Tr., 1-16-07, p.31). Despite the state's suggestion that Elam simply complete an affidavit, Hall contended, "I think deposing Mr. Elam is critical to answering the question: What did trial counsel know." (Id., p.34.) Recognizing Elam was cooperating with Hall's investigation, the district court denied the request to depose Elam, concluding, "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." (Id., p.35.) The vast majority of Hall's remaining discovery requests were granted. (UPCPA, R., pp.864-87.)

Hall filed a Sealed Supplemental Motion for Discovery, which included a request for the depositions of Jay Rosenthal, Detective Daniel Hess, and Roger Bourne and/or Greg Bower. (UPCPA, confidential exhibit 2, pp.9-11.) The motion further renewed Hall's request to depose Elam "to fill the gaps in the testimony of trial counsel regarding the scope of their guilt and sentencing phase investigations" because, while Elam had been interviewed by the SAPD resulting in "relevant information for a final amended petition for post-conviction relief, Mr. Elam has refused to sign an affidavit without express consent from former lead trial counsel, Amil Myshin," who had not responded to requests for consent. (Id., p.9.) The district court denied Hall's motion, concluding he failed to meet his burden of establishing the depositions "are necessary to protect the substantial rights of the petitioner." (UPCPA, R., pp.1044-46.)

While Hall's discovery motions were being litigated, an informal telephone conference was held January 6, 2006, regarding the release of juror questionnaire forms (UPCPA, Tr., 2-15-06, pp.13-14), during which the district court expressed "strong views about access to jurors, frankly and said that there would not be any unless and until counsel came back with a specific motion" (id., p.15). While no oral or written orders were entered (UPCPA, Tr., 2-15-06, p.13), it was clear the court did not want Hall's attorneys contacting jurors "without coming back with a specific motion" (id., p.18). On January 20, 2006, Hall filed a motion and supporting brief (UPCPA, R., pp.112-14, exhibit 3, pp.5-8), contending "juror interviews are critical to uncovering and investigating juror misconduct claims, and denying counsel the ability to so investigate violates Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution" (UPCPA, exhibit 3, p.6). Examining

Hall's motion, the court discussed its concerns that jurors would be threatened, intimidated and harassed, and while not denying his motion, explained, "you need prior express permission from the Court." (UPCPA, Tr., 2-15-06, pp.15-16, 40-42, 44.)

On June 1, 2007, Hall filed a Motion for Juror Contact with a supporting brief asking to interview the jury and alternative jurors, incorporating not only the bases articulated in his prior motion, but the First Amendment. (UPCPA, R., pp.961-63; exhibit 12.) Hall's supporting memorandum also included questions he "anticipated" asking jurors, which included the following general categories: (1) knowledge of undisclosed witnesses; (2) awareness of Hall's shackles; (3) undisclosed information during voir dire or in juror questionnaires; (4) juror experimentation, crime scene visits, or consideration of other extra record evidence; (5) extraneous influences or evidence; (6) extrinsic evidence found in reference materials; (7) religious sources or influences; (8) media exposure and exposure to the Hanlon case; (9) premature jury deliberations; (10) juror bias regarding Hall's dangerousness; and (11) improper consideration of the exercise of constitutional rights. (UPCPA, exhibit 12, pp.13-18.) The memorandum also included questions that would be asked to specific jurors. (Id., pp.18-28.)

At an initial hearing, prior to its written response being filed, the state agreed to limited juror contact, proposing, "there can be some juror contact I think," which would be "in some kind of a hearing so that the process of talking to jurors who agree to this would occur in the courtroom before this Court." (UPCPA, Tr., 6-16-07, p.20.) The state further proposed the district court send the jurors a letter "notifying them of this information, rather than it come[ing] from the State or the defense, and that there be a hearing, if any agree to that." (Id., p.21.) Although not ruling on Hall's motion, the court

noted its concern regarding the need to "treat with courtesy and respect and provide reasonable privacy for jurors" or "we are not going to have any jurors willing to serve, period, in difficult cases." (Id., p.25.)

The state addressed all of Hall's anticipated questions, objecting to "unrestricted access to the jurors," suggesting any questioning "should only be done in the Court's presence so the Court can enforce its order restricting the questions." (UPCPA, R., pp.968-84.) Addressing the state's concession that any questioning could be done in the district court's presence, Hall responded, "we strongly feel should be rejected by the Court. There are so many psychological reasons for not doing that. And there's no support in law. Again, there's nothing prohibiting us from contacting these people." (UPCPA, Tr., 8-8-07, p.121.) After reviewing each of Hall's proposed questions, the district court denied his motion. (Id., pp.123-45.) In its written order filed September 17, 2007, the court concluded the motion was "part of discovery," the claims "relating to possible jury misconduct are made without factual support" and I.R.E. 606(b) "serves to protect jurors from 'post trial inquiry or harassment.'" (UPCPA, R., pp.1020-24.)

On August 23, 2007, Hall filed a Motion for Permission to Appeal, asking that he be permitted to file an interlocutory appeal challenging the district court's orders prohibiting juror contact and taking Elam's deposition. (UPCPA, R., pp.996-1006.) The district court denied Hall's motion. (UPCPA, R., pp.1527-28.) On February 22, 2008, the Idaho Supreme Court entered an order granting Hall's motion for an interlocutory appeal on "discretionary decisions: 1. Contact with jurors; and 2. Deposition of Investigator, Glenn Elam." (UPCPA, R., pp.1570-71.) Pursuant to the supreme court's order, Hall filed a Notice of Appeal on March 5, 2008. (Id., pp.1565-69.)

ISSUES

Hall has phrased the issues on appeal as follows:

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? [sic]

2. Whether the district court abused its discretion by forbidding Mr. Hall's attorneys and their agents from contacting jurors? [sic]

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? [sic]

(Brief, p.5.)

The state wishes to rephrase the issues on appeal as follows:

1. Because Hall failed to establish Elam's deposition was necessary to protect Hall's substantial rights and because he was permitted to depose both of his trial attorneys, has he failed to establish the district court abused its discretion by denying his motion to depose Elam?

2. Because Hall failed to establish *ex parte* and unbridled post-verdict interviews with the jurors and alternate jurors was relevant and necessary to any claim in his amended post-conviction petition, but rather were merely fishing expeditions to gather information to raise claims that were not even alleged in his amended petition, has he failed to establish the district court abused its discretion by not permitting him to conduct such post-verdict interviews?

ARGUMENT

I.

Hall Has Failed To Meet His Burden Of Establishing The District Court Abused Its Discretion By Denying His Request To Depose Elam

A. Introduction

Hall contends, "[u]nder the circumstances of this case" his "requested discovery was mandatory" because he "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." (Brief, p.26.) Alternatively, Hall contends the district court abused its discretion by denying his request to depose Elam "because the Court's denial was based on misapplication of the relevant law and facts," based upon the contention that "trial counsel could not provide either a complete or accurate description of their investigation" thereby preventing Hall from "fully developing his claims" without Elam's deposition, and erroneously concluding Elam was "fully cooperative with Mr. Hall's investigation." (Brief, pp.26, 36.)

Because he deposed his trial attorneys and he attempts to tie his request to depose Elam to a single claim and minor discrepancy in Carr's deposition, Hall has failed to establish the district court abused its discretion by denying his request to depose Elam.

B. Standard Of Review

Discovery in post-conviction relief proceedings is a matter left to the discretion of the district court and will be reversed only upon a showing of an abuse of that discretion. Fairchild v. State, 128 Idaho 311, 319, 912 P.2d 679 (Ct. App. 1996). When this Court reviews a ruling for abuse of discretion, it does so through a multi-tiered inquiry,

"examining 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. Hoak, 2009 WL 1835331, *1 (Ct. App. 2009) (citing State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331 (1989)).

C. General Standards Of Law For Discovery In Post-Conviction Cases

While post-conviction cases are civil in nature, State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548 (1983), the rules of discovery contained in Idaho's rules of civil procedure do not apply in post-conviction cases. I.C.R. 57(b). "When an applicant believes discovery is necessary for acquisition of evidence to support a claim for post-conviction relief, the applicant must obtain authorization from the court to conduct discovery." Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741 (Idaho Ct. App. 2006). "Unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery." Raudebaugh v. State, 135 Idaho 602, 605, 21 P.3d 924 (2001). In Raudebaugh, the petitioner made conclusory statements about what an expert and investigator might have testified to at trial but did not point to specific facts. Id. The Idaho Supreme Court affirmed the district court's denial of discovery because "Raudebaugh's allegations only argue what the experts might have testified to had trial counsel employed them. Raudebaugh's allegations are speculative." Id.

In Aeschilman v. State, 132 Idaho 397, 402, 973 P.2d 749 (Ct. App. 1999), the court denied post-conviction discovery because the applicant failed to "identify the type of information that he or she may obtain through discovery that could affect the disposition of his or her application for post-conviction relief." *See also* LePage v. State,

138 Idaho 803, 810, 69 P.3d 1064 (Ct. App. 2003) ("In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application").

D. The District Court Did Not Abuse Its Discretion By Denying Hall's Request To Depose Elam

Initially, Hall raises a due process claim, contending he has a "constitutional right to meaningful post-conviction proceedings," which is "hollow if there is not a meaningful opportunity to develop a factual basis for all post-conviction claims." (Brief, p.27.) Hall's argument is nothing more than a derivative of an argument already rejected by the Idaho Court of Appeals in Aeschilman, 132 Idaho at 402 - that Idaho's post-conviction discovery procedures allegedly violate due process. Because Hall has failed to even cite Aeschilman, let alone explain why it is distinguishable or should be overruled, his argument must be rejected. As explained by the court of appeals:

> [I]n contrast to ordinary civil litigation, the typical disincentives against unfettered discovery do not exist in the post-conviction arena. First, there is little if any financial disincentive from engaging in unlimited discovery, because an applicant for post-conviction relief is usually indigent and proceeds pro se or is appointed counsel. Thus unbridled discovery costs the applicant nothing and sanctions for discovery abuses are, for the most part, impractical.

Id., at 401.

The court of appeals' rationale is particularly true in capital cases because death-sentenced inmates have every incentive to delay their cases through oppressive and unduly burdensome discovery that is designed to merely increase the costs of capital litigation. In fact, as a result of the incentive death-sentenced inmates have to "thwart their sentences," the Idaho Legislature enacted I.C. § 19-2719, which is designed to

"avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . . ," which has been expressly affirmed by the Idaho Supreme Court. State v. Beam, 115 Idaho 208, 213, 766 P.2d 678 (1988).

Relying upon the steady beat of "death is different," Hall also contends he should have been permitted to depose Elam based upon "heightened procedural safeguards" in capital cases. (Brief, p.37.) While the courts have applied such safeguards in limited situations, Hall has cited only one federal district court case, Payne v. Bell, 89 F.Supp.2d 967, 971 (W.D. Tenn. 2000), to support his contention. Of course, because Payne involves a discovery standard in federal habeas cases, it is inapposite. Moreover, the state is unaware of such a standard being used in any other federal habeas case. Rather, the federal standard permits the district court to order discovery "provided that the habeas petitioner presents specific allegations showing reason to believe that the facts, if fully developed, may lead to habeas relief." Lott v. Coyle, 261 F.3d 594, 602 (6th Cir. 2001).[1] Finally, the Idaho Supreme Court has never adopted a "death is different approach" to post conviction discovery issues. The Idaho Legislature has enacted legislation to expedite capital cases, not facilitate delay associated with unbridled discovery. *See* I.C. §

[1] The "good cause" standard for discovery in federal habeas has been modified as a result of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). In Boyko v. Parke, 259 F.3d 781, 789-90 (7th Cir. 2001), the court recognized if a habeas petitioner engages in discovery and expansion of the record under Rule 7 of the Federal Rules Governing § 2254 Cases "to achieve the same end as an evidentiary hearing, the petitioner ought to be subject to the same constraints that would be imposed if he had sought an evidentiary hearing." In Isaacs v. Head, 300 F.3d 1232, 1248-49 (11th Cir. 2002), the court addressed the limitations on discovery that were imposed by the AEDPA, explaining, "Congress modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing."

19-2719. Moreover, in Fields v. State, 135 Idaho 286, 291, 17 P.3d 230 (2000), the Idaho Supreme Court expressly applied I.C.R. 57 to a capital case, explaining:

> Discovery during post-conviction relief proceedings is a matter put to the sound discretion of the district court. I.C.R. 57(b). The discovery provisions in the civil rules, which generally apply to proceedings on an application for post-conviction relief, are not applicable unless so ordered by the district court. *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992). There is no requirement that the district court order discovery, unless discovery is necessary to protect an applicant's substantial rights. *Id.*

Hall's principle argument centers on his contention that the district court's denial of Elam's deposition constituted an abuse of discretion because it was necessary to protect his "substantial rights" where he allegedly identified claims that Elam's deposition would support and the type of information he would obtain from Elam in support of those claims. (Brief, pp.27-37.) However, the only claim upon which Hall **now** relies is an allegation that "trial counsel failed to investigate an alternate perpetrator or co-perpetrator defense"; presumably an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). (Brief, pp.27-28.) 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), by failing to disclose favorable evidence regarding a "potential alternate perpetrator," not a failure to investigate by his attorneys or Elam. (Brief, pp.27-29 (citing UPCPA, R., pp.190-92).) 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, which was filed October 5, 2007. (UPCPA, R., pp.1053-1350.)

Moreover, even if Hall had raised an ineffective assistance of counsel claim, both in his amended petition and on appeal as a basis for deposing Elam, the argument fails because Hall had already deposed Myshin and Carr. (UPCPA, exhibit 15 containing exhibits 13-16 of Hall's Final Amended Petition.) Myshin explained the defense investigated the "alternate perpetrator" theory involving Patrick Hoffert ("Hoffert"):

> Q. So maybe there's another person, possibly?
>
> A. All the DNA shows that they had sex. Well, we had Christian Johnson. I mean, that was obvious. We had the 13th Alelle, which was obvious. So there was some information that we had, even before the trial, that there was somebody else involved. Then towards the end we had that guy Pat what's-his-face.
>
> Q. Hoffert?
>
> A. Yeah. We knew about that and looked into that. So that was a possibility, although it turned out there wasn't much there.
>
> Q. Can you tell me what your investigation revealed on Patrick Hoffert?
>
> A. Yes. We got a police report late in the case from I think Smith, Dave Smith. And it gave us the names of these people. And so we had Glen -- or I had Glen go out and talk to them.

(UPCPA, exhibit 15 containing exhibit 13, pp.68-69.)

Not only did Myshin discuss his recollection of asking Elam to investigate the alternate perpetrator theory, but he identified a note dated August 9, in which he was "asking Glen to interview Peggy Hill and Lisa Lewis, amongst other individuals," which apparently involved information regarding Hoffert. (Id., pp.70-71.) Myshin "assumed" Elam interviewed Peggy Hill ("Hill") and Lisa Lewis ("Lewis"), which revealed information "pretty much along the lines of the police report, that there wasn't anything

else." (Id., pp.73-74.) Finally, when asked if Elam would be able to give more "detail about those interviews," Myshin explained, "Probably not." (Id., p.74.)

Carr confirmed Elam conducted an investigation regarding Hoffert, although it was his "belief" that he "heard" about Hoffert's statement - that he allegedly raped the girl - after his representation of Hall was completed. (UPCPA, exhibit 15 containing exhibit 15, pp.217-20.) Carr also confirmed that the alternate perpetrator theory, with Hoffert as the alternative perpetrator, was discussed prior to trial because the defense team "didn't like the idea of [Hall] being seen with Lynn Henneman right before she died" (id., pp.221-22), but the defense chose not to present such a theory "in order to keep out from the jury evidence that our client was actually seen with Lynn Henneman that night" (id., p.224). Carr later reaffirmed that Hoffert was investigated by Elam as a possible co-conspirator and that a strategic decision was made not to present such a defense because "it puts Erick at the scene. That was a problem." (UPCPA, exhibit 15 containing exhibit 16, pp.320-22.) Moreover, Carr confirmed that if information that Hoffert had allegedly raped Lynn was known before trial the outcome would not have changed. (Id., pp.358-60.) In other words, the evidence would have also established Hall was seen with Lynn, which was "very concerning," "delicate" and "could be catastrophically bad for Erick Hall." (Id., pp.359-60.)

Moreover, Hall conceded Elam was being cooperative with his attempts to investigate Myshin and Carr's "investigation." After deposing Myshin and Carr, Hall expressly stated, "I can state to the Court that Mr. Elam has been cooperative with our investigator, but has stated that he would not undergo deposition without court order." (UPCPA, Tr., 1-16-07, p.31.) Therefore, when the district court concluded Elam was

being "cooperative" (id., p.35), it was based upon Hall's concession. In lieu of a deposition, Hall attempted to have Elam sign an affidavit, but Elam explained he required Myshin's consent before he could sign the affidavit. (UPCPA, Tr., 8-8-07, p.62.) While Hall attempted to obtain Myshin's consent, due to Myshin and Elam's "very busy [schedule] at the Ada County public defender's office, he had been unsuccessful"; there was no allegation that Myshin or Elam were trying to avoid giving or obtaining permission to sign an affidavit or otherwise be uncooperative. (Id., p.63.) Responding to Hall's motion, the prosecutor asserted the issue could be resolved without a deposition by having Hall's investigator, Michael Shaw ("Shaw"), supply an affidavit regarding the content of his conversations with Elam. (Id., p.63.) While Hall had concerns regarding the admissibility of Shaw's deposition, he agreed, "if the Court were to deny that [the deposition], in the alternative, then, we'd be willing to submit an affidavit for Mr. Shaw." (Id., pp.64-65.) The district court denied Hall's motion to depose Elam, but concluded, "I think the affidavit of Mr. Shaw may be an alternative." (Id., pp.65-66.)

However, instead of providing Shaw's affidavit to support his amended or final post-conviction petition, Hall chose to file his Motion for Permission to Appeal (UPCPA, R., pp.996-1006) with Shaw's affidavit detailing his conversations with Elam, which included information that Elam interviewed Lewis on August 12, 2004, regarding Hoffert allegedly having "raped a girl" (UPCPA, exhibit 13, appendix 11).

Based upon the depositions of Myshin and Carr, coupled with Shaw's affidavit confirming Elam interviewed Lewis on August 12, 2004, well before commencement of jury selection on September 29, 2004, exactly how the district court abused its discretion in denying Hall's request to depose Elam regarding claim D(7), whether as a Brady or

Strickland claim, remains a mystery. Rather, it appears Hall's sole purpose in deposing Elam is to fish for new claims that are not a part of his amended or final post-conviction petitions, or simply increase the costs associated with his post-conviction case, particularly where he has agreed that Shaw's affidavit regarding his interviews with Elam was sufficient. *See* State v. Wood, 132 Idaho 88, 108, 967 P.2d 702 (1998) (affirming the district court's order denying a capital petitioner's request to depose the trial judge where there were alternative sources to obtain the same information).

The state appreciates Hall's desire to have the district court circumvent Idaho's post-conviction discovery rules based upon American Bar Association ("ABA") guidelines or standards that have been adopted by authors of various treatises. (Brief, p.35.) However, neither the United States Supreme Court nor the Idaho Supreme Court has concluded such standards are constitutionally mandated. The Supreme Court has expressly recognized such standards are merely

> guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

Strickland, 466 U.S. at 688.

Recently, the Supreme Court examined ABA Model Rules of Professional Conduct and recognized, "the Constitution does not codify the ABA's Model Rules." Monteja v. Louisiana, --- U.S. ---, 129 S.Ct. 2079, 2087 (2009). Moreover, referring to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty

Cases (2003), the Idaho Supreme Court has declined the "invitation to adopt these guidelines." State v. Porter, 130 Idaho 772, 782, 948 P.2d 127 (1997).

Finally, Hall takes issue with the district court's concern that ordering unnecessary and unwarranted depositions of support staff, including defense investigators, could result in fewer competent defense attorneys to defend capital murderers and contends, "the district court's decision was not consistent with applicable legal standards or a sound factual analysis." (Brief, pp.36-37 (quoting UPCPA, Tr., 11-15-07, pp.18-19.) However, the district court's concern has been raised by the Supreme Court and Ninth Circuit Court of Appeals. Addressing whether it is appropriate to address only the prejudice prong of ineffective assistance claims, the Supreme Court explained, "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." Strickland 466 U.S. at 697. This problem has not been lost on the Ninth Circuit, which explained, "An unfortunate offshoot of death penalty litigation has been the recurrent demonization of prior counsel - no doubt sometimes justly, but sometimes not - through the inevitable filing of *Strickland* claims. Death penalty counsel, whether trial or appellate, face the most demanding challenges the profession has to offer." Williams v. Calderon, 52 F.3d 1465, 1470 n.3 (9th Cir. 1995). Clearly, the district court's concern was not unwarranted or inconsistent with applicable legal standards.

Rather than requesting discovery that was necessary to protect his substantial rights, Hall's request to depose Elam constitutes a fishing expedition, which is simply not permitted because post-conviction cases are "not a vehicle for unrestrained testimony or retesting of physical evidence introduced at the criminal trial." Murphy, 143 Idaho at

148. Moreover, "[t]he scope of post-conviction relief is limited. An application for post-conviction relief is not a substitute for an appeal." Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348 (1997). As explained in Barefoot v. Estelle, 463 U.S. 880, 887 (1983), "it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence." While Barefoot involves the role of federal habeas in state convictions, as explained in Murphy, 143 Idaho at 148, the same is true for state post-conviction. Like federal habeas, post-conviction proceedings are "secondary and limited. . . . not forums in which to relitigate state trials." Barefoot, 463 at 887.

Because the district court correctly perceived the issue of granting Hall's motion to depose Elam as one of discretion, acted within the outer boundaries of that discretion consistent with applicable legal standards, and reached its decision by an exercise of reason, Hall has failed to meet his burden of establishing the district court abused its discretion by denying his request to depose Elam.

II.

Hall Has Failed To Meet His Burden Of Establishing The District Court Abused Its Discretion By Denying His Motion For Unlimited And Unsupervised Interviews With The Jury After He Had Been Found Guilty And Sentenced To Death

A. Introduction

Hall initially contends the district court's order "imposed a prior restraint in violation of First Amendment, impeded [his] post-conviction investigation in violation of [due process], and eliminated an important procedural safeguard against the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment." (Brief, p.6.) Assuming *arguendo* the district court had authority to deny his motion for unlimited and unsupervised interviews with jurors (Brief, pp.20-21), Hall next contends

the district court erred by adopting a "discovery standard for juror contact," "exceeded its authority" because there was no evidence establishing his attorneys or agents committed misconduct, and "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" that impeded his "rights to conduct an independent and thorough post-conviction investigation." (Brief, pp.24-25.)

Hall's First Amendment and due process arguments have been universally rejected by other jurisdictions, and he has failed to establish his "death is different" argument warrants reversal of the district court's order. Because the district court had inherent authority to regulate contact with jurors and the order from which he appeals is from the denial of nothing more than a discovery motion, Hall has failed to establish the court abused its discretion by denying his motion to contact jurors when his motion was merely a fishing expedition searching for claims that had no factual support.

B. Standard Of Review

Because Hall is appealing only from the district court's order denying his Motion for Juror Contact, which is nothing more than an "investigative aid," the district court's order is reviewed for an abuse of discretion. Row v. State, 131 Idaho 303, 310-11, 955 P.2d 1082 (1998); *see also* Anderson v. State, --- S.3d ---, 2009 WL 1954982, *14 (Fla. 2009) ("A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard").

C. Hall Has Failed To Establish The District Court's Order Violates The Constitution

1. The District Court's Order Does Not Violate The First Amendment

Hall correctly notes, "The 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) (internal quotations and citation omitted) (emphasis in original). However, whether the district court's denial of Hall's motion constitutes a "prior restraint" is debatable since judges regularly enter orders prohibiting litigants from various forms of communication and Hall has failed to cite any case in which the Supreme Court's "prior restraint" doctrine was applied to an order denying a motion to contact jurors after entry of the judgment. There is not even universal acceptance of the "prior restraint" doctrine in the context of news gathering by the media. *See* State v. Montana Twenty-First Judicial Dist. Ct., 933 P.2d 829, 838-39 (Mont. 1997) (discussing the "considerable disagreement as to whether participant gag orders are prior restraints on the media").

Moreover, while the Supreme Court has agreed "with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials," Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991), the Court has not adopted the four-step analysis contended by Hall (Brief, p.8), nor has the standard been applied by the Court in cases that are not "pending," i.e., cases in which the defendant has already been convicted and sentenced. Rather, Gentile involved an attorney who made public statements hours after his client was indicted in violation of Nevada's rules governing attorney conduct, and the Court

repeatedly emphasized the "substantial likelihood of material prejudice" standard was being applied in the context of an attorney representing a defendant prior to and during criminal proceedings. *See* Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425, 431 (Tex. 1998) ("The Supreme Court's decision in *Gentile* focused on the lawyers' public comments about pending cases in which they are involved, and expressly declined to decide whether a higher standard applies to the speech of lawyers who are strangers to the litigation"). Because the court in Benton concluded, "If the lawyer tries to continue exerting his influence over the jurors after they have completed their service, he cannot plausibly claim that he is doing so as an ordinary citizen," therefore, under the rationale of Gentile, the court concluded the "likelihood of material prejudice" standard "is sufficient protection for attorneys' speech in this context," id., but concluded the attorney's letter did not violate the First Amendment under that standard, id., at 432.

While Idaho has not addressed the question of whether an order prohibiting post-verdict juror interviews violates the First Amendment, other jurisdictions have rejected such challenges. In Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1020 (5th Cir. 1984), the district court denied one of the parties' attorney leave to learn "some lesson" about the basis for the jury's verdict, which was adverse to his client. While the Fifth Circuit recognized "[w]eighty first amendment interests may be harmed by inhibiting the flow of information from jurors to the public," "[t]he petitioners' access to information from jurors carries far less weight in the first amendment scale than a restriction on access to information that affects political behavior." Id. at 1021-22. The court also explained, "The courts must take such steps by rule and regulation that will protect its processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the

accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its purpose." Id., at 2022. Rejecting the First Amendment argument, the court concluded, "We agree with the district court's implicit conclusion that those interests are not merely balanced but plainly outweighed by the jurors' interest in privacy and the public's interest in well-administered justice." Id.

Likewise, in Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986), the court recognized the necessity of "distinguish[ing] cases discussing contact with jurors by news media from cases dealing with contact by parties or the attorneys that took part in the trial," and explained, "[t]he media has less incentive to upset a verdict than does a losing party or attorney. Thus, while a court may broadly proscribe attorney and party contact with former jurors, it does not have the same freedom to restrict press interviews with former jurors."

In Gagliano v. Ford Motor Co., 551 F.Supp. 1077 (D. Kansas 1982), the court rejected a First Amendment claim challenging a local rule that limited attorneys' ability to interview jurors after a verdict had been rendered. The court explained:

> The rule protects jurors from harassment, decreases changes and temptations for tampering, and promotes the finality of verdicts. The service of a juror to the court is the cornerstone of our judicial system, and competent jurors who are willing to serve are at a premium. An unrestricted fishing expedition, such as that contemplated by plaintiff, would make it seriously difficult to convince such jurors to serve.

Id. at 1079; *see also* United States v. Cleveland, 1997 WL 412466, *1 n.2 (E.D. La. 1997) (" There is no question that the Court's order restricting the parties and their lawyers from contacting the jurors is constitutional"); United States v. Sokoloff, 696 F.Supp. 1451, 1457-58 (S.D. Fla. 1988) (relying upon policies articulated in Tanner v.

United States, 483 U.S. 107 (1987), and F.R.E. 606(b) in rejecting the contention that a rule preventing an attorney from interviewing jurors violates the First Amendment).

State jurisdictions have also rejected First Amendment arguments involving an attorney's post-verdict interview with jurors. In Benton, 980 S.W.2d at 432, the court recognized, "it is well established in the law that post-verdict speech can also pose a significant threat to the fairness of jury trials to justify curtailing the would-be speakers' constitutional interests." Relying in part upon Haeberle, 739 F.2d at 1022, and Tanner, 483 U.S. at 120-21, the Texas court recognized, "Courts have used the same reasoning to uphold restrictions on post-verdict questioning of jurors against a variety of constitutional challenges by criminal defendants and civil litigants." Benton, 980 S.W.2d at 432. "[T]hese and related cases specifically recognize that the state's interest in protecting the jury system includes preventing post-verdict juror harassment." Id., at 432-33. Finally, the court concluded, "If post-verdict interviews are permitted, the cases reason, that fact will become common knowledge among jurors, and the anticipation of such interviews will affect jurors' behavior in deliberations." Id. at 433.

These general principles have also been applied in capital cases. For example, in State v. Marshall, 690 A.2d 1, 96-97 (N.J. 1997), the court focused upon "sound reasons of policy, including the prevention of juror harassment and the avoidance of chilling jury deliberations" and expressly recognized the practice of requiring some showing of extraneous influence before permitting a party to interview jurors "is particularly appropriate when the jury has already been discharged." In rejecting the First Amendment argument, the court explained, "The compelling public interest in protecting jurors and their deliberations amply justifies the restriction on contacting them without

good cause." Id., at 97; *see also* State v. Loftin, 670 S.2d 557, 573-74 (N.J. 1996) (citing cases rejecting First Amendment challenges to rules limiting an attorney's ability to interview jurors); State v. Cabrera, 2008 WL 3853992, *20-22 (Del. 2008) (unpublished).

Presuming the "substantial likelihood of material prejudice" standard applies and relying upon Gentile, *supra*, Hall contends the district court's order targeted "all communications Mr. Hall's attorneys might have with jurors, without regard for whether the communications" meet the presumed standard. (Brief, p.12.) Hall's reliance upon Gentile is misplaced; the Court did not conclude the attorney's pre-trial statements were protected speech. Rather, five Justices concluded Nevada's rule did not violate the First Amendment. Specifically, Chief Justice Rehnquist delivered the opinion of the Court with respect to the First Amendment claim, in which Justices White, O'Connor, Scalia and Souter joined. Id., at 1032. Gentile was reversed based upon a void for vagueness challenge addressed by Justice Kennedy in which Justices Marshall, Blackmun, Stevens and O'Conner joined. Id. On this basis alone, Hall's argument fails. Moreover, Gentile actually supports the state's position because after merely reviewing the policies behind the regulation of lawyers' speech, Chief Justice Rehnquist concluded, "The restraint on speech is narrowly tailored to achieve those objectives." Id. at 1075-76.

The district court recognized the policies associated with limiting post-verdict interviews and, after Hall refused the state's offer to have the jurors interviewed under court supervision, properly denied Hall's motion. The question was not whether Hall's attorneys acted "unprofessionally if left to their own devices" (Brief, p.12), but the policies associated with preventing post-verdict juror interviews as articulated above.

For these same reasons, Hall's contention that the district court's order was not narrowly tailored because it "failed to consider any reasonable time, place, and manner restrictions" (Brief, pp.16-17) also fails. Hall expressly rejected the state's offer to more narrowly tailor the court's order by having the jurors examined under court supervision because "[t]here are so many psychological reasons for not doing that. And there's no support in law. Again, there's nothing prohibiting us from contacting these people." (UPCPA, Tr., 8-8-07, p.121.) Not only did Hall fail to provide any evidence supporting his claim that there are "psychological reasons for not doing that," but he clearly wanted all or nothing. In other words, if he could not have unbridled and unsupervised interviews with the jurors, he wanted no interviews. Hall is now barred from complaining that the district court's order was not narrowly tailored.

2. The District Court's Order Does Not Violate Due Process

Contending he has a due process right to "meaningful post-conviction proceedings," Hall contends the district court's order violated his Fifth and Fourteenth Amendment right to due process. (Brief, pp.8, 18.) Assuming *arguendo* that Hall actually has a due process right to conduct post-conviction proceedings, he has failed to establish the district court's order violated that right.

The state recognizes Hall's attorneys have a duty to conduct an investigation during post-conviction proceedings. However, as explained in section I(D) above, that duty is not dictated by the ABA nor does it permit an unfettered and unbridled investigation that allows for fishing expeditions. *See* Murphy, 143 Idaho at 148 (post-conviction cases are "not a vehicle for unrestrained testimony or retesting of physical evidence introduced at the criminal trial"). Rather, a "direct appeal is the primary avenue

for review of a conviction or sentence." Barefoot, 463 U.S. at 887; *see also* Rodgers, 129 Idaho at 725 ("The scope of post-conviction relief is limited. An application for post-conviction relief is not a substitute for an appeal").

As explained in MalDonado v. Missouri Pacific Railway Co., 798 F.2d 764, 770 (5th Cir. 1986), "The defendant's right to a fair trial is not absolute; it may be outweighed by other considerations, including the jury's right to privacy and protection from harassment." Based upon the considerations of a juror's right to privacy and protection from harassment, the courts have uniformly rejected claims that restrictions on interviewing jurors violate due process. *See e.g.,* Xiong v. Felker, 2009 WL 1438979, *8-10 (E.D. Cal. 2009); Floyd v. State, --- So.3d ---, 2009 WL 1544273, *21 (Fla. 2009); Israel v. State, 985 So.2d 510, 522-23 (Fla. 2008) (citing Johnson v. State, 804 So.2d 1218, 1224-25 (Fla. 2001)); In re Bowling, 2005 WL 924323, *3 (Ky. 2005) (unpublished); State v. Harris, 859 A.2d 364, 434 (N.J. 2004) (citing State v. Loftin, 680 A.2d 677, 720 (N.J. 1996)).

3. The District Court's Order Does Not Violate The Eighth Amendment

When every other argument fails, capital litigants, like Hall, fall back to perennial "death is different" argument. (Brief, p.19.) As explained in section I(D) above, while the courts have applied such safeguards in limited situations, Hall has failed to cite a single case in which the Eighth Amendment has been used to salvage a claim involving post-verdict interviews with jurors during post-conviction proceedings. The Idaho Supreme Court has never adopted a "death is different approach" to post conviction discovery issues. As explained above, the Idaho Legislature enacted legislation to expedite capital cases, not facilitate delay associated with unbridled discovery. *See also*

Fields, 135 Idaho at 286 (applying Idaho's post-conviction discovery rule, I.C.R. 57, to a capital case). As repeatedly discussed, Hall's motion to conduct post-verdict juror interviews was nothing more than a fishing expedition, which has never been tolerated by any court. Finally, as detailed throughout section II, restrictions on post-verdict juror interviews have been regularly and consistently upheld in capital cases without applying additional safeguards that have been required in a limited number of capital issues.

D. Absent Rule Or Statutory Authority, The District Court Had Inherent Authority To Prohibit Unfettered Contact With The Jurors

Presumably, Hall assumed the district court had inherent authority because he was unable to find any case stating a judge does not have inherent authority to limit juror contact after the jury's service has been completed. In Townsel v. Superior Court, 979 P.2d 963, 967 (Cal. 1999), the court recognized, "Despite the absence of any affirmative statutory power, trial courts exercised their inherent powers to ensure jurors were protected, following their discharge from a trial, from threats to their physical safety and invasions of their personal privacy." The court explained, "we [have] found the trial court had the inherent power to impose the limitation, explaining that '[a] trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice' and that, in exercising such discretion the trial court may deny to the losing party in a legal proceeding 'unqualified access to the jury after the conclusion of the trial.'" Id., at 968 (quoting People v. Cox, 809 P.2d 351, 401 (Cal. 1991)). The courts' inherent authority is premised upon "'strong public policies [that] protect discharged jurors from improper[] intrusive conduct in all cases,'" which constitutes "a substantial threat to the administration of justice" when it remains

uncontrolled. Id., at 967 (quoting In re Hamilton, 975 P.2d 600, 629 n.23 (Cal. 1999)); *see also* Crider v. State, 29 P.3d 577, 578 (Okla. Crim. App. 2001) (If a juror reports harassment, the trial court has the inherent authority to issue a protective order, upon application and for cause, prohibiting a named person or persons from having further contact with that juror").

The federal courts are in agreement. As explained in Miller v. United States, 403 F.2d 77, 81-82 (2nd Cir. 1968), "we see no basis for doubting the authority of the trial judge to direct that any interrogation of jurors after the conviction shall be under his supervision." While the court recognized the questioning of jurors after conviction "is indeed appropriate for court rule, the absence of one does not deprive a judge of power to act in an individual case." Id., at 82; *see also* United States v. Moten, 582 F.2d 654, 665 (2nd Cir. 1978) ("in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that post-trial investigation of jurors shall be under his supervision").

While Idaho has not expressly addressed the question of whether courts have inherent authority to restrict juror contact after a verdict has been entered, the Idaho Supreme Court recently addressed the question of inherent authority in In re Facilities and Equipment Provided by City of Boise, --- Idaho ---, --- P.3d ---, 2009 WL 2594878, *7 (2009). Relying in part upon I.C. § 1-1622, which codifies the court's inherent authority, the court concluded, "Courts have the inherent power to grant intervention to persons who may be adversely affected by the outcome of a proceeding or when

equitable principles otherwise require."[2] Id. Certainly, allowing the courts to protect jurors from being harassed by the unwarranted invasion of their right to privacy "is in accordance with the spirit of the Idaho Code." Id.

The court's inherent authority to protect jurors is exemplified in Idaho Criminal Jury Instruction ("ICJI") 232, which reads as follows:

> You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. 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 to me.**

(Emphasis added).

If the courts have inherent authority to guard against harassment of jurors post-verdict when so advised by a juror, certainly the courts have the same authority to guard against harassment even if not so advised by a juror. If that authority does not exist and courts cannot intervene when requested by a juror, the implied promise of intervention from ICJI 232 is indeed hollow and should no longer be given by judges.

---

[2] Idaho Code § 1-1622 reads as follows, "When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specifically pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted, which may appear most conformable to the spirit of this code."

E. The District Court Did Not Abuse Its Discretion By Denying Hall's Motion For Juror Contact

While Hall notes the district court's discussion on January 6, 2006, during an informal telephone conference regarding contact with the jurors, and the resulting motions, hearings, and rulings that stemmed from that conference (Brief, pp.20-22), the only issue before this Court is whether the district court abused its discretion by denying his June 1, 2007 Motion for Juror Contact. While the proceedings, motions, hearings and rulings prior to that motion provide interesting and important background, the time to challenge any prior rulings in the context of an interlocutory appeal has long since expired. *See* I.A.R. 12(c)(1). Therefore, Hall's contention that he "did not ask the court to order jury interviews through discovery or otherwise facilitate his contact with jurors" (Brief, p.25) is untrue. Based upon the district court's orders prior to June 1, 2007, which Hall has not appealed, that is exactly what he did by filing his Motion for Juror Contact. Therefore, the standards detailed in section I(C) above apply to Hall's Motion for Juror Contact, and mandate a showing that the interviews were required to protect his "substantial rights." Raudebaugh, 135 Idaho at 605.

Hall next contends the district court exceeded its authority because there was no "evidence his attorneys or their agents committed (or intended to commit) misconduct." (Brief, p.25.) While the state concedes there was no evidence establishing Hall's attorneys or agents were involved in or intended to commit misconduct, as previously explained, that is not the standard. Rather, "courts have routinely shielded jurors from post-trial 'fishing expeditions' carried out by losing attorneys interested in casting doubt on the jury's verdict." Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986) (citing cases). As detailed above, "the courts have properly exercised their right to

protect jurors from unwanted post-trial harassment" and "upheld the denial of a motion by a losing attorney to interview jurors because that attorney's assertion of jury misconduct was unsubstantiated." Id.

For example, in Anderson, 2009 WL 1954982, *14, five years after his trial, the defendant moved to interview jurors to ascertain whether any of the jurors saw that he was shackled during his trial. Affirming the trial court's rejection of the motion, the Florida Supreme Court explained:

> Because there is no indication in the record that any of the shackles were perceptible to any members of the jury, we agree with the circuit court's decision and conclude that the court did not abuse its discretion in denying the motion. To have granted the motion would have allowed Anderson to conduct a "fishing expedition" interview of the jurors, a practice which we have previously rejected.

Id.

Florida is not the only jurisdiction that bars post-verdict interviews absent some specific evidence of misconduct. In Haeberle, 739 F.2d at 1021, the Fifth Circuit discussed the federal courts' position on post-verdict juror interviews, which does not have a specific statute or rule prohibiting such interviews, as follows:

> Federal courts have generally disfavored post-verdict interviewing of jurors. We have repeatedly refused to denigrate jury trials by afterwards ransacking the jurors in search of some new ground not previously supported by evidence, for a new trial. Prohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the "chances and temptations" for tampering with the jury, increases the certainty of civil trials and spares the districts courts time-consuming and futile proceedings. We have therefore uniformly refused to upset the denial of leave to interview jurors for the purpose of obtaining evidence of improprieties in the deliberations unless specific evidence of misconduct was shown by testimony or affidavit.

Id. (citing cases).

In United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988), the court reiterated, "Requests to impeach jury verdicts by post-trial contact with jurors are disfavored." Because the defendant "made no threshold showing of improper outside influence," the Fourth Circuit determined the trial court's denial of the request for post-verdict interviews was not an abuse of discretion and without such showing of improper outside influence, "defendant's request is a mere fishing expedition." Id.

Reviewing "sound policy reasons for insulating a jury's deliberative process from public scrutiny in order to ensure finality in the verdict, as well as to maintain public confidence in the jury system," which were explained in Tanner, 483 U.S. at 118-19, the court in Sokoloff, concluded, "post-verdict juror interviews based on such wholly unreliable 'evidence' fundamentally undermines the larger policy considerations expressed by the Supreme Court in *Tanner*." 696 F.Supp.1451, 1455-56.

Recognizing the "long-standing common-law rule against inquiring into jurors' motives to impeach their verdict," which was discussed in Tanner, 483 U.S. at 117, the New Jersey Supreme Court, in a capital case, explained, "For sound reasons of policy, including the prevention of juror harassment and the avoidance of chilling jury deliberations, courts typically require some showing of extraneous influence before permitting a party to interview jurors. [Cases omitted]. That practice is particularly appropriate when the jury has already been discharged." Marshall, 690 A.2d at 280.

In Townsel, 979 P.2d at 965, a case remarkably similar to Hall's, the trial court entered a *sua sponte* order that "there's to be no jury contact without prior court approval. In other words, if you do come upon a juror questionnaire that you do want to contact that person, then you'll have to petition the Court, giving forth your reasons before that would

be granted." When asked the reason for the order, the court replied, "I just think it's only fair that jurors not be contacted unless there's some cause, not to go out and disturb them on a fishing expedition." Id. Like other courts, the California Supreme Court recognized that "'strong public policies protect discharged jurors from improperly intrusive conduct in all cases,'" which include, "a juror's state constitutional right to privacy; the possible deterrence of prospective jurors from fulfilling their obligation to serve if they knew they would be subject to postverdict intrusions into their lives; reducing incentives for jury tampering; promoting free and open discussion among jurors in deliberations; and protecting the finality of verdicts." Id. at 968. Although recognizing this was a capital case, the court noted the period of time since the jury had completed its service and ultimately concluded the trial court did not abuse its discretion by ordering appellate counsel approach jurors through the court, which permitted the court to "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." Id. at 971.

Even a cursory review of Hall's Memorandum in Support of Motion for Juror Contact and the "anticipated questioning of jurors" (UPCPA, exhibit 12) reveals his motion was merely a fishing expedition. For example, Hall contended "[s]everal critical State witnesses were not disclosed on the juror questionnaire or during voir dire" and "[i]t is imperative that counsel inquire into the jurors [sic] knowledge of and relationship to the undisclosed witnesses." (Id., pp.13-14.) However, even 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 or that he would otherwise be entitled to post-conviction relief. As explained in Anderson, 2009 WL 1954982, *14, Hall's request to

inquire of jurors regarding an "awareness" of his wearing shackles (UPCPA, exhibit 12, p.14) was merely a fishing expedition; he provided no information "that any of the shackles were perceptible to any members of the jury," but merely based his request upon speculation. Hall provided no evidence that during voir dire or in their juror questionnaires any juror "failed to disclose material information, but merely noted a case that apparently discusses actual bias if a juror "lies concerning his background on juror questionnaire and during voir dire." (Id., p.14.) Likewise, Hall provided absolutely no information that any juror "conducted experiments, visited the crime scene, or otherwise considered extra record evidence" or was "influenced by non-jurors or other extraneous evidence." (Id., p.15.) Moreover, these types of requests are a direct attempt to question jurors regarding deliberations, clearly prohibited by the policies underlying I.R.E. 606(b). In fact, the entirety of Hall's "general inquiries" (id., pp.13-18) are nothing more than a fishing expedition which will lead to the harassment and intimidation of jurors who honorably completed their jury service. This type of behavior was properly rejected by the district court and cannot be countenanced by this Court.

Hall's "inquiries specific to certain jurors" are just as offensive. (UPCPA, exhibit 12, pp.18-28.) For example, Hall wishes to question juror Linda Ostolasa regarding a statement she made during voir dire and whether "personal constraints impacted the time taken to deliberate at sentencing" (id., p.18), a clear attack against the deliberative process and a personal attack regarding Ostolasa's deliberative process without any evidence to support the allegation. Likewise, despite being questioned during voir dire regarding her use of the Greenbelt, Hall desires to question juror Betty Mitchell as to "whether the juror's extensive use of the Greenbelt affected her views of the crime or Mr.

Hall" (id., p.19), another attack against the deliberative process and personal attack regarding whether Mitchell followed the district court's jury instructions. Most of Hall's "specific" questions are linked with questions raised during voir dire. However, voir dire is nearly always a tactical decision that cannot be impugned. *See* Mitchell v. State, 132 Idaho 274, 279, 971 P.2d 727 (1998); Hovey v. Ayers, 458 F.3d 892, 910 (9th Cir. 2006) (quoting Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980)) ("The conduct of voir dire 'will in most instances involve the exercise of a judgment which should be left to competent defense counsel'"). Without some factual basis for making these allegations, Hall's attacks against the deliberative process and specific jurors is unwarranted and prohibited by the policies associated with I.R.E. 606(b).

Finally, Hall contends the district court misinterpreted I.R.E. 606(b) (Brief, p.25), which reads as follows:

> 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, but 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.

Hall's contention regarding I.R.E. 606(b) is misplaced because the district court did not rely upon the actual rule to deny his motion, but the underlying policies that support the rule. As explained in Levinger v. Mercy Medical Center, 139 Idaho 192, 197 n.3, 75 P.3d 1202 (2003), the policy goals of I.R.E. 606(b) include, "to promote finality,

protect jurors from post-trial inquiry or harassment, and to avoid the practical concern that an affidavit by a juror to impeach the verdict is potentially unreliable."

Obviously, the policy goals of I.R.E. 606(b) and those associated with limiting post-verdict juror interviews are similar if not identical. Therefore, the district court's reliance upon I.R.E. 606(b), particularly the policy goals surrounding the rule, is supported by existing law, did not create a new rule abridging Hall's rights, or impede his right to conduct a post-conviction investigation. Rather, it was Hall's complete failure to demonstrate any basis, let alone "good cause" or the denial of his substantive rights that resulted in the district court's decision to deny his motion to interview jurors. Because Hall failed to demonstrate any basis for those interviews, he has failed to establish the district court abused its discretion.

CONCLUSION

The state respectfully requests that the district court's interlocutory orders, including (1) Order Granting in Part and Denying in Part Petitioner's Supplemental Motion for Discovery and (2) Court's Order Denying Petitioner's Motion for Juror Contact, be affirmed on appeal.

DATED this 18th day of September, 2009.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of September, 2009, served a true and correct copy of the foregoing document by causing a file stamped copy addressed to:

MARK ACKLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit